
ARTICLE

PROSECUTING FAMILIES

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Hundreds of thousands of parents are prosecuted in the family regulation system each year. Their cases are investigated by family regulation agencies and prosecuted by lawyers employed by the government—family regulation prosecutors. Like police and prosecutors in the criminal legal system, this family regulation prosecutorial team wields immense power, particularly over race–class subjugated communities. Yet even as scholarship on criminal prosecutors and on the family regulation system has proliferated, the role of family regulation prosecutors has gone underexamined and undertheorized.

This Article offers a critical examination of the role of these family regulation prosecutors. Drawing on a variety of primary sources, it establishes that there is no consensus approach to family regulation prosecution, nor a shared conception of the balance of power between agencies and prosecutors. The Article contends that the role of prosecutors in family regulation cases is uneven and undertheorized precisely because of the contradictions of the family regulation system itself, as a nominally rehabilitative but functionally carceral system.

Once we recognize the family regulation system as carceral, a new, counterintuitive theory of family regulation prosecutions takes shape: prosecutors should be vested with independent discretion to serve as checks on agency overreach.

DOI: <https://doi.org/10.58112/uplr.173-4.2>

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But this is an interim measure. To protect families fully, we must move beyond choosing between models of prosecution and instead meet the needs of families outside any system of prosecution and punishment.

INTRODUCTION	1031
I. THE FAMILY REGULATION SYSTEM'S	
IDENTITY AND PLAYERS	1038
A. <i>A System to Rehabilitate, A System to Punish</i>	1039
B. <i>Shape-Shifting Roles of Agency Personnel</i>	1042
C. <i>Models for Prosecutions and Filing Decisions</i>	1050
1. Institutional Affiliations for Government Lawyers	1052
2. Identifying Prosecutors' Clients	1055
3. Initial Filing Decisions	1056
4. Post-Filing Decisions	1058
II. THE PROSECUTOR-AGENCY RELATIONSHIP	1058
A. <i>Methodology</i>	1059
B. <i>Identifying Prosecutors' Clients and Understanding the Public Interest</i>	1060
1. Agency as Client	1060
2. The Public Interest	1062
C. <i>Initial Filing Decisions</i>	1064
1. Agency Filing Decisions	1065
2. Prosecutor Filing Decisions	1066
D. <i>Ongoing Case Planning and Decisionmaking</i>	1068
E. <i>Resolving Disagreements</i>	1073
F. <i>Prosecutors' Conceptions of Their Role</i>	1075
III. IMPLICATIONS OF THE PROSECUTOR-AGENCY RELATIONSHIP	1078
A. <i>The Salience of Formal Distinctions Between Models of Prosecutions</i>	1078
B. <i>Ethical Considerations</i>	1079
C. <i>Checks on Prosecutors and Checks on Agencies</i>	1083
1. The Power of Prosecutors, The Power of Agencies	1084
2. Deference to Agency Clients	1085
3. Prosecutorial Discretion, Cabined by Agencies	1087
4. The Absence of Other Checks	1088
D. <i>What Should the Role of the Family Regulation Prosecutor Be?</i>	1089
IV. A MORE HONEST APPROACH TO FAMILY REGULATION PROSECUTIONS	1090
A. <i>The Value of an Explicitly Prosecutorial Model</i>	1091
1. Checking Agency Power and Representing the Public Interest	1094

2. Reducing Ethical Quagmires.....	1098
3. Increasing Accountability.....	1099
B. <i>The Limits of an Explicitly Prosecutorial Model</i>	1100
CONCLUSION	1102

INTRODUCTION

Jasmine Arthur, a Black mother, met the investigator in her family regulation case when he knocked on her door and demanded entry.¹ Someone had reported her for mistreating her children, he said, and he was there to help. He also said that if she did not cooperate, he would take her children. Ms. Arthur let him in. The next day, the investigator ordered Ms. Arthur to go to family court. There, Ms. Arthur met with her assigned lawyer—and the investigator met with his: a prosecutor employed by the government to represent the family regulation agency.²

Unlike the prototypical police officer meeting with a criminal prosecutor, this investigator did not just hand the case off to the prosecutor. Instead, he and his supervisors directed the prosecution. The prosecutor pursued only the agency’s directives, exercising no independent discretion. Their agency was the prosecutor’s client. The allegations against Ms. Arthur were thin—that she had used marijuana and had not bathed her children. But the

1 I recount the experience of a parent I represented, with names and details changed to preserve anonymity. I use “family regulation system” to describe the system commonly called the “child welfare” system. As others have noted, “family regulation” more forthrightly reflects the purposes and functions of this system. *See, e.g.,* DOROTHY ROBERTS, TORN APART 24 (2022) [hereinafter ROBERTS, TORN APART] (arguing that descriptors like “child welfare system” elide the “surveillance, coercion, and punishment” inherent to the system); S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1102-03 (2022) (“[T]his Essay utilizes the term ‘family regulation system’ to more accurately describe the surveillance apparatus that is known as the ‘child welfare system.’”); Emma Ruth, Opinion, *‘Family Regulation,’ Not ‘Child Welfare’: Abolition Starts with Changing Our Language*, IMPRINT (July 28, 2020, 11:45 PM), <https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586> [<https://perma.cc/PL55-YATH>] (arguing that the language used to describe systems is pivotal and explaining the utility of the term “family regulation system”).

2 I use “family regulation agency” to refer to the state and county agencies tasked with investigating reports of alleged child maltreatment. In some jurisdictions, investigations are carried out by statewide agencies, while in others, they are carried out by county-level agencies. *See* EMILIE STOLTZFUS, CONG. RSCH. SERV., IF10590, CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING 1 (2023) (“State level administration may be housed in the state human services department, or at an independent, state-level child and family services agency. Some states have county-administered programs supervised by the state agency.”). Given this complex and varied landscape, my reference to a unified “family regulation system” is an oversimplified shorthand for the tangle of local, state-level, and federal institutions that comprise it. *Cf.* Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1826 n.50 (2020) (discussing the view among some scholars who resist labeling the criminal legal system a “system” at all).

prosecutor sought to separate the family at the agency's behest. Ms. Arthur, overwhelmed, initially consented to the separation. From then on, investigators ruled Ms. Arthur's life in and out of court. They monitored her contact with her children, demanded drug screens, searched her home, testified as the only witnesses against her, and decided the government's position on everything from where her children should spend holidays to settlement of her case.

Finally, Ms. Arthur requested a hearing seeking her family's reunification. The day of the hearing, the prosecutor told Ms. Arthur's lawyer that she personally saw no reason to keep the children from their mother. But, the prosecutor said, her client still had some "concerns" and so the government opposed reunification. Asked to articulate any imminent risk the children would face at home—a legal requirement to sustain family separations³—the prosecutor shrugged. Asked why the government still insisted on contesting reunification, the prosecutor replied, "Don't blame me, I'm just doing my job!"

Family regulation prosecutors like the one who prosecuted Ms. Arthur have gone almost entirely ignored both by scholars who study the family regulation system and by scholars who study prosecutors.⁴ This is true even as close to 200,000 children are placed at the center of family regulation court proceedings annually.⁵ Through these proceedings, the government seeks to remove children from their parents' care or condition their family's integrity on their parents' ongoing compliance with government surveillance and other measures like mental health evaluations.⁶ Virtually all of these cases begin with investigations by family regulation agencies,⁷ and virtually all are prosecuted by lawyers employed by or contracting with the government.⁸

³ *Nicholson v. Scoppetta*, 820 N.E.2d 840, 848 (N.Y. 2004).

⁴ See *infra* notes 29–31, 114–116 (surveying the dearth of scholarship).

⁵ This is a rough proxy, based on the number of foster care entrants in 2021, as foster care placements require court orders. See CHILDS. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT: PRELIMINARY FY 2022 ESTIMATES 1 (2023) [hereinafter AFCARS REPORT] (reporting 186,602 children entered foster care in 2022, a decrease from 206,867 in 2021); see also CHILDS. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019 91 tbl.6-5 (2021) [hereinafter CHILD MALTREATMENT 2019] (reporting that, per forty-one states' reports, 133,582 victims of child maltreatment had "[c]ourt [a]ction"—a category no longer reported in the Children's Bureau's annual reports). For an explanation of the difficulty of estimating the number of children involved in family regulation court filings, see *infra* note 80.

⁶ See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that the government must establish that a parent is unfit to impinge on their parental rights).

⁷ See CHILDS. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2022 xv ex. S-2 (2024) [hereinafter CHILD MALTREATMENT 2022] (summarizing data tracing the states' responses to reports of child maltreatment, from report to resolution).

⁸ A small number are initiated and prosecuted by other actors, such as private individuals or lawyers for children. See *infra* notes 136 and 210–211 and accompanying text.

This prosecutorial team holds immense power over families, particularly race–class subjugated families.⁹ Investigations and prosecutions alike focus almost exclusively on poor families, and to a disproportionate degree, Black, Native, and Latine families.¹⁰ Most family regulation investigations involve allegations of neglect, not abuse, and more than 80% of investigations are closed without substantiating any allegations.¹¹ But if a case is initiated in court, it can take years to resolve. Cases may be resolved through a meandering path toward reunification or the permanent severance of a family’s legal ties.¹² The fallout can last years, even generations.¹³

Family regulation cases play out in a nominally rehabilitative system.¹⁴ Yet the system grew out of projects of social control, assimilation, and punishment targeted at marginalized communities,¹⁵ and it has not shed that heritage. Parents, advocates, academics, and judges recognize it as a punitive system that enforces compliance, punishes deviance, and pathologizes individuals for societal problems.¹⁶ Under the veneer of social work and rehabilitation, agency personnel deploy tools of policing to gather evidence

⁹ See Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race–Class Subjugated Communities*, 20 ANN. REV. POL. SCI. 565, 567 (2017) (defining and defending the term “race–class subjugated” as a way to describe the interwoven nature of race and class within social structures).

¹⁰ See, e.g., Kelley Fong, *Child Welfare Involvement and Contexts of Poverty: The Role of Parental Adversities, Social Networks, and Social Services*, 72 CHILD. & YOUTH SERVS. REV. 5, 5–6 (2017) (reviewing past studies that found children from poor families and communities to be highly overrepresented in the child welfare system); CHILDS. BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 2–3 (2021) (summarizing research finding overrepresentation of Native, Black, and, in some states, Hispanic children in the family regulation system); see also ROB GEEN, LYNN FENDER, JACOB LEOS-URBEL & TERESA MARKOWITZ, URBAN INSTITUTE, WELFARE REFORM’S EFFECTS ON CHILD WELFARE CASELOADS 8 (2001), <https://www.urban.org/sites/default/files/publication/61111/310095-Welfare-Reform-s-Effect-on-Child-Welfare-Caseloads.PDF> [<https://perma.cc/245Z-ZBY6>] (analyzing the correlation between the receipt of public benefits and family regulation involvement).

¹¹ CHILD MALTREATMENT 2022, *supra* note 7, at 19–20.

¹² See *Child Welfare and Foster Care Statistics*, ANNIE E. CASEY FOUND. (July 27, 2024), <https://www.aecf.org/blog/child-welfare-and-foster-care-statistics> [<https://perma.cc/3836-HUEQ>] (noting that nearly half of children in foster care reunite with a parent, a quarter are adopted by someone other than their parent, and the median time a child stays in foster care is 17.5 months).

¹³ See Tina Lee, *Response to the Symposium: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 12 COLUM. J. RACE & L. 421, 426 (2022) (“[C]hild welfare’ does not create safety but reproduces the need for intervention, often across generations.”); S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1544 (2023) [hereinafter Washington, *Pathology Logics*] (describing community-wide and intergenerational effects of involvement in the family regulation system).

¹⁴ See *infra* Section I.A.

¹⁵ See *infra* Section I.A.

¹⁶ See *infra* Section I.A.

against parents and to punish them.¹⁷ Though court proceedings within the system were purposefully designed to be informal, they have become increasingly formal and increasingly adversarial.¹⁸

The confused function and purpose of the family regulation system is apparent in the myriad approaches to family regulation prosecution deployed across the country. Some family regulation prosecutors work out of elected local prosecutor's offices; others are employed by county attorney's offices, state attorney general's offices, or local family regulation agencies.¹⁹ Some represent "the public interest"; more treat family regulation agencies as their clients.²⁰ Some are empowered to make initial filing decisions; more have no such authority and step in only after family regulation agencies decide to file.²¹ Virtually all work closely with agency personnel through the duration of cases, with the same agency personnel intervening in families' lives outside of court and recommending legal applications in court.²²

Common approaches to family regulation prosecution upend basic understandings of the prosecutorial function in the criminal legal context. There, academics and practitioners share a set of normative assumptions regarding the division of duties between police and prosecutors: police investigate cases, then hand them off to local prosecutors' offices.²³ In this account, criminal prosecutors are not beholden to the police. Rather, they exercise discretion and act in the public interest to decide which cases to bring and which to drop, what pleas to offer, and what sentences to seek.²⁴ The

¹⁷ See *infra* Section I.B.

¹⁸ See *infra* Section I.A.

¹⁹ See Josh Gupta-Kagan, *Rethinking Family-Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. 743, 791 (2018) [hereinafter Gupta-Kagan, *Family-Court Prosecutors*] (surveying the use of elected prosecutors and those employed by county attorney's offices). In some jurisdictions, particularly smaller jurisdictions, prosecutors are private attorneys with whom the government contracts. See *id.* at 786 (noting that in a 2009 survey, twenty-one states reported that prosecutors were "agency staff or contractors"). This Article focuses on prosecutors employed directly by the government, but the use of private prosecutors in these cases is an area for future study.

²⁰ *Id.*

²¹ *Id.* at 793-94 (reporting that thirty-three states empower agencies to make filing decisions while eleven states and DC empower prosecutors to make filing decisions).

²² See *infra* Section III.C.

²³ See, e.g., Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 YALE L.J. 1730, 1735-36 (2017) ("Police officers, prosecutors, and other criminal justice officials . . . stressed the importance of each actor's staying in his or her own lane."); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874 (2009) (making a normative case for separating actors making investigative decisions from actors making adjudicative decisions); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 803 (2003) (arguing that prosecutors who are involved in investigations struggle to maintain objectivity).

²⁴ For a sampling of scholarship highlighting the power of criminal prosecutors to check police and legislatures through their exercise of discretion, see Miriam Aroni Krinsky, Justin Murray &

differentiation between policing and prosecutorial functions is a check on state power.²⁵ The promise of this normative vision goes unfulfilled in the criminal system—for instance, prosecutors are often reluctant to exercise their discretion to override police, and some jurisdictions allow police to prosecute cases.²⁶ But the vision persists. In the family regulation system, the conception of prosecutors as a check is absent, normatively *and* functionally.

Scholarship on criminal prosecution²⁷ and scholarship critiquing the family regulation system has proliferated,²⁸ but the function of the prosecutorial team within the family regulation system remains largely unstudied.²⁹ A review of twenty years of legal scholarship uncovers one article examining family regulation prosecutions.³⁰ There, Josh Gupta-Kagan lays a much-needed foundation for building a robust understanding of family regulation prosecutors. Like most of the sparse existing literature, though, he focuses on formal distinctions between models of family regulation prosecutions.³¹ Basic questions about how family regulation agencies and

Maybell Romero, *Preface: New Directions in Prosecutorial Reform*, 60 AM. CRIM. L. REV. 1369, 1372 (2023); I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795, 821 (2022); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 503 (2016); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001); *see generally* ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007).

²⁵ *See* Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937, 959–60 (2024) [hereinafter Natapoff, *Misdemeanor Declination*] (describing the police-prosecutor relationship as “a vital intrabranch check”).

²⁶ *See infra* Section IV.A.

²⁷ *See supra* notes 23–24.

²⁸ For various criticisms of the family regulation system, *see generally* JANE M. SPINAK, *THE END OF FAMILY COURT* (2023) [hereinafter SPINAK, *FAMILY COURT*]; ROBERTS, *TORN APART*, *supra* note 1; Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, 111 CALIF. L. REV. 1485 (2023); Washington, *Pathology Logics*, *supra* note 13; Cynthia Godsoe, *Disrupting Carceral Logic in Family Policing*, 121 MICH. L. REV. 939 (2023); Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 CALIF. L. REV. 1315 (2022); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019) [hereinafter Trivedi, *Child Removal*]; Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427 (2021).

²⁹ *See* Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 745 (noting the absence of study of family court prosecutors). Outside the academy, the State of Oregon surveyed its peers on their representation models and conducted interviews with five state entities that represented agencies in family regulation cases. OREGON TASK FORCE ON DEPENDENCY REPRESENTATION, REPORT JULY 2016 24 (2016) [hereinafter OREGON TASK FORCE]. The American Bar Association also surveyed agencies about their understanding of their state’s representation models. RAMON RUIZ & SCOTT TROWBRIDGE, AM. BAR ASS’N CTR. ON CHILD. & THE L., NATIONAL SURVEY OF CHILD WELFARE LEGAL REPRESENTATION MODELS 3 (2009) (on file with author).

³⁰ *See* Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 743.

³¹ *See id.* at 793 (adhering to this distinction in its analysis). *But see* David J. Herring, *Legal Representation for the State Child Welfare Agency in Civil Child Protection Proceedings: A Comparative Study*, 24 U. TOL. L. REV. 603, 603–05 (1993) (reporting results of an empirical study of prosecutions in four Michigan counties between 1989 and 1991).

prosecutors functionally relate to one other and divide and navigate decisionmaking throughout the life of a case remain unanswered and, indeed, unasked.

Informed by a variety of primary sources, including interviews with prosecutors around the country, case law and statutes, policy manuals and regulations, and public-facing agency materials, this Article surfaces these questions, provides initial insights into the functional prosecutor–agency relationship, and exposes new theoretical questions. At base, it posits that the confused prosecutorial role in the family regulation system owes to the existential confusion of the family regulation system itself.

The Article advances three central claims. The first is theoretical. It grapples with the absence of a coherent theory of prosecution in family regulation cases and contends that the prosecutorial role is uneven and undertheorized precisely because of the contradictions of the family regulation system itself. If we conceive of the family regulation system as purely rehabilitative and informal, a model of prosecution that reifies agency expertise and is unconcerned with agency power might be appropriate. But that conception conflicts with the reality of the family regulation system as an increasingly formalized project of social control. Until we more honestly account for the function and purpose of the family regulation system, we cannot coherently theorize the proper role of prosecutors within it.

The second claim is descriptive. Prosecutors' accounting demonstrates that some differences and similarities between prosecutorial practices cut across formal models of prosecution. Formal distinctions may not always be decisive in a world where prosecutors themselves do not have a clear sense of what their role should be, given the muddled system in which they work. It may also be that the carceral logic of the family regulation system overpowers formal distinctions, driving all prosecutors to rely upon agencies as surveillants and sorters.

The third is normative—and unexpected, given that descriptive claim and the many voices inside and outside the academy warning of the dangers of prosecutorial power.³² Once we acknowledge agencies as policing entities that

³² See, e.g., JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 6 (2017) (“The primary driver of incarceration is increased prosecutorial toughness . . .”); DAVIS, *supra* note 24, at 15 (analyzing the inadequacy of the regulation of prosecutorial discretion); Barkow, *supra* note 23, at 883–84 (identifying unchecked prosecutorial discretion as a source of racial and gender disparities in charging and sentencing decisions); Stuntz, *supra* note 24, at 519–23 (noting that criminal law has had the practical effect of placing lawmaking and adjudication powers in the hands of prosecutors); *How Can You Destroy a Person's Life and Only Get a Slap on the Wrist?*, N.Y. TIMES (Dec. 4, 2021), <https://www.nytimes.com/2021/12/04/opinion/prosecutor-misconduct-new-york-doj.html> [<https://perma.cc/BFH6-F624>] (“[Prosecutors] are protected by layers of silence and secrecy that are written in local, state and federal policy, shielding them from any real accountability for wrongdoing.”).

use the power of the state to punish families, the need for another government entity empowered to check them becomes clear. A more traditional model of prosecution, where prosecutors exercise independent discretion and represent the public interest, could begin to fill that need. This is a cautious claim: the criminal legal system as it actually operates, not as it might operate,³³ and the descriptive insights developed in this Article point to the limits of prosecutorial discretion as a robust check on agencies. Protecting marginalized families from government intrusion requires a more searching examination of the family regulation system and the country's approach to child welfare.

Through its novel accounting of on-the-ground prosecutorial practices in family regulation cases, the Article answers the call for institutional analysis of the structures of family law³⁴ and joins scholarship examining the low-level legal institutions and actors that most directly shape most Americans' lives across areas of law.³⁵ Meanwhile, it inserts family regulation prosecutors into the decades-long discourse regarding prosecutorial discretion in the criminal legal system, the promise and reality of prosecutors as a check on police, the risks of prosecutorial power, and the role of institutional design in constraining or augmenting prosecutorial power.³⁶ Following in the vein of administrative law scholars and immigration scholars, it contributes to a broader understanding of prosecutors as actors in arenas outside the criminal legal system.³⁷ Above all, the Article is an invitation for further study of the

³³ See, e.g., Natapoff, *Misdemeanor Declination*, *supra* note 25, at 955 (noting that “[c]riminal law scholars have long decried the codependence and coziness between police and prosecutors” and collecting scholarship).

³⁴ See Clare Huntington, *The Institutions of Family Law*, 102 B.U. L. REV. 393, 396 (2022) (“[I]nstitutionalism is . . . widespread in legal scholarship . . . [e]xcept in family law.”).

³⁵ For examples of scholarship focusing on low-level state courts, see generally Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471 (2022); Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964 (2021); ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND* (2018).

³⁶ See, e.g., Abel, *supra* note 23, at 1737–41 (describing the involvement of police in plea bargaining); Natapoff, *Misdemeanor Declination*, *supra* note 25, at 955 (contrasting the promise of a prosecutorial check on police charging decision with reality); Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1122 (2012) (describing how the office structure of criminal prosecutors' offices produces and reinforces professional identity); see also *supra* notes 23–24 (collecting scholarship on prosecutorial power and prosecutorial discretion).

³⁷ See, e.g., Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2126 (2015) (describing uneven approaches at the state level to prosecutions growing out of administrative investigations); Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 558–61 (2003) (describing uneven approaches at the federal level to civil prosecutions growing out of administrative investigations); Nicole Hallett, *Rethinking Prosecutorial Discretion in Immigration Enforcement*, 42 CARDOZO L. REV. 1765, 1771–88 (2021) (reviewing case law on prosecutorial discretion in immigration law); Jason A. Cade, *The Challenge of Seeing Justice Done*

prosecutorial function in family regulation cases, descriptively, theoretically, and normatively.

The Article proceeds in four Parts. Part I describes the confused purpose and function of the family regulation system and the diffuse agency role within it and recounts the current limited understanding of the prosecutorial role in this system. Part II contributes an on-the-ground account of prosecutorial practices. Part III traces the implications of those practices, highlighting the varying ethical concerns and possible prosecutorial checks on agency overreach under different practice models. Part IV argues for a model of prosecution that places prosecutors in local prosecutors' offices and requires them to exercise independent discretion and to represent the public interest. It concludes that the larger goals of protecting families from government overreach and ensuring the welfare of children require rejecting any model of individualized prosecution and punishment.

I pause here for a note on vocabulary. I deliberately refer to the lawyers who prosecute family regulation cases on behalf of the government as "prosecutors." The title of "prosecutor" is typically associated with criminal cases.³⁸ But I use it here to emphasize that these lawyers, like criminal prosecutors, wield the vast machinery of the state against people—most often race–class subjugated people—and seek to deprive them of a fundamental right.³⁹ That right is one that many people hold more dear than even their liberty; it is the right to parent their children, to raise them, hold them, teach them, and love them freely. The word "prosecutor" conveys, viscerally and descriptively, what these lawyers do.

I. THE FAMILY REGULATION SYSTEM'S IDENTITY AND PLAYERS

Family regulation agencies are tasked simultaneously with helping families and policing them. This muddled role reflects the unsettled identity of the family regulation system writ large. This Part begins by complicating

in *Removal Proceedings*, 89 TUL. L. REV. 1, 29 (2014) (describing ICE prosecutors' uneven application of prosecutorial discretion in deportation proceedings).

38 See MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2023) (ascribing special responsibilities to "[t]he prosecutor in a criminal case").

39 See Douglas J. Besharov, *The "Civil" Prosecution of Child Abuse and Neglect*, 6 VT. L. REV. 403, 408–09 (1981) ("[I]t is a mistake to ignore, or deny, the essentially prosecutorial function of the attorneys who assist petitioners."); Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 745 n.3 (noting that although the term "prosecutor" is not frequently used in child protection cases, the term is apt to describe the lawyer representing petitioners in these cases); see also *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 38–40 (1981) (Blackmun, J., dissenting) (describing contours of right at issue in termination of parental rights cases); *id.* at 43 (describing the State's resources for prosecuting parental rights cases); *Prosecutor*, OXFORD ENGLISH DICTIONARY (2007) (defining prosecutor as "a person, especially a public official, who institutes legal proceedings against someone").

the view that the family regulation system is rehabilitative and non-adversarial. It then describes the typical path of a family regulation case, illustrating agencies' wide-ranging tasks and power. The Part closes by turning to a far less-studied topic: the prosecutorial role within this system.

A. *A System to Rehabilitate, A System to Punish*

The federal Children's Bureau describes the family regulation system as a "group of services designed to promote the well-being of children by ensuring safety, achieving permanency, and strengthening families."⁴⁰ Impacted parents describe it as a system that "surveils, criminalizes, and punishes disproportionately Black, Latine, and low-income children and families."⁴¹ This is hardly a fringe view. Justice Blackmun observed forty years ago, "[i]t is hardly surprising that [the] forced dissolution of the parent-child relationship has been recognized as a punitive sanction by courts, Congress, and commentators."⁴²

The family regulation system's disputed identity traces back to its inception. The establishment of juvenile courts at the start of the twentieth century is often considered the start of formalized family regulation in the United States.⁴³ While these courts ostensibly aided poor immigrant families,⁴⁴ in fact, white middle-class reformers created them as tools of assimilation and family separation, to be wielded against immigrants whom reformers saw as besmirching images of good white motherhood.⁴⁵ Juvenile courts followed in the tradition of earlier projects, such as the forced assimilation of Native children⁴⁶ and the destruction of Black enslaved families,⁴⁷ through which the government claimed to aid families by violently regulating them.

⁴⁰ CHILDS. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., HOW THE CHILD WELFARE SYSTEM WORKS 2 (2020).

⁴¹ JUST MAKING A CHANGE FOR FAMILIES, <https://jmacforfamilies.org> [<https://perma.cc/R6AN-EDUJ>] (last visited Jan. 25, 2025).

⁴² *Lassiter*, 452 U.S. at 39-40 (footnotes omitted).

⁴³ SPINAK, FAMILY COURT, *supra* note 28, at 1-2.

⁴⁴ *See id.* at 2 ("A key purpose of [family] court was to make the lives of immigrant children better . . ."); Jane M. Spinak, *Family Defense and the Disappearing Problem-Solving Court*, 20 CUNY L. REV. 171, 171 (2016) [hereinafter Spinak, *Family Defense*] (describing juvenile courts as the first problem-solving courts).

⁴⁵ Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23, 47, 55-57 (2016).

⁴⁶ Theresa Rocha Beardall & Frank Edwards, *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, 11 COLUM. J. RACE & L. 533, 538 (2021).

⁴⁷ Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 781-82 (2021) (citing Peggy C. Davis & Richard G. Dudley, Jr., *The Black Family in Modern Slavery*, 4 HARV. BLACKLETTER L.J. 9 (1987)).

Today, the conflict between the family regulation system's purported purpose of rehabilitation and apparent purpose of punishment and control still looms.⁴⁸ Several features of the family regulation system lay bare the incoherence of its claimed benevolence. First, the family regulation system focuses almost exclusively on poor families and disproportionately on families of color. Across the country, "[v]irtually every child in foster care is from a family with low- or no income."⁴⁹ Black children and Native children are overrepresented in the family regulation system across the country and Latine children are overrepresented in parts of the country.⁵⁰ White children are largely underrepresented.⁵¹ Though it can be difficult to disentangle poverty and neglect,⁵² studies establish that poor families and Black, Native, and Latine families are more likely to be reported and investigated than wealthier families and white families, even when underlying concerns are identical.⁵³

⁴⁸ See, e.g., ROBERTS, TORN APART, *supra* note 1, at 11 (highlighting the family regulation's system role in the "surveillance, control, and demolition of Black families"); Washington, *Pathology Logics*, *supra* note 13, at 1530-31 (drawing the connection between the family regulation system and the criminal legal system); Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 651-53 (2021) (describing personal experiences with the family regulation system); Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785, 1789-92, 1803 (2019) (studying the harmful effects of family policing on mothers); Shalonda Curtis-Hackett, *Stop Weaponizing Protective Services*, N.Y. DAILY NEWS (Nov. 8, 2021, 10:00 AM), <https://www.nydailynews.com/2021/11/08/stop-weaponizing-protective-services> [<https://perma.cc/TKF8-UUWD>]; MOVEMENT FOR FAM. POWER, <https://www.movementforfamilypower.org> [<https://perma.cc/8G7N-PZJ3>] (last visited Oct. 22, 2024) ("Racial disparities in the modern family policing system are a product of a white supremacist family separation regime.").

⁴⁹ Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. STATE L. REV. 913, 940 (2013); GEEN ET AL., *supra* note 10, at 8 (finding that more than half of children in foster care come from homes eligible for welfare and that as many as 90% of families receiving in-home services through family regulation agencies are eligible for welfare); Fong, *supra* note 10, at 5-6 (reviewing past studies that find children from poor families and communities to be highly overrepresented in the child welfare system).

⁵⁰ Charles Puzzanchera, Marly Zeigler, Moriah Taylor, Wei Kang & Jason Smith, *Disproportionality Rates for Children of Color in Foster Care Dashboard (2010-2021)*, NAT'L CTR. FOR JUV. JUST. (2023), https://www.ncjj.org/AFCARS/Disproportionality_Dashboard.asp?selYear=2020&selRace=Hispanic&selDisplay=3 [<https://perma.cc/4V3C-TY45>]; Hyunil Kim, Christopher Wildeman, Melissa Jonson-Reid & Brett Drake, *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017) (finding that Black children in the United States are more likely than not to experience a family regulation investigation during childhood).

⁵¹ Puzzanchera et al., *supra* note 50.

⁵² See generally Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, 109 IOWA L. REV. 1541 (2024) (discussing the ways in which family poverty has become intertwined with child neglect law and the need to disentangle the two).

⁵³ See, e.g., Marian Jarlenski, Jay Shroff, Mishka Terplan, Sarah C.M. Roberts, Brittany Brown-Podgorski & Elizabeth E. Krans, *Association of Race With Urine Toxicology Testing Among Pregnant Patients During Labor and Delivery*, JAMA HEALTH F., Apr. 2023, at 2-3 (finding that during childbirth, Black patients had a greater probability of receiving urine testing to evaluate substance

For this reason alone, it is difficult to conceive of the family regulation system as a system providing support to all families in need.

Second, the family regulation system is driven by a carceral logic common to “problem-solving” courts.⁵⁴ Under that logic, rather than meeting needs on a societal level, the government firewalls support behind individual punishment.⁵⁵ Thus, parents may be able to access certain supports through family-regulation agencies—like substance-use treatment, childcare, or material provisions—but only after they are deemed deficient.⁵⁶ As discussed at greater length in Section I.B., family regulation agencies are on the frontlines of both prongs of this approach, tasked with surveilling and sorting families in the name of supporting them.⁵⁷

use compared with white patients, regardless of the history of substance abuse, and that Black patients did not have a higher probability of a positive test result); Kent P. Hymel, Antoinette L. Laskey, Kathryn R. Crowell, Ming Wang, Veronica Armijo-Garcia, Terra N. Frazier, Kelly S. Tieves, Robin Foster & Kerri Weeks, *Racial and Ethnic Disparities and Bias in the Evaluation and Reporting of Abusive Head Trauma*, 198 J. PEDIATRICS 137, 141 (2018) (finding that minority patients were more frequently suspected of and evaluated for abusive head trauma than white and non-Hispanic patients); Wendy G. Lane, David M. Rubin, Ragin Monteith & Cindy W. Christian, *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603, 1607 (2002) (identifying significant disparities in the provision of care and reporting of injuries to CPS in white versus non-white children); Rebecca Rebbe, Kierra M.P. Sattler & Joseph A. Mienko, *The Association of Race, Ethnicity, and Poverty with Child Maltreatment Reporting*, 150 J. PEDIATRICS 24, 29 (2022) (finding that “[c]hildren who had public health insurance were more likely to be reported to [Child Protective Services] than children with private health insurance” which “suggests that children and families of a lower socioeconomic status may be more closely scrutinized for child maltreatment in hospital settings than those with more means”).

⁵⁴ See, e.g., KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 129 (2017) (“[T]he moral construction of poverty counsels that rupturing families while trying to fix bad parents is the proper course of action.”); Christy E. Lopez, *Abolish Carceral Logic*, 17 STAN. J. C.R. & C.L. 379, 396-97 (2022) (arguing that carceral logic has infiltrated broad areas of our lives and institutions); Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between “Child Welfare” and the Carceral State*, 17 STAN. J. C.R. & C.L. 255, 305-06 (2021) (drawing connections between the punishment and coercive tools used by the social work system and those inflicted by policing systems); Dorothy Roberts, *Abolishing Police Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM) [hereinafter Roberts, *Abolishing Police*], <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/ZBM4-39EQ>] (urging individuals to understand that CPS is part of the U.S. carceral regime).

⁵⁵ See generally WENDY A. BACH, *PROSECUTING POVERTY, CRIMINALIZING CARE* (2022) (documenting how criminal legal system actors in Tennessee treated criminalization of individuals as the only path to substance abuse treatment). See also Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1594-95 (2012) (describing common models of “problem-solving” criminal courts and arguing that predominant models reflect and deepen the carceral logics and pathologies of the criminal legal system).

⁵⁶ CHILDS. BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., *IN-HOME SERVICES TO STRENGTHEN CHILDREN AND FAMILIES* 3-4 (2021) (describing types of services available and noting that these services are typically provided to families who have “open cases with a child welfare agency”).

⁵⁷ See Anna Arons, *Family Regulation’s Consent Problem*, 124 COLUM. L. REV. (forthcoming 2025) (manuscript at 13-15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5024694

Finally, family regulation court proceedings are at once formal and informal, adversarial and problem-solving. Family courts were designed to be informal, without the adversarial and procedural trappings of criminal law.⁵⁸ Today's family courts have been reshaped by the recognition of constitutional floors for juvenile delinquency proceedings and states' implementation of statutory reforms.⁵⁹ Modern proceedings have an "obvious accusatory and punitive focus" and are "distinctly formal and adversarial."⁶⁰ But problem-solving norms persist. Courts and agencies still demand cooperation and compliance from parents and work closely together to gather information on families in the name of rehabilitation.⁶¹ Court proceedings exhibit the conflicting expectations and narratives of the system as a whole.

B. *Shape-Shifting Roles of Agency Personnel*

Nowhere is the existential conflict of the family regulation system clearer than in the shape-shifting roles of family regulation agencies. The same agencies that investigate parents and support prosecutions of them purport to help them.⁶² Agencies are often taken to be experts in social work and

[<https://perma.cc/8TE5-YVNM>] (describing the role of surveillance in the family regulation system and noting the inefficacy of surveillance as a means of increasing child safety).

⁵⁸ SPINAK, FAMILY COURT, *supra* note 28, at 20 (describing how early family courts "glorified informality as nonadversarial, preventive, and rehabilitative"); Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241, 1293 (2019) (quoting an expert consulting on the founding of New York's family courts who wrote of his desire to "keep out the penal law atmosphere . . . with all the formal trappings of jury trials and the rest").

⁵⁹ See Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 769 (describing the formalization of family regulation proceedings over the last 50 years); Lucas A. Gerber, Yuk C. Pang, Timothy Ross, Martin Guggenheim, Peter J. Pecora & Joel Miller, *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42, 42-43 (2019) (noting that thirty-nine states provide a right to counsel to parents in neglect and abuse proceedings and describing the rise of institutional defense offices for parents with family regulation cases).

⁶⁰ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 42-43 (1981) (Blackmun, J., dissenting).

⁶¹ See Anna Arons, *The Empty Promise of the Fourth Amendment in the Family Regulation System*, 100 WASH. U. L. REV. 1057, 1110-11, 1078-79 (2023) (describing governmental branches' shared project of information-gathering and summarizing pressures on parents to "collaborate" and "cooperate" inside and outside court); see also Spinak, *Family Defense*, *supra* note 44, at 172 (describing the roles of different offices in New York's problem-solving court model); Vicki Lens, *Against the Grain: Therapeutic Judging in a Traditional Family Court*, 41 LAW & SOC. INQUIRY 701, 702 (2015) (explaining that problem-solving courts tend to rely on collaboration and teamwork).

⁶² TINA LEE, CATCHING A CASE 89 (2016); (describing caseworkers' "dual role" as investigators and helpers); Dorothy E. Roberts, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881, 886 (2007) (same); Kelley Fong, *Getting Eyes in the Home: Child Protective Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 611 (2020) ("[T]hese dual capacities—the possibility of therapeutic support alongside the threat of coercive intervention—generate expansive investigations of domestic life . . ."); *Matter of Autumn A.*, 84 Misc. 3d 1255(A), at *16 n.3 (N.Y. Fam. Ct. 2024) ("Overcoming this inherent conflict and tension in [the agency]'s two legal mandates of being the same agency that enters a family's life as an investigator and prosecutor and then

rehabilitation.⁶³ But nationally, fewer than half of agency personnel are social workers, and the median tenure of a caseworker is 1.8 years.⁶⁴ Meanwhile, agencies have developed another area of expertise: investigation and policing.⁶⁵ Family regulation agencies occupy the field of investigating child maltreatment, pushing non-state actors and even police to the side.⁶⁶ For this reason, I use “investigator” to describe caseworkers and highlight their non-social work role. This section traces the pathway of a typical family regulation case, highlighting the incongruous and expansive roles of agency personnel.

Family regulation cases typically begin when an agency receives a report alleging that a parent has mistreated their child.⁶⁷ Most reports relay

attempts to forge a supporting working relationship with that same parent is perhaps the most challenging task of the child welfare system.”).

⁶³ See, e.g., AM. BAR ASS’N, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES 3 (2004) [hereinafter AM. BAR ASS’N, STANDARDS OF PRACTICE] (touting “agency’s expertise in making decisions regarding the safety, permanency and well-being of children”); *In re B.D.*, 247 Cal. Rptr. 3d 740, 752-53 (Cal. Ct. App. 2019) (noting the “professional objectivity” of social workers who work for social services agencies and ascribing “trustworthiness” and “reliability” to their work).

⁶⁴ Tracy R. Whitaker, *Professional Social Workers in the Child Welfare Workforce: Findings from the NASW*, 12 J. FAM. STRENGTHS 1, 3 (2012) (reporting that less than 40% of the family regulation workforce is comprised of social workers); Frank Edwards & Christopher Wildeman, *Characteristics of the Front-Line Child Welfare Workforce*, 89 CHILD. & YOUTH SERVS. REV. 13, 17-18 (2018) (surveying data from forty-six states and finding that the median caseworker handles fifty-five cases annually and is on the job for 1.8 years).

⁶⁵ See Ismail, *supra* note 28, at 1501 (“Today’s [Child Protective Services] agents train for investigation side-by-side with police departments.”); Thomas Tracy, *Childrens Services Case Managers to Get Real-Life Home Visit Experience in Simulated Settings*, N.Y. DAILY NEWS (Dec. 12, 2018, 6:39 AM), <https://www.nydailynews.com/2018/11/25/exclusive-childrens-services-case-managers-to-get-real-life-home-visit-experience-in-simulated-settings> [<https://perma.cc/ZYU2-W7F7>] (describing a simulation-based training program for family regulation investigators, “loosely based on the [police department] . . . exercise where recruits and other law enforcement trainees never know what is behind each door”); see also *Cornejo v. Bell*, 592 F.3d 121, 128 (2d Cir. 2010) (noting that “the caseworker defendants essentially functioned much more like investigators than prosecutors” and describing their decision to take custody of a child as “the functional equivalent of police officers’ making arrests in criminal cases”); *Rieman v. Vazquez*, 96 F.4th 1085, 1090 (9th Cir. 2024) (noting that “as prosecutors and others investigating criminal matters have no absolute immunity for their investigatory conduct, it follows that social workers conducting investigations have no such immunity as well” (internal quotation marks omitted)).

⁶⁶ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 208 (1989) (Brennan, J., dissenting) (“[State] law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse.”); cf. Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1094-95 (2013) (describing the State’s, and particularly the police’s, monopoly on formal tools of investigation in criminal cases).

⁶⁷ To receive federal funds, states must maintain systems to receive reports of child maltreatment. 42 U.S.C. § 5106a(a)(2)(A) (2019). As a result, almost all states have set up hotlines to receive reports. See Ismail, *supra* note 28, at 1493. The hotlines screen and refer cases for investigation; reports may be rejected for insufficient identifying information, but screening rarely focuses on the veracity or reliability of allegations. See CHILD MALTREATMENT 2022, *supra* note 7,

allegations of neglect, not abuse.⁶⁸ But virtually all reports trigger sweeping investigations that go far beyond the immediate allegation.⁶⁹ Investigators delve into all areas of families' lives. They seek out information on topics ranging from the parents' trauma histories, substance use, and mental health to families' financial and immigration statuses and support networks to their neighborhood's environment.⁷⁰ Investigators use an array of tools to gather this intimate information. They conduct body checks of children's near-nude bodies, enter and search families' homes, interrogate parents, children, and families' acquaintances, demand that parents take drug tests and psychiatric evaluations, and seek records from medical providers and schools.⁷¹ One investigator described a family regulation investigation as akin to being "stopped and frisked for 60 days."⁷²

6-7 (noting that about half of reports are "screened in" and listing reasons reports are screened out). Reports may be called in about parents or other legally responsible caregivers; throughout, I use "parent" to simplify.

⁶⁸ In cases where investigations substantiated allegations of child maltreatment, 74% found neglect, 17% found physical abuse, and 11% found sexual abuse. CHILD MALTREATMENT 2022, *supra* note 7, at 23. Children may be counted in more than one category. *Id.* Localities report similar breakdowns for initial allegations reported to hotlines. Arons, *supra* note 61, at 1069-70 n.48 (summarizing individual localities' data regarding types of allegations).

⁶⁹ Arons, *supra* note 61, at 1071-73, 1093 (describing the generalized search requirements and the absence of particularity requirements for family regulation investigations).

⁷⁰ See CHILDS. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE USE OF SAFETY AND RISK ASSESSMENTS IN CHILD PROTECTION CASES 2-3 (2021) [hereinafter CHILDS. BUREAU, SAFETY ASSESSMENTS], https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/safety_risk.pdf?VersionId=ssUjM9eGAF05e9YAiAkm8zjJ_AibAyRS [https://perma.cc/4ADX-C65X] (summarizing states' formal policies and statutes requiring wide-ranging safety or risk assessments); see also, e.g., OR. DEP'T OF HUM. SERVS., CHILD WELFARE PROCEDURE MANUAL 204-21 (2024), <https://www.oregon.gov/odhs/rules-policy/Documents/cw-procedure-manual.pdf> [https://perma.cc/HPL4-DXTR] (outlining Oregon Department of Human Services' safety assessment procedures for investigating child wellbeing); S.C. DEP'T OF SOC. SERVS., HUMAN SERVICES POLICY AND PROCEDURE MANUAL § 730 (2008), https://dss.sc.gov/media/1897/cpps_2019-01-15.pdf [https://perma.cc/R474-YZC4] (establishing South Carolina family assessment procedures); VA. DEP'T. OF SOC. SERVS., CHILD AND FAMILY SERVICES MANUAL 56-60 (2022), https://www.dss.virginia.gov/files/division/dfs/cps/intro_page/manuals/09-2022/section_3_complaints_reports_SEPT_2022.pdf [https://perma.cc/26CH-4AZJ] (outlining how to determine the appropriate response to a complaint).

⁷¹ See Washington, *Pathology Logics*, *supra* note 13, at 1537, 1546 (describing investigation protocols, including "strip searches"); Arons, *supra* note 61, at 1070 (collecting sources describing strip searches of children during investigations); see also CHILDS. BUREAU, SAFETY ASSESSMENTS, *supra* note 70, at 2-3 (surveying states and describing six wide-ranging "domains" of information sought during investigations).

⁷² Andy Newman, *Is N.Y.'s Child Welfare System Racist? Some of Its Own Workers Say Yes*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2022/11/22/nyregion/nyc-acs-racism-abuse-neglect.html> [https://perma.cc/4K2Z-3MTS].

Because agencies use investigations to gather evidence about the initial report and to judge families expansively,⁷³ the outcome of an investigation is more complex than a determination of guilt or innocence. More than 80% of investigations are closed without substantiating any allegations,⁷⁴ but an unsubstantiated determination does not guarantee closure of a case. Regardless of the agency's determination, agencies have three basic options: close the case outright, route the family into ongoing surveillance and services without initiating a court case, or initiate a court case.⁷⁵ An agency can find a report unsubstantiated and still refer the family for services or initiate a court case, or it can close a case even if it substantiates the report.⁷⁶

Agencies most often route families into ongoing surveillance and services outside of court.⁷⁷ But, at any time after an investigation begins, agencies may decide to bring a case to court. This decision may be driven by the initial allegations, but it may also come after caseworkers uncover evidence of other possible maltreatment through their ongoing surveillance⁷⁸ or because caseworkers are frustrated with parents' attitudes toward agency personnel or refusal to cooperate with agency demands.⁷⁹

⁷³ See Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217, 220 (2022) [hereinafter Gupta-Kagan, *Confronting Indeterminacy*] (noting the wide discretion child protective services agencies have to determine the scope of investigations).

⁷⁴ CHILD MALTREATMENT 2022, *supra* note 7, at 20 ex. 3-B.

⁷⁵ Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 755.

⁷⁶ In New York City, for instance, in 2022, 26% of unsubstantiated reports of neglect were referred for ongoing services through the family regulation system. In contrast, 11% of substantiated reports of neglect were closed without referral for any ongoing services. N.Y.C. ADMIN. FOR CHILDS. SERVS., CHILD WELFARE INDICATORS ANNUAL REPORT CY 2022 11-12 (2023), <https://www.nyc.gov/assets/acs/pdf/data-analysis/2022/CityCouncilReportCY2022.pdf> [<https://perma.cc/CNX5-929U>]; see also Jane Waldfogel, *Prevention and the Child Protection System*, 19 FUTURE CHILD. 195, 197 fig.1 (2009) (noting that in 2006, nationwide, 30% of reports that were not substantiated were referred for services and 40% of reports that were substantiated were not referred for services).

⁷⁷ CHILD MALTREATMENT 2019, *supra* note 5, at 88 tbl.6-2, 91 tbl.6-5 (noting, for 2019, agencies reported post-investigation services for about 60% of the children that they found to be maltreated and reported initiating court cases for about 25% of these children).

⁷⁸ See Suzanne Hirt, *How to Protect Parental Rights in a Child Welfare Investigation by Child Protection Agency*, USA TODAY (Apr. 6, 2022, 5:03 AM), <https://www.usatoday.com/story/news/investigations/2022/04/06/parental-rightschild-protection-agency-probe/7250541001> [<https://perma.cc/S3GF-DX6H>] (quoting a former family regulation prosecutor in Florida who reported that investigators search homes for "anything and everything they can possibly use against you," rather than only "illegal things," and cautioning that "[p]robable cause (to remove your child) can be made on most anything" (internal quotation marks omitted)); see also E-mail from Parent Defense Lawyer, In-House Jurisdiction, to author (June 22, 2023, 11:01 EDT) (on file with author) (describing agencies' practice in her jurisdiction of keeping cases open long enough that they develop support for new allegations against parents).

⁷⁹ See Washington, *Pathology Logics*, *supra* note 13, at 1564 (summarizing accounts from caseworkers and affected parents describing ways in which parents' emotions of anger and frustration during investigations are used to justify removing their children from their care).

Close to 200,000 children are involved in new family regulation court filings each year.⁸⁰ Agency personnel work with prosecutors to build a legal case against the parent, while ostensibly “rehabilitating” families outside of court by facilitating services and visitation. These roles are not neatly bifurcated. Rather, caseworkers’ out-of-court work is driven by legal requirements in court; at the same time, that out-of-court work becomes critical evidence in court.

In court, cases proceed through a series of hearings. The government must initially establish that removal of a child from their parent is justified⁸¹ and, eventually, that the alleged maltreatment actually occurred.⁸² If the court finds that maltreatment did occur, it enters dispositional orders prescribing services, placement, and visitation for the child and parents.⁸³ Courts cannot close cases until a child achieves “permanency”—a legally recognized

⁸⁰ It is difficult to estimate how many children are subjects of family regulation filings. At one time, the federal Children’s Bureau reported the number of “victims” (i.e., children with substantiated reports) with “some court action,” including “any legal action taken by the CPS agency or the courts on behalf of the child,” annually, but this was an incomplete count as it was based on only forty-one states’ reports and excluded court action for “non-victims.” CHILD MALTREATMENT 2019, *supra* note 5, at 80. The Children’s Bureau has since stopped reporting this number. However, in 2019, the most recently reported year, it reported approximately 133,000 children had court action. *Id.* at 91 tbl.6–5. Another federal report (the AFCARS Report) draws from a different dataset, also reported by states, and reports that in 2019, 252,198 children entered foster care. *See* AFCARS REPORT, *supra* note 5, at 1. All foster care placements require periodic court or administrative review. 42 U.S.C. § 675(5)(B) (2019). Thus, all 252,198 of these children should have had some “court action.” The gap between the “court action” number and the AFCARS Report’s number hints that the “court action” number undercounts the actual number of children involved in family regulation filings. But the AFCARS Report is also an imperfect proxy, as it does not include children who are the subjects of family regulation proceedings but are *not* placed in foster care. I rely here on the AFCARS Report’s number of children entering foster care in a given year for a very rough approximation of the number of children with court action in a given year. For 2022, there were 186,602 entries to foster care. *See* AFCARS REPORT, *supra* note 5, at 1.

⁸¹ *See* Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 214 (2016) (“The burden on the state agency is typically a *prima facie* showing that probable cause exists to believe the child is at imminent risk of harm.”); *see also* Trivedi, *Child Removal*, *supra* note 28, at 560 (describing the narrow focus of most states’ child removal statutes).

⁸² *See* CHILDS. BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., UNDERSTANDING CHILD WELFARE AND THE COURTS 4 (2022) [hereinafter CHILDS. BUREAU, UNDERSTANDING COURTS], https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/cwandcourts.pdf?VersionId=1kHnv8ZqoZLz1VuzzsQGkPVeCr_6. [https://perma.cc/9QKM-7G7B] (summarizing types of hearings in family regulation cases); *In re Louie L.V.*, 111 N.Y.S.3d 317, 320 (N.Y. App. Div. 2019) (explaining the differences in evidentiary requirements and standards between initial hearings and later adjudications).

⁸³ CHILDS. BUREAU, UNDERSTANDING COURTS, *supra* note 82 (summarizing hearing types in family regulation cases and actions that judges may take).

permanent living arrangement.⁸⁴ “Permanency” options range from reunification with a parent at one extreme and permanent severance of parental rights at the other.⁸⁵ Between these extremes lie possibilities such as family members other than the parent taking custody of the child.⁸⁶ As a case continues, parents may contest court orders setting visitation, placement, or services at interim hearings.⁸⁷ Cases may resolve through settlement, rather than contested hearings.⁸⁸ However, data on settlement is limited.⁸⁹

Outside of the courtroom, federal law requires agencies to pursue two conflicting objectives for their states to receive federal funding: first, to facilitate reunification, but second, to cease efforts to facilitate reunification within a short timeframe. Once a child is in foster care, the agency must create a “case plan” designed to “facilitate return of the child to his own safe

⁸⁴ 42 U.S.C. § 675(5)(B) (2019) (requiring that courts review and approve permanency plans for children in care at minimum every six months); see Gupta-Kagan, *Confronting Indeterminacy*, *supra* note 73, at 249 (summarizing permanency options under federal law).

⁸⁵ See Gupta-Kagan, *Confronting Indeterminacy*, *supra* note 73, at 249 (summarizing permanency options under federal law); see also 42 U.S.C. § 675(5)(C) (2019) (explaining permanency hearing procedures).

⁸⁶ See Gupta-Kagan, *Confronting Indeterminacy*, *supra* note 73, at 249.

⁸⁷ See, e.g., Alicia LeVezu, *Alone and Ignored: Children Without Advocacy in Child Abuse and Neglect Courts*, 14 STAN. J. C.R. & C.L. 125, 152-53 (2018) (describing challenges to agency actions raised by parents and their attorneys during hearings in three separate family regulation cases).

⁸⁸ ALICIA SUMMERS, SOPHIA GATOWSKI, TAMMY RICHARDS & ANNE FROMKNECHT, CHILDS. BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., MEASURING CHILD WELFARE COURT PERFORMANCE: REVIEW OF RESOURCES 50 (2022), https://capacity.childwelfare.gov/sites/default/files/media_pdf/cw-court-performance-resource-review.pdf [<https://perma.cc/H3UB-H8AW>] (describing attorneys’ activities outside of hearings to include “participating in settlement or alternative dispute resolution procedures on behalf of clients”).

⁸⁹ Some states’ court systems report that they do not track or make available disposition data for family regulation cases. See, e.g., E-mail from Susan Emmanuel, Dir., Commc’ns Off., Fla. Off. of State Cts. Adm’r, to author (May 12, 2023, 2:00 PM) (on file with author) (confirming that the court does not collect case information in dependency proceedings); E-mail from Claire Bell, Ct. Mgmt. Analyst, Me. Admin. Off. of Cts., to author (May 15, 2023, 8:47 AM) (on file with author) (declining a request for juvenile dependency data). Other court systems track data only for certain cases, see, for example, E-mail from Lucian Chalfen, Dir., Pub. Info., N.Y. Off. of Ct. Admin., to author (March 22, 2023, 1:25 PM) [hereinafter N.Y. O.C.A. Response] (on file with author) (reporting disposition data for only abuse cases), or track only very high-level data, such as the number of cases that are disposed of at trial as compared to those disposed of by other means. See, e.g., E-mail from Nev. Admin. Off. of the Cts. to author (June 1, 2023, 8:14 PM) [hereinafter Nev. A.O.C. Response] (on file with author). Because of these data collection limitations and variations in states’ substantive and procedural family regulation laws, it is difficult to draw trends. But the limited available data reveals that, as in criminal cases, most family regulation cases resolve without a trial. New York State, for example, reported that only about 15% of abuse cases were resolved via a finding entered after a hearing, while 34% were resolved through a mechanism similar to a no-contest plea and 7.5% resolved via admissions of guilt. N.Y. O.C.A. Response, *supra*. Nevada, meanwhile, reports that of the dependency and termination of parental rights cases that reached disposition in 2022, 18% were disposed of via trial. Nev. A.O.C. Response, *supra*.

home”⁹⁰ Agencies must make “reasonable efforts” to achieve that goal.⁹¹ “Reasonable efforts” is an ill-defined term, but it generally requires that agencies facilitate parent-child visits and refer parents for services.⁹² But a much-criticized federal law, the Adoption and Safe Families Act (ASFA),⁹³ gives families only a short time to meet the oft-onerous agency and court requirements for reunification.⁹⁴ If children remain in foster care for fifteen of the most recent twenty-two months, then ASFA requires that the agency file a petition in court to permanently terminate the parent-child relationship, with few exceptions.⁹⁵ The agency will also seek court approval for a new “permanency goal,” such as adoption or placement with a relative.⁹⁶ Once a family’s permanency goal is changed, the agency must make reasonable efforts toward the new goal rather than toward reunification.⁹⁷

Unlike criminal cases, the legal outcomes of family regulation cases turn not only on what happened in the past, but also what is happening in the present and what might happen in the future.⁹⁸ Caseworkers simultaneously

⁹⁰ 42 U.S.C. § 675(1)(B) (2019). *See also* 42 U.S.C. § 671(a)(16) (2023) (requiring states to develop case plans to receive federal funding); 42 U.S.C. § 675(1) (2019) (defining case plan).

⁹¹ 42 U.S.C. § 671(a)(15)(B)(ii) (2023).

⁹² *See* CHILDS. BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 2 (2019) [hereinafter CHILDS. BUREAU, REASONABLE EFFORTS] (summarizing common reasonable efforts); *see also* Gupta-Kagan, *Confronting Indeterminacy*, *supra* note 73, at 253 (describing “reasonable efforts” requirements as ill-defined and indeterminate).

⁹³ *See, e.g.*, Shanta Trivedi, *The Adoption and Safe Families Act Is Not Worth Saving: The Case for Repeal*, 61 FAM. CT. REV. 315, 319-30 (2023) (summarizing existing criticisms of ASFA and explaining that ASFA “led to the destruction of black families and communities”); Dorothy Roberts, *The Clinton-Era Adoption Law That Still Devastates Black Families Today*, SLATE (Nov. 21, 2022, 5:50 AM), <https://slate.com/news-and-politics/2022/11/racial-justice-bad-clinton-adoption-law.html> [<https://perma.cc/C5ZA-WMX2>] (“[ASFA] has dramatically increased the chances that Black families, which are disproportionately separated by state child welfare authorities, will be permanently torn apart.”); Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE & L. 711, 715 (2021) (“[ASFA is] the most family destructive law ever enacted since slavery was abolished.”); Ashley Albert, Tiheba Bain, Elizabeth Brico, Bishop Marcia Dinkins, Kelis Houston, Joyce McMillan, Vonya Quarles, Lisa Sangoi, Erin Miles Cloud & Adina Marx-Arpadi, *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861, 867-68 (2021) (criticizing ASFA as “an antagonist to our story of liberation”).

⁹⁴ *See* S. Lisa Washington, *Time and Punishment*, 134 YALE L.J. 536, 545, 556 (2024) (describing “tension between the inflexible deadline for the termination of parental rights and the flexibility demanded of parents during the extended period of separation,” as parents are required to juggle visitation, services, court dates, and obligations like work schedules).

⁹⁵ 42 U.S.C. § 675(5)(E) (2019).

⁹⁶ *See* Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13, 14 (2010) [hereinafter Gupta-Kagan, *Due Process*].

⁹⁷ 42 U.S.C. § 671(a)(15)(C) (2023).

⁹⁸ *Cf.* Gupta-Kagan, *Due Process*, *supra* note 96, at 14 (distinguishing abuse and neglect proceedings from civil cases because they involve “constantly changing facts”).

act as investigators attempting to uncover past facts, ongoing witnesses, and shapers of future facts.⁹⁹ At each step in the legal process, agency personnel are the main source of evidence.¹⁰⁰ Take a proceeding to terminate a parent's rights. At the heart of the proceeding are questions about what efforts the agency took toward reunification, how visits went, whether parents "benefitted" from services, and whether it is in the child's "best interest" for the parent-child relationship to be severed.¹⁰¹ Caseworkers control the lion's share of information that judges rely on to answer those questions. They provide evidence at hearings through their testimony and reports, locate witnesses and records before hearings, and generate evidence by referring parents for drug screens, evaluations, and services. Thus, agencies "create the real-life facts that will lead to achieving the permanency plan chosen."¹⁰² They do not do so neutrally. Rather, their reports often reflect and perpetuate pathologizing narratives.¹⁰³

Considering the myriad roles that caseworkers play in a single case, it is unsurprising that the caseworker-parent relationship can be a tense and troubled one. Caseworkers, parents, and the parents' lawyers report that legal actions can be driven by caseworkers' frustration or anger with parents rather than by proper legal standards.¹⁰⁴

Race and class bias, both at an agency level and at an individual level, also affects caseworkers' decisionmaking.¹⁰⁵ A recent audit of New York City's family regulation agency found investigators themselves describing the

⁹⁹ See Washington, *Pathology Logics*, *supra* note 13, at 1547 (explaining the numerous roles caseworkers play throughout a family regulation case).

¹⁰⁰ *Id.* at 1568 n.224 (collecting examples of cases where caseworkers were the only witness or the key witness).

¹⁰¹ See CHILDS. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 2-3 (2017) (explaining common statutory grounds justifying termination of parental rights); see also Deirdre M. Smith, *Termination of Parental Rights as a Private Remedy: Rationales, Realities, and Alternatives*, 72 SYRACUSE L. REV. 1173, 1207 (2022) (noting that courts often use the best interest standard "to transform what should be an analysis of the adequacy of a factual basis to sever a parent's constitutionally protected interest into a comparison of the adults in a child's life"); Laura Matthews-Jolly, *Visitation as Family Regulation*, 103 N.C. L. REV. (forthcoming 2025) (manuscript at 101, 107, 140-41), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5013563 [<https://perma.cc/JZ3J-Z2NT>] (arguing that agencies use visitation in family regulation cases as a tool to surveil and regulate parents and as evidence to support their efforts to terminate parents' rights).

¹⁰² Gupta-Kagan, *Due Process*, *supra* note 96, at 15.

¹⁰³ See Washington, *Pathology Logics*, *supra* note 13, at 1562-63 (explaining how caseworkers' use of "vague, benign and subjective language" distorts families' expressed emotions and amplifies paradigms of compliance and individual responsibility).

¹⁰⁴ See *id.* at 1564-65 (collecting accounts).

¹⁰⁵ Chris Gottlieb, *Remembering Who Foster Care Is For: Public Accommodation and Other Misconceptions and Missed Opportunities in Fulton v. City of Philadelphia*, 44 CARDOZO L. REV. 1, 43, 60 (2022) (summarizing empirical evidence demonstrating that racial and class bias affects decisionmaking in the family regulation system).

family regulation system as a “predatory system that specifically targets Black and brown parents and subjects them to a different level of scrutiny.”¹⁰⁶

Through the long duration of family regulation cases, agency personnel become more than just characters in families’ lives. They become authors, selecting “goals” that decide families’ trajectories, excavating facts and turning tangential details into material evidence, and spinning narratives through their reporting and testimony that become the basis for legal decisions that shape families’ futures.

C. Models for Prosecutions and Filing Decisions

Once a family regulation court case is initiated, it can take years to resolve. Regardless of the outcome, the emotional fallout can linger for generations.¹⁰⁷ Despite these high stakes, little attention has been paid to how prosecutions of family regulation cases play out or how prosecutors and investigators relate to one another.

This dearth of research stands in contrast to the wealth of scholarship on the role of prosecutors in criminal cases. The immense, and oft-unchecked, power of criminal prosecutors is well-documented.¹⁰⁸ Scholars have set forth normative arguments for prosecutorial discretion and prosecutorial independence as checks on police,¹⁰⁹ and descriptive accounts of the close relationship between prosecutors and investigators.¹¹⁰ I return to those accounts in Part IV. Other areas of law also yield careful studies of the relationship between those who investigate cases and those who prosecute them. Adding to decades of scholarship on investigative and prosecutorial

¹⁰⁶ Newman, *supra* note 72 (internal quotations omitted).

¹⁰⁷ See Washington, *Pathology Logics*, *supra* note 13, at 1587 (arguing that family regulation has community-wide and intergenerational effects); Lee, *supra* note 13, at 426 (“[C]hild welfare’ does not create safety but reproduces the need for intervention, often across generations.”).

¹⁰⁸ See, e.g., PFAFF, *supra* note 32, at 6 (“The primary driver of incarceration is increased prosecutorial toughness when it comes to charging people . . .”); Barkow, *supra* note 23, at 871 (explaining the significant power federal prosecutors have over criminal cases); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 175-76 (2022) (noting the lack of checks on prosecutorial power).

¹⁰⁹ See, e.g., Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 596 (2019) (“Although [criminal] prosecutors may take account of other stakeholders’ views, they make the final call.”); Barkow, *supra* note 23, at 874 (advocating for the separation of prosecutors and investigators); Richman, *supra* note 23, at 754 (suggesting that “the distinctive incentives of prosecutors and [law enforcement] agents can most productively be harmonized if the two enforcement elements are seen as mutually monitoring . . .”).

¹¹⁰ See, e.g., Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 757 (2016) (“Prosecutors do not check their law enforcement partners by refusing to pursue cases where police have violated a suspect’s constitutional rights.”); Abel, *supra* note 23, at 1732-34 (describing involvement of police in substantive plea negotiations).

authority in the federal administrative state,¹¹¹ recent administrative scholarship considers the distribution of litigation authority between state agencies and state attorneys general.¹¹² And in other quasi-criminal areas, like immigration law, scholars have begun to grapple with questions of prosecutorial discretion and independence.¹¹³

Yet the investigator-prosecutor relationship in the family regulation system remains largely unexamined. Existing social work scholarship shows that caseworkers do not think about prosecutors much at all: in one survey, caseworkers rated prosecutors as the legal personnel who least influenced (and were least beneficial to) case outcomes.¹¹⁴ The limited existing legal scholarship and surveys of the field focus primarily on questions of institutional choice and design.¹¹⁵ They do not reveal how institutional choice and design translate to practice.¹¹⁶

This Article begins to fill in those gaps. This Section surveys what we do know, describing the formalistic taxonomies for models of family regulation prosecution which emerge from existing literature and public-facing government materials. These taxonomies describe prosecutorial models along two axes: prosecutors' institutional affiliations and prosecutors' clients. The

¹¹¹ See, e.g., Barkow, *supra* note 23, at 889 (discussing the 1941 recommendation of the Attorney General's Committee on Administrative Procedure to separate investigatory and adjudicatory functions within agencies); Devins & Herz, *supra* note 37, at 558 (examining the Department of Justice's role in federal litigation); Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 765 (1981) (explaining that the APA places agency personnel into one of three classifications and that "investigators or prosecutors in the particular case being adjudicated or one that is factually related" are classified as "[a]dversaries").

¹¹² See, e.g., Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651, 658-59 (2023) (examining division of responsibilities for criminal law enforcement in different states); Devins & Prakash, *supra* note 37, at 2126 (explaining the separation of litigation authority between state agencies and state attorneys general).

¹¹³ See, e.g., Hallett, *supra* note 37, at 1771-78 (reviewing the foundations of prosecutorial discretion in immigration law); Cade, *supra* note 37, at 5-6 (arguing that immigration prosecutors have a responsibility to exercise discretion).

¹¹⁴ Raquel T. Ellis, *Child Welfare Workers' Perceptions of Juvenile Court Influence on Child Welfare Practices*, 4 J. PUB. CHILD WELFARE 158, 167 (2010).

¹¹⁵ See, e.g., Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 793-95 (drawing from states' statutory schemes to survey institutional choice and design for family regulation prosecutions); Besharov, *supra* note 39, at 403-04 (drawing from states' statutory schemes to give examples of institutional choice for family regulation prosecutions); AM. BAR ASS'N, STANDARDS OF PRACTICE, *supra* note 63, at 3-4 (surveying "representation models" for family regulation prosecutions and emphasizing that the choice of representation model affects the quality of representation).

¹¹⁶ The absence of this research on family regulation prosecutors stands in contrast with juvenile delinquency prosecutors, where scholars have filled in these abstract accountings with closer study of how prosecutors and agency personnel carry out their jobs on the ground. See, e.g., Amanda J. Fairchild, Josh Gupta-Kagan & Tia Stevens Andersen, *Operationalizing Intake: Variations in Juvenile Court Intake Procedures and Their Implications*, 102 CHILD. & YOUTH SERVS. REV. 91, 96-97 (2019) (describing county-level survey of intake procedures for delinquency proceedings).

Section closes by reviewing existing studies of the formal distribution of decisionmaking authority between prosecutors and agencies.

1. Institutional Affiliations for Government Lawyers

Existing research, state statutes, and materials from agencies and prosecutors' offices establish a rough taxonomy of models of institutional affiliation for family regulation prosecutors. These materials—capturing formal, rather than functional, designations—reveal four basic models for agency representation by government lawyers.¹¹⁷ Cases might be prosecuted by lawyers: (1) within the jurisdiction's family regulation agency (“in-house”); (2) in another local government entity, such as the city or county attorney's office (“county counsel”); (3) in the statewide attorney general's office (“attorney general”); or (4) in local criminal prosecutors' offices (“local prosecutor”).¹¹⁸

Accounting for the prevalence of these models requires approximation, as structures vary even within jurisdictions. States might use a local prosecutor model for larger jurisdictions and an attorney general model for rural areas, or a county counsel model for larger jurisdictions and private attorneys contracted to represent agencies for rural areas.¹¹⁹ Some states use different models for different litigation stages—for instance, turning termination of parental rights cases over to the attorney general or lawyers retained by

¹¹⁷ As noted above, some jurisdictions contract with private attorneys for representation. I exclude prosecutions by contracted private attorneys from my discussion. *See supra* note 19 and *infra* note 119.

¹¹⁸ These categories are adapted from Ruiz and Trowbridge's national survey of child welfare representation models. *See* RUIZ & TROWBRIDGE, *supra* note 29, at 3. Different jurisdictions use different names for these entities. For instance, some jurisdictions use “county attorney” to refer to the local elected official charged with prosecuting criminal felonies and misdemeanors. *See, e.g., About MCAO*, MARICOPA CNTY. ATT'Y'S OFF., <https://www.maricopacountyattorney.org/277/About> [<https://perma.cc/A5JZ-28MC>] (last visited Jan. 18, 2025); *County Attorney*, HILLSBOROUGH CNTY., N.H., <https://hcnh.org/Departments/County-Attorneys-Office> [<https://perma.cc/68QW-7KS7>] (last visited Jan. 18, 2025). Many other jurisdictions refer to that official as a district attorney, *see, e.g., HARRIS CNTY. DIST. ATT'Y'S OFF.*, <https://www.harriscountyda.com> [<https://perma.cc/4KSL-JGGG>] (last visited Jan. 18, 2025), and use “county counsel” or “county attorney” to refer to the local official charged with representing the locality in civil matters. *See, e.g., About the Office*, OFF. OF THE HARRIS CNTY. ATT'Y, <https://cao.harriscountytexas.gov/About/About-The-Office> [<https://perma.cc/6FEZ-MUZF>] (last visited Jan. 18, 2025). For the sake of clarity, I use the four descriptors outlined above regardless of local terminology.

¹¹⁹ *See, e.g., N.Y. FAM. CT. ACT* § 1038(a) (referencing county counsel, corporation counsel, and district attorneys in the context of abuse and neglect proceedings); *TEX. FAM. CODE ANN.* § 264.009 (West 2023) (referencing county attorneys and district attorneys in the context of agency representation); E-mail from Anna Daniszewski, Fam. Def. Fellow, Va. Poverty L. Ctr., to author (May 15, 2023, 1:05 PM) (on file with author) (explaining Virginia's use of different models based on size of the locality).

private foster care agencies.¹²⁰ Speaking only roughly, about thirteen states use an in-house model,¹²¹ twelve states and the District of Columbia use an

¹²⁰ See, e.g., N.Y.C. ADMIN. FOR CHILDS. SERVS., A GUIDE FOR PARENTS OF CHILDREN IN FOSTER CARE 34 (2022) (explaining that foster agencies file petitions to terminate parents' rights); DIV. OF CHILD & FAM. SERVS., NEV. DEP'T OF HEALTH & HUM. SERVS., 0514.0: TERMINATION OF PARENTAL RIGHTS (TPR) 0514.5.1.E (2013) (describing the agency's responsibility to consult with either the attorney general or the district attorney when seeking to terminate parental rights).

¹²¹ See *Legal Office*, ALA. DEP'T OF HUM. RES., <https://dhr.alabama.gov/directory/legal-office> [<https://perma.cc/6D4L-JAN7>] (last visited Jan. 19, 2025); *Office of Chief Counsel*, ARK. DEP'T OF HUM. SERVS., <https://humanservices.arkansas.gov/divisions-shared-services/shared-services/office-of-chief-counsel> [<https://perma.cc/F9JB-ZGNK>] (last visited Jan. 19, 2025); FLA. STAT. § 409.996(19)–(20) (2024); *Children's Legal Services*, FLA. DEP'T OF CHILD. & FAMS., <https://www.myflfamilies.com/services/child-family/child-and-family-well-being/childrens-legal-services> [<https://perma.cc/B6DA-ABWP>] (last visited Jan. 19, 2025); IND. CODE §§ 31-25-2-10, 31-25-2-11.5 (2023); *DCS Needs Attorneys*, IND. DEP'T OF CHILD SERVS., <https://www.in.gov/dcs/careers/attorneys> [<https://perma.cc/743R-ZGQK>] (last visited Jan. 19, 2025); MASS. GEN. LAWS ANN. ch. 18B, § 10 (West 2024); MD. CODE ANN., FAM. LAW § 5-710 (West 2024); MO. REV. STAT. § 210.109(8) (2020); N.M. STAT. ANN. § 32A-1-6(A) (West 2020); N.M. CODE R. § 8.10.7.9 (LexisNexis 2024); CORINNE WOLFE CTR. FOR CHILD & FAM. JUST., NEW MEXICO CHILD WELFARE HANDBOOK 5-1, 5-2 (2018) (explaining the structure of children's court attorneys in New Mexico); N.C. JUD. BRANCH, NORTH CAROLINA JUVENILE COURT: A HANDBOOK FOR PARENTS IN ABUSE, NEGLECT AND DEPENDENCY HEARINGS 8 (2018) (explaining the role of the Department of Social Services attorney in North Carolina); 237 PA. CODE § 1150(A)(3) (2024); PA. CHILD WELFARE RES. CTR., UNIV. OF PITT., CHARTING THE COURSE TOWARDS PERMANENCY FOR CHILDREN IN PENNSYLVANIA 13 (2016), http://www.pacwrc.pitt.edu/curriculum/CTC/MOD7/Cntnt/Cntnt_NewAppealsLanguage.pdf [<https://perma.cc/8NA5-YYFJ>] ("Solicitors are attorneys employed or contracted by the CYS agency to represent their interest at dependency hearings."); R.I. GEN. LAWS § 40-11-14 (2024); S.C. CODE ANN. § 63-7-1620(4) (2024); Job Announcement, Tenn. Dep't of Childs. Servs., Associate Counsel (Feb. 17, 2021) (on file with author) (searching for an Associate Counsel for the Department of Children's Services to represent the state in judicial proceedings).

attorney-general model,¹²² and five states use a county-counsel model.¹²³ The remaining states authorize local prosecutors to represent the state in proceedings.¹²⁴

¹²² See *Civil Division*, STATE OF ALASKA DEP'T OF L., <https://law.alaska.gov/departments/civil/civil.html> [<https://perma.cc/U87L-MBW5>] (explaining the structure and duties of Alaska's attorney general's office) (last visited Oct. 20, 2024); ARIZ. REV. STAT. §§ 8-817, 41-192 to -193 (2024); *Legal Process: Understanding Roles*, ARIZ. DEP'T OF CHILD SAFETY (Oct. 1, 2021), https://extranet.azdcs.gov/DCSPolicy/Content/Program%20Policy/07_Records_Legal_QA_Supervision/Legal/CH7_So8%20Legal%20Process%20Understanding%20Roles.htm [<https://perma.cc/D7DF-DPFT>] (outlining the attorney general's role in representing Arizona's Department of Child Safety); CONN. GEN. STAT. § 17a-47 (2025); DEL. CODE ANN. tit. 29, § 2505 (2024); GA. CODE ANN. § 45-15-3 (2024); GA. DIV. OF FAM. & CHILD. SERVS., FY 2023 ANNUAL PROGRESS AND SERVICES REPORT 81 (2022) (referencing the attorney general's role in Georgia's family regulation system); HAW. REV. STAT. § 571-62 (2024); ME. REV. STAT. ANN. tit. 5, § 191 (2023); *Office Organization: Child Protection Division*, OFF. OF THE ME. ATT'Y GEN., https://www.maine.gov/ag/about/office_organization.html#childprotective [<https://perma.cc/AEgR-8A2A>] (last visited Oct. 21, 2024) (explaining the structure of the Maine Attorney General's Child Protection and Support Divisions); *Department of Attorney General Contact Directory: Children & Youth Services (CYS) Division*, MICH. DEP'T OF ATT'Y GEN., <https://www.michigan.gov/ag/ag-contact-directory> [<https://perma.cc/FUW7-7YZ5>] (last visited Oct. 21, 2024) (providing contact information for the Michigan Attorney General's Children and Youth Services Division); *Department of Children and Families Practice Group (DCF)*, OFF. OF THE ATT'Y GEN., STATE OF N.J., <https://nj.gov/oag/law/dyfs-pg.htm> [<https://perma.cc/NBD3-DASF>] (last visited Oct. 21, 2024) (describing the New Jersey Attorney General's Department of Children and Families Practice Group); *Child Advocacy and Protection*, OR. DEP'T OF JUST., <https://www.doj.state.or.us/oregon-department-of-justice/divisions/child-advocacy> [<https://perma.cc/4Y3W-Q6F6>] (last visited Jan. 26, 2025); UTAH CODE ANN. § 80-2-303 (2022); WASH. REV. CODE § 13.04.093 (2024); *Our Structures and Divisions: Family Services Division*, OFF. OF THE ATT'Y GEN. FOR D.C., <https://oag.dc.gov/about-oag/our-structure-and-divisions> [<https://perma.cc/5ACH-JM9J>] (last visited Oct. 21, 2024) (explaining the Family Services Division within Washington, D.C.'s Attorney General Office).

¹²³ CAL. WELF. & INST. CODE § 318.5 (2023); COUNTY COUNSEL ROLES AND RESPONSIBILITIES, INST. FOR EXCELLENCE IN CNTY. GOV'T, CAL. STATE ASS'N OF COUNTIES 9, https://www.counties.org/sites/main/files/file-attachments/county_counsel_roles_and_responsibilities_ho.pdf [<https://perma.cc/E43U-72CY>] (last visited Oct. 21, 2024) (explaining that California county counsel acts as counsel in "probate, conservatorship, guardianship, and juvenile dependency proceedings"); COLO. REV. STAT. ANN. § 19-3-206 (2023); N.Y. FAM. CT. ACT § 1038 (2024); Letter from Audrey Carmical, Gen. Couns., Tex. Dep't of Fam. & Protective Servs., to Child Protective Services Attorneys (Sept. 2018), https://www.dfps.texas.gov/Child_Protection/Attorneys_Guide/documents/Introduction.pdf [<https://perma.cc/TK72-7GHN>]; VA. CODE ANN. § 63.2-1503 (2024); E-mail from Anna Daniszewski, Fam. Def. Fellow, Va. Poverty L. Ctr., to author, *supra* note 119 (explaining that Virginia's system is run on the city and county level).

¹²⁴ As described above, some of these jurisdictions give local prosecutors exclusive authority to prosecute family regulation cases, whereas others grant local prosecutors and other executive officers, such as the attorney general's office, concurrent authority. See IDAHO CODE § 16-1610 (2024); 705 ILL. COMP. STAT. 405/1-6 (2024); IOWA CODE § 232.90 (2024); KAN. STAT. ANN. § 38-2214 (2023); KY. REV. STAT. ANN. § 620.040 (2024); LA. CHILD. CODE ANN. art. 615, 631 (2022); MINN. STAT. § 260C.163 subd. 4 (2023); MISS. CODE ANN. § 43-21-117 (2024); MONT. CODE ANN. § 41-3-422 (2023); NEB. REV. STAT. § 43-261 (2016); NEV. REV. STAT. § 432B.510 (2021); N.H. DIV. FOR CHILD., YOUTH & FAMS., INTERVENING THROUGH COURT ACTIONS, 1276 (2018) (referencing the requirement for New Hampshire district attorneys to review all child protection

2. Identifying Prosecutors' Clients

A second taxonomy intersects with the first, capturing who it is that prosecutors represent. This inquiry may be puzzling to those steeped in the criminal legal system: it is axiomatic that criminal prosecutors do not formally represent the police—they represent the public interest.¹²⁵ The identity of family regulation prosecutors' clients is less monolithic. Although some prosecutors formally represent the public interest, others formally represent the investigating agency. The repercussions of client identity are significant. As Josh Gupta-Kagan explains, “[i]f the agency is the client, the lawyer can advise agency staff about the legal basis for a potential court action, or how a particular decision can support broader agency goals”; however, the lawyer’s power is limited, as the lawyer “must ultimately abide by the agency’s decisions regarding case objectives and let the agency make core decisions.”¹²⁶ If the lawyer instead represents the public interest, then they may exercise independent decisionmaking power.¹²⁷

Direct agency representation has the endorsement of the American Bar Association, which posits that the model centers “the agency’s expertise in making decisions regarding the safety, permanency and well-being of children” and “boost[s] caseworker credibility in court” while safeguarding against lawyers making decisions ungrounded in family regulation law or agencies’ expertise.¹²⁸ Gupta-Kagan’s study of family court prosecutorial practices concluded with an argument for agency representation for similar reasons.¹²⁹ But Douglas Besharov, perhaps the first scholar to consider the quandary of family regulation prosecution, advocates a public-interest approach, noting that agencies and prosecutors could resolve their disputes

petitions); N.D. CENT. CODE ANN. § 27-20.3-12 (2023); OKLA. STAT. ANN. tit. 10A, § 1-4-301 (2009); S.D. CODIFIED LAWS § 26-7A-10 (2017); VT. STAT. ANN. tit. 33, § 5309 (2023); W. VA. CODE § 49-4-501 (2024); WIS. STAT. § 48.09 (2021); WYO. STAT. ANN. § 14-3-424 (2023).

¹²⁵ See Irene Oritseweyinmi Joe, *The Prosecutor’s Client Problem*, 98 B.U. L. REV. 885, 899 (2018) (“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.”); see also CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.3 (AM. BAR ASS’N 2017) (“The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel . . . and such law enforcement personnel are not the prosecutor’s clients.”). A small minority of jurisdictions allow for police to prosecute misdemeanor offenses. Natapoff, *Misdemeanor Declination*, *supra* note 25, at 1004. I return to that topic in Section IV.A.

¹²⁶ Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 784-85.

¹²⁷ See *id.* at 785 (“[I]f the lawyer represents the amorphous ‘state’ or ‘the people,’ then the lawyer has freer rein to determine what the client wants.”).

¹²⁸ AM. BAR ASS’N, STANDARDS OF PRACTICE, *supra* note 63, at 3-4.

¹²⁹ See Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 786.

“in much the same way that the police and district attorneys have accommodated themselves to their frequently conflicting perspectives.”¹³⁰

Past surveys have found that most jurisdictions—approximately thirty-six states—adhere to agency representation.¹³¹ But in approximately nine states, prosecutors represent the public interest or “the people.”¹³² In some states, prosecutors represent both.¹³³ This breakdown does not neatly map onto the taxonomy of institutional affiliations: as a formal matter, a lawyer working out of a local prosecutor’s office might represent the public interest or the agency, and a lawyer working out of an attorney general’s office might represent the public interest, the agency, or both.¹³⁴ Part III shows that the on-the-ground reality is even more muddled.

3. Initial Filing Decisions

Given the prevalence of direct agency representation, it follows that, in most jurisdictions, agencies rather than prosecutors make initial filing decisions. This routine family regulation practice is at odds with criminal practice, where the decision to file formal charges is conceived of as a prototypical prosecutorial function.¹³⁵

Approximately thirty-seven states empower agencies to make filing decisions.¹³⁶ In most of those jurisdictions, those agencies are directly

¹³⁰ Besharov, *supra* note 39, at 413.

¹³¹ See RUIZ & TROWBRIDGE, *supra* note 29, at 6 (reporting states’ responses to a survey in which forty-five jurisdictions participated); see also Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 792–93 (describing survey results in which most responding states reported that “lawyers represented the agency rather than the state”).

¹³² RUIZ & TROWBRIDGE, *supra* note 29, at 6.

¹³³ See Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 793; see, e.g., IOWA CODE ANN. §§ 232.87, 232.90(1)–(2) (2024) (allowing agencies or county attorneys to file petitions but requiring that “[t]he county attorney shall represent the state in proceedings arising from a petition,” with the “state” defined as “the general interest held by the people in the health, safety, welfare, and protection of all children living in this state”); MINN. STAT. ANN. § 260C.163 subd. 4 (2023) (“In representing the responsible social services agency, the county attorney shall also have the responsibility for advancing the public interest in the welfare of the child.”).

¹³⁴ Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 792–93.

¹³⁵ See, e.g., Kirby v. Illinois, 406 U.S. 682, 689 (1972) (“The initiation of judicial criminal proceedings . . . is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute . . .”); see also Natapoff, *Misdemeanor Declination*, *supra* note 25, at 966 (describing prosecutors’ “routine” decisions to convert or decline to convert arrests into formal charges as “seminal as a matter of substantive criminal law and procedure as well as institutional integrity”). Some jurisdictions, by contrast, buck this norm in the criminal legal system, allowing police officers to make filing decisions instead. See *infra* note 389 and accompanying text.

¹³⁶ Josh Gupta-Kagan surveyed filing authority in 2018. See Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 793. In the years since, a few states have made changes to their filing authority and others have updated or renumbered their statutes. I update that survey here. As Gupta-Kagan did, I include states that allow agencies to initiate filings and states that allow anyone

represented by prosecutors working in-house or out of attorney general or county counsel offices.¹³⁷ Approximately twelve states and the District of Columbia empower prosecutors to exercise final authority over filing decisions.¹³⁸ Further, some jurisdictions allow agencies to override a prosecutor's decision not to file; others allow the reverse.¹³⁹ Those override

(including laypeople) to initiate filings. ALASKA STAT. § 47.10.020(a)(3) (2023); ARIZ. REV. STAT. § 8-841(A) (2024); ARK. CODE ANN. § 9-27-310(b)(2) (2024); CAL. WELF. & INST. CODE §§ 325, 328(a) (2023); COLO. REV. STAT. § 19-3-501(1)(b) (2024); CONN. GEN. STAT. § 46b-129(a) (2023); DEL. CODE ANN. tit. 10, § 1003 (2024); FLA. STAT. § 39.501(1) (2022); GA. CODE ANN. § 15-11-150 (2024); HAW. REV. STAT. § 571-62 (2024); 705 ILL. COMP. STAT. 405/2-13(1) (2023); IND. CODE § 31-34-9-1(a)(1) (2019); IOWA CODE §§ 232.87(1)–(2), 232.90(1)–(2) (2024); KY. REV. STAT. ANN. § 620.070(1) (2024); LA. CHILD. CODE ANN. art. 631 (2014); ME. STAT. tit. 22, §§ 4004(2)(F), 4032 (2023); MD. CODE ANN., FAM. LAW § 5-710(c) (2024); MD. CODE ANN., CTS. & JUD. PROC. § 3-809(e) (2024); MASS. GEN. LAWS ch. 119, § 51B(c)–(g) (2023); MICH. COMP. LAWS § 722.638(18)(1) (2024); MINN. STAT. § 260C.141(1)(a) (2023); N.H. REV. STAT. ANN. §§ 169-C:6-a(I), 169-C:8-a (2016); N.J. STAT. ANN. § 9:6-8.34(a)–(f) (2023); N.Y. FAM. CT. ACT § 1032 (2024); OHIO REV. CODE ANN. § 2151.27(A)(1) (2017); OR. REV. STAT. § 419B.890(1) (2023); 23 PA. CONS. STAT. § 6370(b) (2024); R.I. GEN. LAWS § 40-11-7(c) (2022); S.C. CODE ANN. § 63-7-920(A)(1) (2023); TENN. CODE ANN. § 37-1-119 (2024); TEX. FAM. CODE ANN. § 262.101(a) (2023); UTAH CODE ANN. § 80-3-201(1)–(2) (2022); VT. STAT. ANN. tit. 33, § 5309(a) (2023); VA. CODE ANN. § 16.1-260(A) (2021); WASH. REV. CODE § 26.44.195(4) (2005); W. VA. CODE §§ 49-4-501(a)–(b), 49-4-601(a) (2024). Approximately half of states allow for anyone to file petitions. How frequently non-state actors avail themselves of those statutes is an area for future study. As an initial observation, it appears that in at least some states that allow private petitions, government-initiated petitions are still the default course of action. *See, e.g., Dependency Petitions Filed*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/improve/Statewide-Dependency-Statistics/Dependency-Petitions-Filed> [<https://perma.cc/VL9U-DZNG>] (last visited Jan. 26, 2024) (“These petitions are frequently filed by the child welfare agency but can also be filed by a family member or an attorney representing the child in another matter.”); *Dependency Cases*, FLA. OFF. OF CRIM. CONFLICT & CIV. REG’L COUNS., <https://rcifl.com/services/civil-cases/dependency-cases> [<https://perma.cc/TA4P-YJGR>] (last visited Jan. 26, 2024) (“The proceeding is based on allegations communicated to the Department of Children and Families . . .”); *DCFS Cases and Child Protection Services*, ILL. LEGAL AID, <https://www.illinoislegalaid.org/legal-information/dcfs-cases-and-child-protection-services> [<https://perma.cc/PG5Q-97S5>] (last visited Jan. 26, 2024) (“In most counties, the decision of whether the child protection matter goes to court is made by a state’s attorney.”).

¹³⁷ Compare *supra* notes 121–124 and accompanying text, with *supra* note 136 and accompanying text.

¹³⁸ D.C. CODE § 16-2305(c)(1) (2024); IDAHO CODE §§ 16-1610(1)(a), 16-1631(1)(c) (2024); KAN. STAT. ANN. §§ 38-2214, 38-2230, 38-2233(a) (2023); MONT. CODE ANN. § 41-3-422(2) (2023); NEB. REV. STAT. § 43-261(1)(a) (2016); NEV. REV. STAT. § 432B.510(2) (2021); N.M. STAT. ANN. §§ 32A-1-6(A)–(D), 32A-4-15 (2023); N.C. GEN. STAT. ANN. §§ 7B-401.1(a), 7B-302, 7B-305, 7B-306 (2023); N.D. CENT. CODE § 27-20.3-12 (2023); OKLA. STAT. ANN. tit. 10A, §§ 1-4-301(A)(1), 1-4-501(B)(4) (2023); S.D. CODIFIED LAWS § 26-7A-10 (2017); WIS. STAT. § 48.25(1) (2022); WYO. STAT. ANN. § 14-3-204(a)(viii) (2023). Three outlier states grant court-intake officers filing authority. ALA. CODE § 12-15-120(a) (2008); MISS. CODE ANN. § 43-21-357(1) (2024); MO. REV. STAT. § 211.081(1) (2021).

¹³⁹ *See, e.g.,* MD. CODE ANN., FAM. LAW § 5-710(c) (allowing prosecutors to override agencies); WYO. STAT. ANN. § 14-3-204(a)(viii) (2023) (allowing agencies to petition the court if the prosecutor refuses to file).

decisions may also happen even where not specifically contemplated by statute, as some jurisdictions allow anyone to file a petition.¹⁴⁰

4. Post-Filing Decisions

A comprehensive study of the distribution of authority over the myriad decisions that arise post-filing does not seem to exist. This is a surprising gap, given the myriad matters—children’s placement, visitation, settlement, disposition, and permanency goal—on which the government must take positions across the life of the case.¹⁴¹ Someone—agency or prosecutor—must decide the government’s goals and positions in these matters.

Existing research offers few hints regarding who is responsible for decisionmaking or what happens when agencies and prosecutors disagree. Working from a presumption that prosecutors should represent agencies, the American Bar Association suggests that prosecutors defer to agencies but maintain “[o]pen lines of communication” with caseworkers, consult on “major decision[s],” and negotiate settlements only as authorized by the agency.¹⁴² But these practice guidelines are aspirational, not descriptive.¹⁴³ Another survey found that five jurisdictions escalated disputes up agencies’ and prosecutors’ chains of command, but gave little insight into the substance of disputes or what decisionmaking looks like absent a dispute.¹⁴⁴ The next Part turns to these sorts of functional dynamics.

II. THE PROSECUTOR–AGENCY RELATIONSHIP

This Part draws on interviews with prosecutors to illuminate the functional family regulation prosecutorial role. It begins with a discussion of methodology. Then, it recounts prosecutors’ perspectives on who they represent, how filing decisions are made, and the post-filing relationship

¹⁴⁰ See, e.g., OR. REV. STAT. § 419B.809(1) (2023) (“Any person may file a petition in the juvenile court”); TENN. CODE ANN. § 37-1-119 (2024) (“The petition may be made by any person . . . who has knowledge of the facts alleged or is informed and believes that they are true.”).

¹⁴¹ See *supra* Section I.B.

¹⁴² AM. BAR ASS’N, STANDARDS OF PRACTICE, *supra* note 63, at 8-10.

¹⁴³ RUIZ & TROWBRIDGE, *supra* note 29, at 6 (reporting that only prosecutors counsel agencies on individual cases).

¹⁴⁴ The survey included structured interviews with five state entities identified as model jurisdictions that provide representation for the government in family regulation proceedings. Summaries of each interview include short descriptions of “conflict resolution protocol,” prosecutors’ availability to the agency, and how prosecutors “[s]upport[] [g]ood [c]ase [w]ork and [t]imely [d]ispositions.” OREGON TASK FORCE ON LEGAL REPRESENTATION IN CHILDHOOD DEPENDENCY, GOVERNMENT ATTORNEY STRUCTURED INTERVIEWS 7, 9-10, 14, 19, 23 (2016) [<https://perma.cc/J3FG-ATYS>].

between prosecutors and agencies. It concludes by describing how prosecutors view their roles.

A. Methodology

I interviewed family regulation prosecutors from eleven jurisdictions, through ten individual interviews with division heads and one group interview with approximately fourteen prosecutors in one office.¹⁴⁵ Four were local-prosecutor jurisdictions,¹⁴⁶ three were county-counsel jurisdictions;¹⁴⁷ two were attorney-general jurisdictions;¹⁴⁸ and two were in-house jurisdictions.¹⁴⁹ Outside the statewide attorney-general jurisdictions, the nine other included jurisdictions were mid-size or large cities. Some prosecutors also spoke of previous experiences in smaller jurisdictions.¹⁵⁰ Of the eleven included jurisdictions, two were located within the same state;¹⁵¹ all others were in different states.

I selected interview subjects by purposively sampling for diverse cases, a technique of intentionally selecting a sample based on particular characteristics.¹⁵² I aimed to interview prosecutors practicing under a variety of prosecution models. Interviews were semi-structured. Each covered the same topics, but the questions were open-ended and conversations were fluid. All participants were told that their names and geographic identifiers would

¹⁴⁵ The individual interviews were: Interview with Prosecutor A (Mar. 21, 2023) [hereinafter Prosecutor A] (notes in online appendix); Interview with Prosecutor C (Mar. 30, 2023) [hereinafter Prosecutor C] (notes in online appendix); Interview with Prosecutor D (Mar. 31, 2023) [hereinafter Prosecutor D] (notes in online appendix); Interview with Prosecutor E (Apr. 12, 2023) [hereinafter Prosecutor E] (notes in online appendix); Interview with Prosecutor F (Apr. 14, 2023) [hereinafter Prosecutor F] (notes in online appendix); Interview with Prosecutor G (Apr. 14, 2023) [hereinafter Prosecutor G] (notes in online appendix); Interview with Prosecutor H (Apr. 21, 2023) [hereinafter Prosecutor H] (notes in online appendix); Interview with Prosecutor I (Apr. 25, 2023) [hereinafter Prosecutor I] (notes in online appendix); Interview with Prosecutor K (May 24, 2023) [hereinafter Prosecutor K] (notes in online appendix). One individual interview took place over email, rather than in real-time. Interview with Prosecutor B (Mar. 28, 2023) [hereinafter Prosecutor B] (notes in online appendix). There was one group interview. Interview with Prosecutor's Office J (Apr. 25, 2023) [hereinafter Prosecutor's Office J] (notes in online appendix).

¹⁴⁶ Prosecutor E, *supra* note 145; Prosecutor H, *supra* note 145; Prosecutor I, *supra* note 145; Prosecutor K, *supra* note 145. Prosecutors H and I practice in different jurisdictions in the same state.

¹⁴⁷ Prosecutor B, *supra* note 145; Prosecutor C, *supra* note 145; Prosecutor's Office J, *supra* note 145.

¹⁴⁸ Prosecutor A, *supra* note 145; Prosecutor D, *supra* note 145.

¹⁴⁹ Prosecutor F, *supra* note 145; Prosecutor G, *supra* note 145.

¹⁵⁰ Prosecutor G, *supra* note 145; Prosecutor H, *supra* note 145.

¹⁵¹ Prosecutor H, *supra* note 145; Prosecutor I, *supra* note 145.

¹⁵² See JOHN GERRING, CASE STUDY RESEARCH: PRINCIPLES AND PRACTICES 88, 97-99 (2007) (describing diverse-case sampling as a method of purposively sampling to "maxim[ize] variance along relevant dimensions").

be kept confidential. Excerpts of prosecutors' responses are compiled in the Appendix.¹⁵³

This methodology captured information on a wide range of prosecutorial models and highlighted similarities and variations between and within those models. But the information obtained is preliminary and incomplete.¹⁵⁴ It does not capture the full breadth of prosecutorial approaches in the family regulation system, it does not establish that the included jurisdictions are representative,¹⁵⁵ and it does not explore the relationship between prosecution models and case outcomes. What it does is collect a wealth of information that reveals initial insights and serves as a springboard for future research.

B. *Identifying Prosecutors' Clients and Understanding the Public Interest*

A strong majority of prosecutors reported they represented family regulation agencies as their clients: nine in all, including prosecutors in three jurisdictions that require prosecutors to act in the public interest.¹⁵⁶ Beyond that apparent conflict, prosecutors' responses shed light on two fundamental questions: first, when prosecutors refer to "the agency," who do they mean, and second, when prosecutors must act in the public interest, how do they conceptualize that duty?

1. Agency as Client

Prosecutors representing agencies understood their client's identity on two levels. On an abstract level, they identified their client as the agency head or the agency as an entity.¹⁵⁷ This abstracted client was not necessarily a stable

¹⁵³ See Anna Arons, *Appendix*, ST. JOHN'S L. SCHOLARSHIP REPOSITORY (2025), https://scholarship.law.stjohns.edu/faculty_publications/769/ [<https://perma.cc/T7QK-TUMB>].

¹⁵⁴ For a discussion of the pros and cons of purposive sampling, see generally David Collier, *Case Selection, Case Studies, and Causal Inference: A Symposium*, QUALITATIVE & MULTI-METHOD RSCH., Oct. 2008, at 1.

¹⁵⁵ This is a salient limitation, as research on juvenile delinquency prosecutions shows that urban jurisdictions are associated with greater prosecutorial control over filing decisions and rural jurisdictions are associated with greater agency control over filing decisions. Fairchild, *supra* note 116, at 98 ("[R]elative rurality significantly predicted intake structure scores, such that more urban counties were associated with more prosecutor-centric intake structures.").

¹⁵⁶ In six jurisdictions, prosecutors reported that they represented the agency, and my research did not find any statutory or common-law duty to act in the public interest. Prosecutor B, *supra* note 145; Prosecutor C, *supra* note 145; Prosecutor D, *supra* note 145; Prosecutor F, *supra* note 145; Prosecutor G, *supra* note 145; Prosecutor's Office J, *supra* note 145. In three jurisdictions, prosecutors reported that they represent the agency, and my research found a duty to act in the public interest. Prosecutor A, *supra* note 145; Prosecutor H, *supra* note 145; Prosecutor I, *supra* note 145.

¹⁵⁷ See Prosecutor A, *supra* note 145 (agency as a whole and agency head). Some specifically described the client as the agency head. See Prosecutor B, *supra* note 145; Prosecutor F, *supra* note

one. Prosecutors who represented agencies across multiple directors noted that directors' shifting policies and priorities affected their work.¹⁵⁸ Some prosecutors advised agency personnel on high-level policy proposals and changes.¹⁵⁹ Generally, though, they played a more limited role in policymaking and instead focused on counseling agency personnel on adherence to existing agency policy.¹⁶⁰

Prosecutors identified a more concrete client as well: caseworkers far removed from the upper echelons of the agency's organizational charts.¹⁶¹ These line-level caseworkers were prosecutors' most common points of contact—their client's mouthpiece for weighty decisions like whether to initiate a case alleging child maltreatment and seeking to separate a family, whether to seek a change in visitation, or whether to initiate a case to terminate parental rights.¹⁶² In some jurisdictions, prosecutors reported that caseworkers were to consult with their own supervisors before coming to prosecutors,¹⁶³ but prosecutors themselves generally spoke with supervisors

145. Others conceptualized the client as the agency as a whole. Prosecutor C, *supra* note 145; Prosecutor D, *supra* note 145; Prosecutor G, *supra* note 145; Prosecutor H, *supra* note 145; Prosecutor I, *supra* note 145; Prosecutor's Office J, *supra* note 145.

158 See Prosecutor A, *supra* note 145 (describing changes in agency reliance following changes in administration); Prosecutor B, *supra* note 145 (noting that agency policies evolve based on staff turnover); Prosecutor F, *supra* note 145 (describing the individual director's role in determining the prosecutor–agency relationship and the turnover of seven different directors during the prosecutor's tenure).

159 See, e.g., Prosecutor A, *supra* note 145 (noting that advice could include counsel on legislation, policy issues, or civil litigation); Prosecutor C, *supra* note 145 (describing involvement in reviewing agency policy).

160 See, e.g., Prosecutor B, *supra* note 145 (describing the prosecutor's role as confirming whether agency decisions in individual cases were consistent with the law and agency policy); Prosecutor F, *supra* note 145 (explaining that the prosecutor's role is to work on “how the agency is going to comply with state policies”); Prosecutor G, *supra* note 145 (describing the prosecutor's role as working with the agency to ensure employees comply with court orders and agency policies); Prosecutor's Office J, *supra* note 145 (explaining that the prosecutor ensures agency compliance with the agency's policies); Prosecutor I, *supra* note 145 (describing the need for prosecutors to know all of the agency's existing policies so that they understand why caseworkers must take certain action).

161 See, e.g., Prosecutor C, *supra* note 145 (“In the field, lawyers will deal with individual caseworkers.”); Prosecutor F, *supra* note 145 (“That face of that client may be the individual caseworkers.”).

162 See, e.g., Prosecutor C, *supra* note 145 (noting that “[w]e primarily deal with caseworkers in [the] filing section” and that this decisionmaking process looks the same throughout the case, including for goal changes and petitions to terminate parental rights); Prosecutor D, *supra* note 145 (noting that normally prosecutors “deal with just the assigned caseworker”); Prosecutor's Office J, *supra* note 145 (describing the caseworker as “[t]he actual physical person [prosecutors] will see in [their] office to tell[] [the prosecutors] what they want”); Prosecutor H, *supra* note 145 (explaining that caseworkers place children into protective custody and may ask prosecutors for advice). *But see* Prosecutor G, *supra* note 145 (reporting that supervisors are typically present for legal meetings).

163 See, e.g., Prosecutor G, *supra* note 145 (noting that many decisions involve advice from caseworkers, but that issues are ultimately decided through discussions with supervisors);

only where prosecutors had concerns about caseworkers' work or the legal soundness of caseworkers' proposed plan of action.¹⁶⁴

The trust and discretion placed in the hands of caseworkers is noteworthy, given prosecutors' common concerns over caseworkers' turnover.¹⁶⁵ Frequent turnover, too, added to the difficulty of representing agencies in the abstract and caseworkers on the ground, as prosecutors found that new caseworkers struggled to adapt to the policies and regulations of their sprawling bureaucracies.¹⁶⁶ I return to this disconnect between front-level workers and agency leadership in Section III.B.¹⁶⁷

2. The Public Interest

Four prosecutors acknowledged operating under mandates to represent the public.¹⁶⁸ A fifth prosecutor worked in a jurisdiction that required her office to act in the public interest, but she did not mention that mandate and described her role exclusively as representing an agency.¹⁶⁹

The four prosecutors who acknowledged a mandate to represent the public interest interpreted their mandate in dissonant ways. For prosecutors in one state, representing the public interest meant nothing more than representing the agency.¹⁷⁰ While these prosecutors acknowledged that they were statutorily required to represent the public interest, they understood that requirement as more a legislative relic than live command.¹⁷¹ As they saw it, by directly representing the agency, prosecutors met their mandate,

Prosecutor's Office J, *supra* note 145 (describing ultimate decisionmaking authority on legal action as held by caseworkers' supervisors).

¹⁶⁴ See, e.g., Prosecutor D, *supra* note 145 (describing a prosecutor's tendency to involve a supervisor where the caseworker has a reputation of not doing their job completely); Prosecutor F, *supra* note 145 (explaining that prosecutors will call supervisors if there is disagreement with the caseworker). For further discussion of prosecutors' escalation of disagreements to supervisors, see *infra* Section II.E.

¹⁶⁵ Most prosecutors noted frequent caseworker turnover in their jurisdictions. Prosecutor A, *supra* note 145; Prosecutor B, *supra* note 145; Prosecutor D, *supra* note 145; Prosecutor G, *supra* note 145; Prosecutor's Office J, *supra* note 145. Some prosecutors also noted issues with the education of caseworkers' supervisors due to turnover. *Id.* (citing concerns about supervisors' safety assessments).

¹⁶⁶ See Prosecutor B, *supra* note 145 (citing agency size and turnover as an "inevitable challenge" in keeping staff up to date on agency policy).

¹⁶⁷ See *infra* Section III.B.

¹⁶⁸ See Prosecutor E, *supra* note 145 (explaining their role in serving the community); Prosecutor H, *supra* note 145 (describing their legal representation as being in the "best interest" of the public); Prosecutor I, *supra* note 145 (sharing that prosecutors want "what's best for the public"); Prosecutor K, *supra* note 145 (expressing their responsibility to protect children).

¹⁶⁹ Prosecutor A, *supra* note 145.

¹⁷⁰ Prosecutor H, *supra* note 145; Prosecutor I, *supra* note 145.

¹⁷¹ See Prosecutor H, *supra* note 145 (describing that under the current statutory scheme they "just had to make things work"); Prosecutor I, *supra* note 145 (suggesting that the legislature "forgot" to include provisions on representing the agency).

because they conceived of their local family regulation agencies as acting in the public interest.¹⁷² By directly representing the agency, they said, they met their mandate.¹⁷³ This is akin to a criminal prosecutor purporting to represent the public interest by taking direction from police, under the logic that police act in the public interest.

Other prosecutors representing the public interest rejected the notion that they represented the agency.¹⁷⁴ But they conceptualized “the public interest” as centered around the best interest of children in individual cases.¹⁷⁵ In the words of one prosecutor, “The child’s not my client, the child [is] my responsibility.”¹⁷⁶ Upholding that responsibility required the exercise of judgment independent of their jurisdictions’ family regulation agency¹⁷⁷ and only limited consideration of the broader community’s interests.¹⁷⁸ Prosecutors saw themselves as advocating for the eventual interests of the community when they advocated for the best interest of individual children, under the logic that the community benefited from better outcomes for children.¹⁷⁹ Though these prosecutors at times took broader aim and advocated for policy goals like a better-funded and more efficient family regulation system, they tied that advocacy back to individual children. In their view, these policy changes would redound to the benefit of the children in their cases.¹⁸⁰

¹⁷² Prosecutor H, *supra* note 145; Prosecutor I, *supra* note 145.

¹⁷³ Prosecutor H, *supra* note 145; Prosecutor I, *supra* note 145.

¹⁷⁴ See Prosecutor K, *supra* note 145 (noting that she represents the state and that the agency is represented by its in-house counsel).

¹⁷⁵ See, e.g., Prosecutor K, *supra* note 145 (understanding the prosecutor’s role in “represent[ing] the state” as entailing a responsibility owed to the individual child). As noted above, Prosecutor H previously worked in another jurisdiction within her state. See *supra* note 150. There, she viewed her mandate as representing only the public interest, not the agency, and had similar views to Prosecutor K. Prosecutor H, *supra* note 145 (“[T]he role [is] exactly what the statute says: protecting the interests of the public meaning protecting children. That’s the public that we’re protecting, their interests.”). This view of “public interest” as limited to the public’s interest in the welfare of the particular child in the case at bar is reflected in at least one state’s statute. See MINN. STAT. § 260C.163 subd. 4 (2023) (“In representing the responsible social services agency, the county attorney shall also have the responsibility for advancing the public interest in the welfare of the child.”).

¹⁷⁶ Prosecutor K, *supra* note 145.

¹⁷⁷ See Prosecutor H, *supra* note 145 (describing situations in her prior role representing the public interest where she would “stand up and argue against [the agency]” upon disagreement with it); Prosecutor K, *supra* note 145 (explaining that, after the agency made a recommendation, the prosecutors themselves independently decide whether they are filing a petition and, if so, what kind).

¹⁷⁸ See Prosecutor K, *supra* note 145 (describing the factors that prosecutors may consider in deciding whether to file a petition, which necessarily limit their decision); Prosecutor H, *supra* note 145 (framing protecting the public interest as meaning protecting the interests of children).

¹⁷⁹ See Prosecutor K, *supra* note 145; Prosecutor H, *supra* note 145.

¹⁸⁰ Prosecutor K, *supra* note 145; Prosecutor H, *supra* note 145.

At a glance, this single-minded focus on the best interest of individual may appear cabined. It is not. Instead, it grants prosecutors wide discretion to import their own personal values and judgments—the same discretion judges enjoy when they apply the best interest standard.¹⁸¹

Just one prosecutor took an explicitly broader view of the public interest. This prosecutor, working in a local prosecutor model, reported that she understood her client as “[her] community and the People”¹⁸² She saw her mandate as seeking the best solutions for individual children, their families, and their community.¹⁸³ This broader view distinguished her from other actors in the family regulation system. Free of an individual client, her office could take a “more global look” at cases than the family regulation agency or attorneys for children.¹⁸⁴ This conception of prosecutors as independent actors, beholden to do justice but freed from answering to investigators or victims, more closely resembles idealized views of the roles of criminal prosecutors.¹⁸⁵ Yet it was an anomalous view for a family regulation prosecutor.

C. Initial Filing Decisions

There was wide variation in the role that prosecutors play in filing decisions, an inflection point in cases. As one prosecutor explained, because these decisions are “the entryway, it’s a lot easier to bring a case in than to get it out of the system.”¹⁸⁶ Prosecutors’ roles in filing decisions could be nonexistent if agencies brought matters to court without consulting with prosecutors. Or the reverse could be true: prosecutors could have unilateral authority over filing decisions. Most commonly, prosecutors and agencies consulted before filing.

181 See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 45 n.13 (1981) (Blackmun, J., dissenting) (criticizing the “best interests” standard as offering “little guidance” to judges and thereby “encourag[ing] them to rely on their own personal values”); *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring) (observing that the “best interest of a minor” standard “provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores”); cf. Barkow, *supra* note 23, at 878 (describing how criminal prosecutors have come to act as adjudicators).

182 Prosecutor E, *supra* note 145.

183 *Id.*

184 *Id.*

185 See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2023) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

186 Prosecutor E, *supra* note 145.

1. Agency Filing Decisions

In six jurisdictions, agencies were statutorily empowered to make filing decisions.¹⁸⁷ The degree of agency independence in making those decisions varied.

At one extreme, one jurisdiction's family regulation agency regularly exercised its power to file petitions without any prior consultation with prosecutors.¹⁸⁸ Prosecutors routinely learned of cases only after the agency had already filed a petition.¹⁸⁹ This jurisdiction's prosecutor strongly advised agency personnel to reach out before filing.¹⁹⁰ Often, though, if the agency concluded that it needed to take emergency action or, absent an emergency, that the case obviously warranted legal action, it forewent prosecutorial consultation and filed unilaterally.¹⁹¹ In those cases, judges received information unreviewed by legal staff¹⁹² and formed their initial impressions accordingly. The same judges who see those initial unfiltered filings could retain jurisdiction over a family for years, with those initial impressions haunting their decisionmaking.¹⁹³

More typically, prosecutors reported that while agencies made filing decisions, prosecutors reviewed petitions for legal sufficiency, assisted agency personnel with drafting petitions, and bolstered agencies' positions.¹⁹⁴ Prosecutors reviewed proposed filings with an eye toward immediate legal requirements, such as showing that caseworkers made reasonable efforts to prevent a removal, and toward their ultimate burden of establishing child maltreatment.¹⁹⁵ If prosecutors did not think that caseworkers had "enough," they brainstormed evidence caseworkers could develop and other out-of-

187 Prosecutor A, *supra* note 145; Prosecutor B, *supra* note 145; Prosecutor C, *supra* note 145; Prosecutor F, *supra* note 145; Prosecutor G, *supra* note 145; Prosecutor's Office J, *supra* note 145.

188 Prosecutor A, *supra* note 145.

189 *Id.*

190 *Id.*

191 *Id.*

192 See Prosecutor A, *supra* note 145 (describing how the agency files petitions in court without prosecutorial involvement, at times due to emergency circumstances); see also Prosecutor D, *supra* note 145 (describing a process in which the agency independently files the initial complaint with the court, then prosecutors review that complaint and make the final filing decision); Prosecutor H, *supra* note 145 (describing a similar process). In other jurisdictions, as cases progress, agencies independently file status reports with the court and prosecutors review them only after they are filed. Prosecutor C, *supra* note 145.

193 See Fraidin, *supra* note 49, at 963-64 (describing family regulation judges' tendency to reaffirm and bolster their prior decisions when dealing with the same family in later hearings).

194 See Prosecutor B, *supra* note 145; Prosecutor C, *supra* note 145; Prosecutor F, *supra* note 145; Prosecutor G, *supra* note 145; Prosecutor's Office J, *supra* note 145.

195 See, e.g., Prosecutor B, *supra* note 145; Prosecutor C, *supra* note 145; Prosecutor's Office J, *supra* note 145.

court steps caseworkers needed to take to meet their legal burdens.¹⁹⁶ Though some also brainstormed steps the agency could take outside of filing a petition, such as encouraging another relative to take custody of the child,¹⁹⁷ prosecutors primarily viewed their role as limited to finding strategies to get their clients where they wanted to go: into court.

Where, despite prosecutors' counseling, caseworkers insisted on filing petitions that prosecutors did not believe were legally colorable, prosecutors addressed these disagreements through mechanisms described in Section III.D.

2. Prosecutor Filing Decisions

In the remaining five jurisdictions, prosecutors were statutorily empowered to make filing decisions.¹⁹⁸ The extent to which they exercised that power independent of the agency was inconsistent. Their ability to exercise independent discretion was limited everywhere because virtually all cases came to prosecutors' attention through the agency's actions.

Some jurisdictions presented a puzzle: though prosecutors were empowered to make filing decisions, they represented family regulation agencies as clients, which would seem to imply that their agency clients should make the filing decisions. In these jurisdictions, prosecutors acknowledged that they had "prosecutorial discretion"—but exercised that discretion only to weed out petitions they deemed legally insufficient.¹⁹⁹ One prosecutor estimated that in cases where the agency removed children using its emergency-removal authority, she agreed with the agency's assessment and moved forward in ninety-eight percent of cases.²⁰⁰ In the few remaining cases, the prosecutor worked with the agency to identify measures outside of initiating a case to address their concerns about child safety or worked with the caseworker to identify legal gaps for the agency to address before moving forward with the petition.²⁰¹ This approach is not so different from jurisdictions where agencies file petitions but rely on prosecutors' review.

In jurisdictions where prosecutors represented the public interest and not agencies, prosecutors placed greater rhetorical emphasis on their independent discretion. They acknowledged the initial filing decision as the most

¹⁹⁶ See, e.g., Prosecutor C, *supra* note 145; Prosecutor F, *supra* note 145; Prosecutor's Office J, *supra* note 145.

¹⁹⁷ Prosecutor A, *supra* note 145.

¹⁹⁸ See Prosecutor D, *supra* note 145; Prosecutor E, *supra* note 145; Prosecutor H, *supra* note 145; Prosecutor I, *supra* note 145; Prosecutor K, *supra* note 145.

¹⁹⁹ Prosecutor D, *supra* note 145; Prosecutor H, *supra* note 145; see also Prosecutor I, *supra* note 145.

²⁰⁰ Prosecutor D, *supra* note 145.

²⁰¹ *Id.*

important decision in a case²⁰² and described holistic and searching screening processes.²⁰³ Beyond legal sufficiency, they considered whether court intervention would help improve a family's situation and whether other factors (such as informal family arrangements or the child's age) and interventions (such as in-home services) might mitigate risk to the child.²⁰⁴ One prosecutor also reported that she tried to be attuned to any biases or interpersonal dynamics between caseworkers and families that could drive caseworkers' decisions.²⁰⁵ At times, this review led prosecutors to decline to file petitions that would have been legally sufficient or to file for in-home surveillance of families instead of removal; more typically, though, they agreed with the agency's recommendations.²⁰⁶ Outside their own experiences, prosecutors shared anecdotal examples of other prosecutors who more frequently overrode agencies.²⁰⁷

By declining to file a case, prosecutors risked conflict with agencies that they worked with closely.²⁰⁸ That same close relationship, however, could help ease tensions by allowing prosecutors to build consensus around their decisions and by creating a well of goodwill to draw on in the absence of consensus.²⁰⁹ As a last resort, prosecutors pointed to mechanisms by which agencies or other parties could file petitions without their involvement.²¹⁰ On a practical level, resource constraints and the ongoing relationship between agencies and prosecutors often prevented other parties from filing independent petitions.²¹¹

²⁰² Prosecutor E, *supra* note 145.

²⁰³ *Id.*; Prosecutor K, *supra* note 145.

²⁰⁴ See Prosecutor E, *supra* note 145; Prosecutor K, *supra* note 145.

²⁰⁵ Prosecutor E, *supra* note 145.

²⁰⁶ Prosecutor H, *supra* note 145; Prosecutor K, *supra* note 145.

²⁰⁷ Prosecutor H, *supra* note 145 (providing an example from another jurisdiction); Prosecutor K, *supra* note 145 (describing previous practices in her jurisdiction).

²⁰⁸ See Prosecutor E, *supra* note 145 (noting that disagreements over filing are frustrating and logistically complicated).

²⁰⁹ *Id.*; Prosecutor K, *supra* note 145 (describing her office's efforts to be more communicative with the agency in order to increase accountability and change the office culture, after a previous office head had fostered a culture of fighting between the agency and the prosecutor's office).

²¹⁰ See Prosecutor E, *supra* note 145; Prosecutor K, *supra* note 145; Prosecutor H, *supra* note 145. While I do not name the statewide entity to preserve this prosecutor's anonymity, multiple states allow for such intervention. See, e.g., VT. STAT. ANN. tit. 33, § 5309 (2023) (permitting school superintendents to request that the Attorney General file a petition); KY. REV. STAT. ANN. § 620.040 (West 2024), amended by Ky. Acts chs. 133, 144 (authorizing law enforcement officers, hospital administrators, and physicians to take children into custody and request emergency orders from the court); NEV. REV. STAT. § 432B.510 (2021) (permitting agencies, law enforcement or probation officers, the district attorney, and the Attorney General to file petitions).

²¹¹ Prosecutor E, *supra* note 145; Prosecutor H, *supra* note 145. One prosecutor reported that in the rare instances in which the agency filed an independent petition, her office could be in a complicated position. Her office could move to dismiss the petition, but if it was not dismissed, her office would then be assigned and ordered to prosecute it by a judge. Prosecutor E, *supra* note 145.

Only one prosecutor reported using her discretion to file petitions in cases that were *not* initially referred to her office by the agency. Like her counterparts elsewhere, she was limited in her ability to initiate cases without agency involvement because her office usually had no knowledge of other cases.²¹² Indeed, across models, prosecutors lamented cases that they wished the agency had referred for filing sooner.²¹³ But this particular prosecutor reported that she did sometimes receive referrals from outside the agency through direct calls from sources in the community, such as teachers or doctors, regarding cases in which the agency had not taken action.²¹⁴ The prosecutor attributed these referrals to her public outreach,²¹⁵ which reflected her perspective that her job was to serve the community rather than the agency. This independence in filing was rare, though, even for her. In most instances, the agency controlled the front door.

D. Ongoing Case Planning and Decisionmaking

While the filing of a petition may be the weightiest decision in a family regulation case, it is just the beginning of the prosecutor–agency relationship. Once a petition is filed and children are removed from their home, cases continue in court until children have a “permanent” living arrangement.²¹⁶ Over the long life of a case, courts adjudicate the underlying maltreatment petition and periodically review the agency’s efforts to achieve permanency.²¹⁷ Thus, the government takes positions on matters bearing on adjudication (such as settling cases) and permanency (such as visitation and children’s placement).

Legal matters and casework decisions bleed into one another. Reports about casework form the basis for legal decisions, and legal standards and decisions shape casework. For example, if a child is removed, state laws require agencies to make “reasonable efforts” toward reunification, including arranging visits.²¹⁸ The nature of those visits—level of supervision, location,

Her office would then continue to make a record in court that they did not believe the case merited filing. *Id.*

²¹² Prosecutor D, *supra* note 145; Prosecutor E, *supra* note 145.

²¹³ Prosecutor E, *supra* note 145; Prosecutor I, *supra* note 145.

²¹⁴ Prosecutor E, *supra* note 145.

²¹⁵ *Id.*

²¹⁶ See *supra* Section II.B.

²¹⁷ See *id.*

²¹⁸ CHILDS. BUREAU, REASONABLE EFFORTS, *supra* note 92, at 1 (“Laws in all States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands require that child welfare agencies make reasonable efforts to provide services that will help families remedy the conditions that brought the child and family into the child welfare system.”).

etc.—is often prescribed by court order.²¹⁹ In this example, a legal standard (“reasonable efforts”) and decision (the visitation order) drive casework. As the case progresses, the court revisits its visitation order, and the government takes a position on whether to expand or further restrict visits. The government’s position and the court’s eventual decision depend on the caseworker’s reporting on out-of-court events, such as prior visits or parents’ behavior. Thus, casework drives legal decisions.

The difficulty of neatly separating legal work and casework was a persistent theme in prosecutors’ responses. All prosecutors described collaborative relationships with agency personnel.²²⁰ As a baseline, prosecutors consulted with caseworkers in the time immediately surrounding court appearances, as prosecutors received reports from caseworkers and learned the agency’s positions on matters such as modifying visitation or changing a child’s placement.²²¹ Prosecutors acknowledged that these consultations could be shallow, despite the high stakes. Six months might pass between updates,²²² and updates were sometimes rushed or received by prosecutors after a worker had already submitted a report to the court.²²³ Multiple prosecutors noted that lawyers in their offices *could* attend meetings with caseworkers and families out of court but that their demanding caseloads curtailed such attendance.²²⁴

Individual prosecutors typically had discretion over their contact with caseworkers between appearances.²²⁵ Some prosecutors checked in with caseworkers periodically, proactively seeking updates or offering legal

219 NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 64, 87-88 (2016).

220 Prosecutor A, *supra* note 145; Prosecutor B, *supra* note 145; Prosecutor C, *supra* note 145; Prosecutor D, *supra* note 145; Prosecutor E, *supra* note 145; Prosecutor F, *supra* note 145; Prosecutor G, *supra* note 145; Prosecutor H, *supra* note 145; Prosecutor I, *supra* note 145.

221 See, e.g., Prosecutor A, *supra* note 145 (“We ask the caseworkers to develop legal summaries ahead of each court appearance so that we have a sense of what the updates are relating to reunification, how the child’s doing, and what the plan is moving forward.”); Prosecutor C, *supra* note 145 (describing reviewing reports from caseworkers after caseworkers filed reports for court appearances); Prosecutor G, *supra* note 145 (describing some cases “that are quiet and then you hear about the week before the hearing”); Prosecutor K, *supra* note 145 (describing variation in the frequency of caseworker communication with prosecutors).

222 Prosecutor K, *supra* note 145.

223 Prosecutor C, *supra* note 145.

224 Prosecutor H, *supra* note 145; see also Prosecutor A, *supra* note 145.

225 See, e.g., Prosecutor A, *supra* note 145 (“I have attorneys who are more heavily involved in the case management of the particular cases and I have some that are strictly litigators. It’s sort of up to them.”); Prosecutor’s Office J, *supra* note 145 (describing their reluctance to “micromanage”); Prosecutor K, *supra* note 145 (describing variation in the frequency of caseworker communication). But see Prosecutor D, *supra* note 145 (noting that her office encouraged prosecutors check in with caseworkers once a month).

consultations; others waited for caseworkers to contact them.²²⁶ Court structure and judicial preference accounted for some of the variance. Some jurisdictions had specialty courts—for example, “treatment court” for parents tagged as having substance-use problems or “dual status” courts for children being prosecuted for delinquency while their parents were being prosecuted for neglect—that imposed more surveillance and more frequent court dates on families, causing prosecutors to track cases more closely.²²⁷ Prosecutors also knew of certain judges’ idiosyncratic preferences and worked with caseworkers to adjust accordingly.²²⁸ Those adjustments point to the small world of family regulation, in which the same sets of prosecutors and caseworkers appear in front of the same judges, over and over.²²⁹

This small world also allowed prosecutors to adjust their relationships to caseworkers depending on their knowledge of individual caseworkers. As one prosecutor explained, “[a] caseworker might have a reputation of not doing their job fully, and so you foreshadow, ‘I want to stop this right here. Let me just make sure the supervisor is involved from the beginning.’”²³⁰ Beyond the rigor of caseworkers’ work, prosecutors were also attuned to caseworkers showing particular animosity or sympathy toward a family,²³¹ a dynamic discussed further below.

Prosecutors representing agencies viewed the agency’s role as identifying goals for litigation and their own role as developing strategies that would allow for the agency to achieve its goals. Thus, almost all legal applications—such as seeking court orders to change visitation or to return children home—came at the agency’s initiative, rather than at the prosecutor’s prompting.²³²

²²⁶ See *supra* note 225.

²²⁷ Prosecutor K, *supra* note 145; Prosecutor’s Office J, *supra* note 145.

²²⁸ Prosecutor A, *supra* note 145; Prosecutor’s Office J, *supra* note 145.

²²⁹ See Melissa L. Breger, *Making Waves or Keeping the Calm?: Analysis the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 LAW & PSYCH. REV. 55, 56 (2010) (highlighting how “groupthink” dynamics can emerge from such repeat interactions).

²³⁰ Prosecutor D, *supra* note 145; see also Prosecutor F, *supra* note 145; Prosecutor I, *supra* note 145; Prosecutor’s Office J, *supra* note 145; Prosecutor K, *supra* note 145.

²³¹ See, e.g., Prosecutor C, *supra* note 145; Prosecutor E, *supra* note 145.

²³² See, e.g., Prosecutor A, *supra* note 145; Prosecutor C, *supra* note 145 (“They’re the caseworkers, we’re the attorneys. They have the expertise in the area of social work, and we defer to them on that.”); Prosecutor D, *supra* note 145 (describing caseworkers driving next steps in the case and consulting with attorneys on legal issues); Prosecutor F, *supra* note 145 (“We’re going to represent the agency, and we’re going to do what we can to get the agency what the agency would like to see happen.”). As an exception, prosecutors were more proactive in prodding the agency to take certain steps in cases that prosecutors or the agency forecasted as heading toward termination of parental rights, as prosecutors saw these cases as more difficult to prove and more bound to specific timelines. See, e.g., Prosecutor F, *supra* note 145 (emphasizing the higher burden of proof as justifying more “pushback” from prosecutors); Prosecutor G, *supra* note 145 (“[T]here’s more of a braking structure in place with starting a termination action than starting a removal action.”); Prosecutor H, *supra* note 145 (describing formal case staffing processes for termination cases).

Once caseworkers identified a position, prosecutors saw it as their responsibility to assess the legality and strength of the agency's position and counsel the agency on the likelihood of success and the sorts of evidence the agency would need to support it.²³³ Prosecutors counseled their clients with an eye toward their own ultimate responsibility—conducting hearings and trials.²³⁴ That responsibility, in turn, prompted prosecutors to work closely with caseworkers to prepare their testimony and other trial evidence.²³⁵

If prosecutors had concerns about the agencies' applications, they primarily framed their concerns in terms of legal standards or questions judges might ask.²³⁶ But some prosecutors probed *why* caseworkers wanted to take a certain action, particularly when they sensed caseworkers' personal feelings were driving their desire. Prosecutors noted that caseworkers' feelings could cloud their judgment and lead them to be too harsh or too lenient with families.²³⁷ In the first instance, caseworkers might attempt to limit visits or prolong family separation due to their frustration over parents' behavior toward caseworkers, rather than over safety risks for children.²³⁸ One prosecutor put it bluntly, explaining that she reminded caseworkers, "behavioral change doesn't mean you have to be nice to your caseworker."²³⁹ In the second, caseworkers might feel particularly sympathetic to a family and rush toward reunification even where risk to a child existed.²⁴⁰

²³³ See, e.g., Prosecutor A, *supra* note 145 ("Attorneys weigh in on the likelihood of success."); Prosecutor C, *supra* note 145 ("We'll talk to them about how a legal decision is going to play itself out, and what would be more strategic, and then they can file documents in order to do that."); Prosecutor F, *supra* note 145 (describing client counseling about the risks of proceeding without legal sufficiency).

²³⁴ See, e.g., Prosecutor A, *supra* note 145 (describing counseling an agency on "how the court is going to analyze" the information presented); Prosecutor's Office J, *supra* note 145 ("What we bring to it is just a little bit more focusing on what's going to happen at the next court hearing.").

²³⁵ See, e.g., Prosecutor D, *supra* note 145 ("We do trainings for them, and a lot of times we prep them in person for trial to give them that extra support."); Prosecutor K, *supra* note 145 ("We do spend a lot of time with the agency prepping it.").

²³⁶ See, e.g., Prosecutor A, *supra* note 145 ("The attorney will analyze the facts against the laws and give the agency a realistic view of what the outcomes will be."); Prosecutor G, *supra* note 145 ("[E]xplain it to me so I can explain it to the court."); Prosecutor's Office J, *supra* note 145 ("[M]y perspective is . . . '[w]hat is my ask gonna be at the next hearing? And what information do I have to have to prevail on that?'").

²³⁷ See, e.g., Prosecutor's Office J, *supra* note 145 (describing one caseworker's commitment to family reunification based on her personal experiences with family separation as a child).

²³⁸ See, e.g., Prosecutor G, *supra* note 145 (emphasizing the importance of staffing with prosecutors and supervisors as "that other set of eyes [for caseworkers], saying, 'Your fights with mom are maybe impacting your view here'"); Prosecutor I, *supra* note 145 ("I would always tell caseworkers that they needed to take a step back . . . when that parent is abrasive or off-putting to the worker . . .").

²³⁹ Prosecutor G, *supra* note 145.

²⁴⁰ See, e.g., Prosecutor F, *supra* note 145 (describing pushing a caseworker to realize that placement with a relative was not feasible); Prosecutor's Office J, *supra* note 145 ("I've also had caseworkers absolutely break their souls to try to reunite kids with their parents . . .").

As prosecutors saw it, their greater distance allowed them to be more measured about family–caseworker dynamics.²⁴¹ Prosecutors’ scrutiny of caseworkers’ decisionmaking could help families reunify more quickly,²⁴² or it could speed up the permanent dissolution of a family.²⁴³

Yet greater distance from families could cause even prosecutors representing the public interest to defer to caseworkers. Those prosecutors still spoke to agency personnel leading up to court appearances and tended to hew to agency recommendations.²⁴⁴ As elsewhere, agency personnel saw families more often than prosecutors and served as prosecutors’ sources of information. One prosecutor explained that in some cases, she might have workers who “call . . . periodically throughout the life of the case to staff problems or to say, ‘Hey, these parents are doing great, we want to move it forward,’” while in others, she would hear nothing until the week before court.²⁴⁵ In either situation, she had “the authority to prosecute the case” independently.²⁴⁶ But that independence had limits when she did not have independent sources of information.

Despite these similarities, the agency-representation/public-interest distinction gave rise to two key differences. First, prosecutors with independent discretion took more proactive stances toward resolving cases, encouraging line prosecutors in their offices to move for expansions of contact between parents and children and to independently assess case resolutions.²⁴⁷ Second, they took positions adverse to the agency in court when they could not resolve disagreement with the agency.²⁴⁸ In such situations, agencies might make their own applications without counsel,²⁴⁹ align themselves with lawyers for the children or parents to make their desired application,²⁵⁰ or

²⁴¹ Prosecutor A, *supra* note 145; Prosecutor’s Office J, *supra* note 145.

²⁴² See Prosecutor B, *supra* note 145 (“Attorneys regularly examine[] expanding contact and reunification options on pending cases . . .”).

²⁴³ See Prosecutor I, *supra* note 145 (“Federal law says that you can’t just sit on a case for this long and hope that the parents get their act together. We give that advice to caseworkers . . . because one thing is, they will sit on cases forever. Especially if they think they’re close to the parent being ready.”).

²⁴⁴ See, e.g., Prosecutor H, *supra* note 145 (“90% of the time, we were on the same page and had the same goal.”); Prosecutor K, *supra* note 145 (“We’re seeing fewer and fewer removals where we have to decide about a petition. Now when we do get them, typically, the agency already tried to prevent the removal in the first place.”). But see Prosecutor E, *supra* note 145 (“We just don’t ever blindly follow a recommendation of a caseworker.”).

²⁴⁵ Prosecutor K, *supra* note 145.

²⁴⁶ *Id.*

²⁴⁷ See, e.g., Prosecutor E, *supra* note 145 (“I tell my folks, ‘It’s as much your job to bring a motion for expansion of visits or to . . . at least to put a bug in someone’s ear and say we’re ready for this next phase, can you file a motion for your client?’”).

²⁴⁸ Prosecutor K, *supra* note 145; Prosecutor E, *supra* note 145; Prosecutor H, *supra* note 145.

²⁴⁹ Prosecutor H, *supra* note 145; Prosecutor K, *supra* note 145.

²⁵⁰ Prosecutor K, *supra* note 145.

seek representation from other government lawyers.²⁵¹ This could create a strange spectacle: a prosecutor cross-examining the caseworkers they usually called as their own witnesses.²⁵²

Prosecutors spoke of some jurisdictions where this adversariness between prosecutors and agencies was common.²⁵³ One prosecutor noted that there were rural counties in her state where the same prosecutors worked on criminal cases and family regulation cases.²⁵⁴ She described prosecutors' attitudes in those counties as, "I choose what I do in this case and nobody else gets to tell me," with prosecutors expressing little interest in the agency's position.²⁵⁵ Prosecutors rarely spoke with agency personnel out of court and often took positions adverse to the agency.²⁵⁶ In one county in particular, the local prosecutor and agency were so often at odds that the agency was frequently represented in court by personnel from another statewide office.²⁵⁷

E. *Resolving Disagreements*

Disagreements, whether so extreme that they required the intervention of outside counsel or more workaday, occurred in all prosecutor–agency relationships. All prosecutors described similar mechanisms for dispute resolution. Where these mechanisms failed to resolve disputes, prosecutorial models affected legal decisionmaking.

All prosecutors reported that they counseled caseworkers on the strength of legal applications and attempted to dissuade caseworkers from pursuing applications that seemed unlikely to succeed in court.²⁵⁸ In counseling clients, they raised legal requirements and issues like caseworker and agency

²⁵¹ Prosecutor H, *supra* note 145; Prosecutor K, *supra* note 145.

²⁵² Prosecutor H, *supra* note 145.

²⁵³ See *id.* ("I know of one particular district where the district attorney's office did not like the agency, had no good relationship with them, fought them all the time."); Prosecutor K, *supra* note 145 ("There was a period of time where there was a director out here that was very hostile to the agency. I think that just sort of fostered a culture in the prosecutor's office of fighting with the agency.").

²⁵⁴ Prosecutor H, *supra* note 145.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See *e.g.*, Prosecutor A, *supra* note 145 ("It can be a very dynamic conversation, where the attorney is like, 'I don't see how you're going to get this at this point. I think we need to go back, work the case for a little bit longer . . .'"); Prosecutor C, *supra* note 145 ("The attorney will go to the caseworker who's working on that petition filing, and we'll explain that why it doesn't meet the legal standards, and what would be needed in order to do that."); Prosecutor F, *supra* note 145 ("Those kinds of situations, we advise . . . '[T]he court may not understand, but as long as you guys can testify about it.'").

credibility with the court.²⁵⁹ Where caseworkers still insisted on a particular action, prosecutors reported escalating conversations, looping in caseworkers' supervisors and sometimes prosecutors' supervisors as well.²⁶⁰ Per prosecutors, escalating a dispute often resolved it, in one of two ways: the agency might modify its position or prosecutors might reassess the strength of the legal argument after refining their understanding of the agency's goals or learning of additional evidence and context.²⁶¹

Where disagreement persisted, prosecutors' options diverged, depending on whether they represented the agency. In jurisdictions where prosecutors did not represent agencies, they reported exercising their discretion and declining to make applications they felt were legally weak or otherwise ill-advised.²⁶² Prosecutors who viewed agencies as their clients lacked that freedom. Instead, these prosecutors viewed their obligation as an obligation to counsel their clients, not to win in court.²⁶³ If their client wanted to make a longshot application, that was their client's decision to make.

Agency-representation prosecutors pointed to one limitation on their freedom to take up a legal argument on behalf of their client's argument: their ethical obligation against asserting an argument for which there was no basis in law.²⁶⁴ Prosecutors varied in how they interpreted that constraint. Legal definitions in the family regulation system are so nebulous that prosecutors

²⁵⁹ See, e.g., Prosecutor A, *supra* note 145 (focusing on the importance of caseworker credibility in the eyes of the judge); Prosecutor C, *supra* note 145 (same); Prosecutor D, *supra* note 145 (same).

²⁶⁰ Prosecutor C, *supra* note 145; Prosecutor D, *supra* note 145; Prosecutor F, *supra* note 145; Prosecutor G, *supra* note 145; Prosecutor H, *supra* note 145; Prosecutor's Office J, *supra* note 145.

²⁶¹ See, e.g., Prosecutor A, *supra* note 145 ("We'll ask the agency to potentially fill in some blanks with an investigation . . . so that they might be better positioned if they're insistent on pursuing a certain end."); Prosecutor C, *supra* note 145 ("The attorney will . . . explain [to the caseworker] . . . why it doesn't meet the legal standards . . . [a]nd get their thinking on why do they want to file it. Because if that gets developed, maybe we will say, 'Okay, well, that's the piece of information that's not in the report.'"); Prosecutor D, *supra* note 145 (describing gathering information from agencies on parents' "compliance" in preparation for permanency hearings to ensure that the agency's proposed goal is defensible in court).

²⁶² See, e.g., Prosecutor K, *supra* note 145 (describing a case the prosecutor declined to move towards termination because the agency had not clearly identified safety concerns that would prevent a child from returning to their parent).

²⁶³ See e.g., Prosecutor A, *supra* note 145 (emphasizing that "[i]t's the client's decision whether to move forward"); Prosecutor C, *supra* note 145 ("[T]he risk assessment is the agency's . . . [E]ven if, for example, the attorney thought, 'Whoa, that's not going to win in this courtroom,' or we disagree . . . if you could legally make the argument in good faith, we'll advise them on that."); Prosecutor I, *supra* note 145 (describing a similar process of counseling and deference); Prosecutor's Office J, *supra* note 145 (same).

²⁶⁴ Prosecutor A, *supra* note 145; Prosecutor B, *supra* note 145; Prosecutor C, *supra* note 145; Prosecutor D, *supra* note 145; Prosecutor F, *supra* note 145; Prosecutor G, *supra* note 145; Prosecutor H, *supra* note 145; Prosecutor's Office J, *supra* note 145; see also MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2023) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.").

may not have to strain to find some legal basis for their argument.²⁶⁵ As one prosecutor observed, there is no “algebraic equation” for when an argument for termination of parental rights is well-founded.²⁶⁶ Another prosecutor acknowledged this ethical limitation in the abstract but could not recall any instances where ethical considerations prevented her office from seeking the relief that the agency wanted.²⁶⁷ Elsewhere, prosecutors described their ethical concerns more concretely, recalling cases where they refused to take actions the agency sought.²⁶⁸

Unresolvable disagreements between prosecutors and agencies could leave prosecutors who worked in-house for agencies in a particular dilemma: if they refused to take an action, they defied their client *and* their direct employer. One prosecutor reported such a dispute where the agency was insistent on taking a particular course of action about which prosecutors harbored grave reservations.²⁶⁹ Following that incident, the jurisdiction changed their prosecutorial structure, moving upper levels of legal management out of the agency—but leaving line-level prosecutors on staff at the agency.²⁷⁰

Prosecutors who represent agencies—in-house or from other government offices—may face even greater pressure to heed their clients’ wishes than interviewed prosecutors acknowledged. Former prosecutors outside the interview group recount facing immense pressure to accede to agency desires and note that it can be easier to agree with agencies and “throw” hearings or otherwise dispose of cases than to obtain the approvals to overrule the agency, as discussed at greater length in Section III.B.

F. Prosecutors’ Conceptions of Their Role

Asked to define their own roles, prosecutors across models differentiated their work from the work of criminal prosecutors. As they saw it, criminal prosecutors worked within a punitive system; in contrast, they worked within a system designed to be rehabilitative.²⁷¹ For one prosecutor under a county-

²⁶⁵ Gupta-Kagan, *Confronting Indeterminacy*, *supra* note 73, at 233-38, 253-57 (tracing indeterminacy of legal terms like “child neglect” and “reasonable efforts” through the life of a family court case).

²⁶⁶ Prosecutor’s Office J, *supra* note 145.

²⁶⁷ Prosecutor A, *supra* note 145.

²⁶⁸ Prosecutor H, *supra* note 145; Prosecutor’s Office J, *supra* note 145.

²⁶⁹ Prosecutor F, *supra* note 145.

²⁷⁰ *Id.*

²⁷¹ See, e.g., Prosecutor B, *supra* note 145 (“I see the purpose of a child protective proceeding in family court as separate from the objective of a criminal prosecution . . .”); Prosecutor C, *supra* note 145 (“The goal in our system is to protect children. In the criminal system, they have bigger societal issues other than the specifics of this case, and there’s times where they are punishing, but that is not our system.”); Prosecutor G, *supra* note 145 (“I do think that the system ultimately, if used correctly, should not be a punitive system. It should be a real rehabilitative system, which I think

attorney model, this distinction was so crucial that he rejected the title of prosecutor outright, describing his work as “prov[ing]” cases.²⁷² Other prosecutors were less interested in that linguistic distinction, describing their work as “prosecut[ing]” cases or working as “civil prosecutor[s].”²⁷³

Even as prosecutors maintained that the purpose of the family regulation system was rehabilitative, they acknowledged that the system was “very flawed”²⁷⁴ and that it may not work “correctly.”²⁷⁵ Prosecutors compiled a list of crises in the family regulation system that likely sounds familiar to many in the broader field. Agencies churn through caseworkers far too quickly,²⁷⁶ and caseworkers are overworked, undertrained, and undersupported.²⁷⁷ Decisionmaking can be driven by fear,²⁷⁸ and by race- or class-based bias.²⁷⁹ Families are targeted for minor issues like parental marijuana use.²⁸⁰ Families wait far too long for their cases to be heard in court²⁸¹ and for referrals for services outside of court.²⁸² There are too few foster placements available for

does differentiate it from the criminal justice system writ large.”); *see also* Prosecutor’s Office J, *supra* note 145 (describing joint staffing of juvenile and family regulation cases with the district attorney’s office based on the “mutual goal” of “rehabilitative as opposed to punitive [outcomes], which is the distinction from the criminal system”); Prosecutor K, *supra* note 145 (“I have no interest in criminal prosecution. I do kid stuff.”). Of course, many criminal prosecutors disagree with this classification of their work. *See* Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1691 (2018) (finding that a third of surveyed state criminal prosecutors value “the rewards of doing the job to help defendants”).

²⁷² Prosecutor C, *supra* note 145.

²⁷³ Prosecutor D, *supra* note 145; *see also* Prosecutor G, *supra* note 145 (“We’re the plaintiff in our cases and so you’re prosecuting the case; in a civil sense, you are the plaintiff and you’re the one with the burden of proof . . . I’m ambivalent toward the term.”).

²⁷⁴ Prosecutor E, *supra* note 145.

²⁷⁵ Prosecutor G, *supra* note 145.

²⁷⁶ *See, e.g.*, Prosecutor A, *supra* note 145 (describing the challenge of caseworker turnover); Prosecutor B, *supra* note 145 (describing similar challenges with agency staff turnover); Prosecutor D, *supra* note 145 (focusing on agency turnover); Prosecutor G, *supra* note 145 (same); Prosecutor H, *supra* note 145 (same); Prosecutor’s Office J, *supra* note 145 (same); Prosecutor K, *supra* note 145 (noting that turnover was especially acute during the COVID pandemic).

²⁷⁷ *See, e.g.*, Prosecutor A, *supra* note 145 (“Caseworkers are getting it from all sides.”); Prosecutor E, *supra* note 145 (“There’s a larger systemic problem with not enough staffing or overworking, or systems that are inappropriate.”); Prosecutor H, *supra* note 145 (“In some jurisdictions, caseworkers wouldn’t know anything about court; well, nobody is training them.”).

²⁷⁸ *See, e.g.*, Prosecutor E, *supra* note 145 (“Sometimes I’m worried that the agency’s recommendations are being made to take the most cautious approach . . .”).

²⁷⁹ *See, e.g., id.* (“A huge part of the filing conversation is the implicit biases that we may be working with, and the implicit biases that may have been brought.”).

²⁸⁰ *See* Prosecutor B, *supra* note 145 (highlighting issues with cases grounded on “frequent marijuana use alone”).

²⁸¹ *See, e.g.*, Prosecutor E, *supra* note 145 (“[I]t takes too long to get to trial.”); Prosecutor K, *supra* note 145 (“It’s not doable, people waiting for trial for years.”).

²⁸² *See, e.g.*, Prosecutor K, *supra* note 145 (“They’d do the removal, and it would be like three months into this and we’re just now getting a referral for services to an outpatient facility. That was disastrous.”).

children,²⁸³ and children in foster care suffer far-reaching trauma.²⁸⁴ These are just the problems within the family regulation system itself. Prosecutors pointed to structural problems like a lack of affordable housing and deficient mental healthcare,²⁸⁵ as well as an overall “scarcity of resources” and absence of community support that channel families into the system.²⁸⁶

Likely as a result of the large sizes of the included jurisdictions, all of the prosecutors interviewed worked within office divisions that prosecuted only family regulation cases, or family regulation and delinquency cases. As specialists and repeat players, prosecutors highlighted their institutional knowledge of idiosyncrasies and desires of particular judges and families’ histories with agencies and contrasted their relative stability with caseworkers’ turnover.²⁸⁷

Yet prosecutors did not share a normative impulse about their proper role and discretion. Some prosecutors who had been vested with discretion were firm in their belief that discretion and independent decisionmaking were necessary to insulate their decisionmaking from the pressures of caseworkers’ work in the field.²⁸⁸ Others were just as sure that discretion allowed prosecutors to run roughshod over caseworkers and left agencies unrepresented in court.²⁸⁹ Agency-representation prosecutors, meanwhile,

283 Prosecutor H, *supra* note 145 (“[T]he lack of foster homes is at a crisis level.”).

284 See Prosecutor K, *supra* note 145 (“[T]he longer children . . . spend in foster care, the more likely they are to go to prison, the more likely they are to pick up delinquency cases, the less likely to graduate.”).

285 See Prosecutor D, *supra* note 145 (“The other challenge in this field is just continuity of resources, specifically mental health providers.”).

286 Prosecutor E, *supra* note 145; see also Prosecutor K, *supra* note 145 (“I think the hardest thing to deal with that really no one has a fix for is that a lot of people just don’t have support.”).

287 Compare Prosecutor A, *supra* note 145 (“I have people who have been at this for decades, and so they have a real understanding of how to address a family holistically, how the law is going to be applied . . . and how their judges are going to interact with the facts and the law.”), and Prosecutor’s Office J, *supra* note 145 (“I think a lot of the relationship depends on your court too, because a lot of the judges will micromanage it and then a lot of the judges will stay very big picture.”), with Prosecutor H, *supra* note 145 (“You have to keep doing training because the workers turn over a lot.”), and Prosecutor’s Office J, *supra* note 145 (“Sometimes there’s some concerns about caseworkers’ safety assessments, especially with newer workers and newer supervisors. We have a lot of turnover with that and so it’s a lot of education.”).

288 See Prosecutor E, *supra* note 145 (“The child is not our individual client like it is for the guardian ad litem. The parent is not our individual client. That affords us the ability to take a more global look at cases than the agency.”); Prosecutor K, *supra* note 145 (“I have the authority to prosecute the case. So when the agency says, ‘Hey, file a motion to terminate . . .,’ that’s on me. If I disagree with them, I just say no.”).

289 See Prosecutor H, *supra* note 145 (recounting how caseworkers became upset to the point of physical illness after they appeared unrepresented in court in a jurisdiction where the local prosecutor did not represent the agency); *id.* (describing a rare situation where the statewide legal office stepped in to represent the agency after the local prosecutor routinely refused to take action on agency’s behalf); Prosecutor I, *supra* note 145 (noting that agency representation seems at times like an afterthought and noting local prosecutors’ resistance to representing the agency).

readily pointed to the ethical quandaries posed by being bound by their client's decisionmaking.²⁹⁰ Yet, when asked about the prospect of greater decisionmaking authority, they expressed ambivalence.²⁹¹

III. IMPLICATIONS OF THE PROSECUTOR-AGENCY RELATIONSHIP

These initial interviews yield intriguing preliminary insights into the relationships between prosecutors and agencies and between formal models of prosecution and practice. On one hand, prosecutors' reports draw into question the salience of formal distinctions between models of prosecution. On the other, they hint that certain models do raise greater ethical issues for prosecutors and diminish checks on agencies. At base, the confusion over the prosecutorial role seems to bleed over from larger confusion: the confusion over the purpose and function of the family regulation system itself.

A. *The Salience of Formal Distinctions Between Models of Prosecutions*

Previous studies of family regulation prosecutors highlight formal distinctions between prosecutorial models.²⁹² Yet prosecutors' accounts draw into question the importance of these formal distinctions. Across jurisdictions, prosecutors carried out their work in ways that seemed to conflict with their formal models, for example, representing agencies as clients despite mandates to represent the public interest.²⁹³ Meanwhile, prosecutors working within the same formal models did not share the same understanding of their mandates: for example, prosecutors representing agencies felt differently constrained by ethical rules.²⁹⁴

Most fundamentally, each model of prosecution centered agencies. All prosecutors relied on agencies for everything from initial case referrals to collecting and presenting evidence at hearings and trials.²⁹⁵ Dependence on agencies squared with prosecutors' understandings of the family regulation

²⁹⁰ See Prosecutor F, *supra* note 145 ("If I represent the department and my client wants me to do something that I don't believe is appropriate, they're still my boss.").

²⁹¹ See Prosecutor G, *supra* note 145 ("They proposed a bill here that would give agency attorneys prosecutorial discretion. It did not get very far. I really don't know what my thoughts on that would be. I don't know.").

²⁹² See *supra* Section I.C.

²⁹³ See *supra* notes 170–172 and accompanying text.

²⁹⁴ Compare Prosecutor A, *supra* note 145 ("I'm thinking about ethical concerns in a very abstract manner. So much so that I can't think of a situation that we've encountered where we say, 'I'm sorry, I can't bring that forward.'"), with Prosecutor H, *supra* note 145 ("There have been a few cases where I have said I will not sign that because I will be violating my ethical and court rules by signing that. That does not happen very often.").

²⁹⁵ See *supra* Section II.C.

system as rehabilitative, if flawed.²⁹⁶ That rehabilitative branding legitimizes agencies as experts and justifies extensive agency surveillance and information-gathering.²⁹⁷ Given this context, family regulation prosecutors' reliance on agencies may amplify—rather than merely mirror—the close relationship between prosecutors and investigators on display in the criminal legal system.²⁹⁸

Though formal distinctions were not decisive, two common features of prosecutorial models—direct agency representation and the absence of prosecutorial discretion—did appear to increase ethical problems for lawyers and diminish checks on agencies. In the next section, I sketch out this measured observation that “internal features of the prosecutor’s office frame the professional identities of prosecutors in substantial ways” and “incline prosecutors to think of themselves and their professional role in a certain way.”²⁹⁹ This “role orientation,” in turn, “can motivate prosecutors to make certain professional decisions.”³⁰⁰

B. Ethical Considerations

Prosecutors’ direct representation of agencies or concurrent representation of agencies and the public interest present sharp ethical concerns. Some of those concerns are outlined below.

First, prosecutors representing both agencies and the public interest may find those mandates in tension. In the normal course of representation, clients decide objectives and lawyers zealously advocate for their clients’ position.³⁰¹ When lawyers represent government agencies, they too must vigorously advocate for their clients.³⁰² But some family regulation prosecutors representing agencies have additional obligations to act in the public interest—an interest prosecutors variously understood to mean in the best interest of a particular child, a family, or a community.³⁰³ The duty to

²⁹⁶ See *supra* Section II.E.

²⁹⁷ See *supra* Section I.A.

²⁹⁸ See *infra* Section III.C.

²⁹⁹ Levine & Wright, *supra* note 36, at 1130-31 (emphasis omitted) (describing these dynamics in the context of criminal prosecution).

³⁰⁰ *Id.* at 1131.

³⁰¹ See MODEL RULES OF PRO. CONDUCT r. 1.2, 1.3 (AM. BAR ASS’N 2023) (requiring that a lawyer “abide by a client’s decision’s concerning the objectives of representation” and “act with reasonable diligence” in said representation).

³⁰² See Michael A. Cardozo, *The Conflicting Ethical, Legal, and Public Policy Obligations of the Government’s Chief Legal Officer*, 22 PRO. LAW., no. 3, 2014, at 1, 4, 7 (“The ABA Model Rules, for example, mandate that all lawyers, specifically including government lawyers, should ‘zealously assert[] the client’s position under the rules of the adversary system’ and take ‘whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.’” (footnotes omitted)).

³⁰³ See *supra* Section II.B.

zealously advocate for the agency's objectives and to act in the public interest can conflict. Consider a situation where an agency directs a prosecutor to file a case alleging that a parent neglected their twelve-year-old child by leaving them home alone. The caseworker's proposed cause of action is legally colorable in most states,³⁰⁴ but it is arguably not in the public interest—no matter how narrowly or broadly public interest is defined. A prosecutor bound to represent both the agency and the public interest must decide which client to abandon.

Second, prosecutors representing agencies must balance ethical obligations prohibiting legally baseless applications against their loyalty to their client. Ethical rules dictate that lawyers only pursue meritorious claims,³⁰⁵ and across jurisdictions, prosecutors cited their ethical obligations as a limit on their actions.³⁰⁶ This limit is a weak one, even for ethically scrupulous prosecutors, as the vagueness of legal concepts like neglect can give cover to even far-fetched legal theories.³⁰⁷ But even the nebulous laws of neglect have their boundaries. When agencies want to go beyond them, prosecutors must balance their ethical obligations against their client relationship.

This conflict seemed most acute for prosecutors working in-house. Prosecutors directly employed by family regulation agencies may have little recourse if their client—who is also their employer—insists on taking a step that a lawyer does not feel is legally supported. One in-house prosecutor described this as a “conflict of interest.”³⁰⁸ Lawyers for other parties in in-house jurisdictions confirm that prosecutors at times overlook the baselessness of an application in the service of appeasing their clients' concerns.³⁰⁹

Prosecutors representing agencies from outside face similar pressures, as their refusal to pursue the agency's goals could upset their ongoing

304 See CHILDS. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., LEAVING YOUR CHILD HOME ALONE 2 (2018) (reporting that only three states have a clear minimum age for leaving a child home alone and most states “do not provide any detail on what is considered ‘adequate supervision’”).

305 See MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2023) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . .”).

306 See *supra* notes 264–268 and accompanying text.

307 See Gupta-Kagan, *Confronting Indeterminacy*, *supra* note 73, at 235 (noting the capaciousness of legal definitions of concepts like neglect).

308 Prosecutor F, *supra* note 145.

309 E-mail from Parent Defense Lawyer, In-House Jurisdiction, to author (June 22, 2023, 11:01 AM) (on file with author) (describing how prosecutors would acknowledge no legal basis for their applications but would justify proceeding with the applications because of non-legal concerns or because, in prosecutors' words, “they'd rather be safe than sorry”).

relationships with agencies.³¹⁰ Thus, prosecutors might make legally baseless arguments to the detriment of children and families. Adding to the accounts captured in the interviews, other former prosecutors and lawyers for other parties in family regulation proceedings readily provide examples of cases where prosecutors made baseless arguments.³¹¹ A former prosecutor who represented an agency reported that in her office, prosecutors would bring legally baseless applications at caseworkers' insistence, even though this practice was "terrible," "unethical," and a "waste of time," because it was easier to "go forward and lose" than "go through the hassle of overriding the agency."³¹² Others echoed the same sentiment.³¹³

Third, prosecutors representing agencies as clients must navigate the complications of organizational representation. When lawyers represent organizations, they represent diverse sets of individuals who might have conflicting or differing needs and priorities.³¹⁴ In family regulation cases, this not only means adjusting to the wants of changing agency leadership and toggling between the desires of individual caseworkers, but also attempting to ensure that the actions of caseworkers accord with agency policies.³¹⁵

³¹⁰ See, e.g., Prosecutor C, *supra* note 145 (discussing tension between caseworkers and attorneys when they disagree on matters including risk assessments and legal arguments); Prosecutor D, *supra* note 145 (discussing measures in place to resolve disagreements between attorneys and caseworkers on "next steps"); Prosecutor H, *supra* note 145 (highlighting the rarity of attorneys refusing to move forward with a case).

³¹¹ For three accounts of cases in which prosecutors brought baseless cases for removal or refused to reunify despite a lack of safety concerns, see E-mail from Parent Defense Lawyer, Agency-Representation Jurisdiction, to author (June 22, 2023, 10:54 AM) (on file with author); E-mail from Parent Defense Lawyer, Agency-Representation Jurisdiction, to author (June 22, 2023, 10:51 AM) (on file with author); E-mail from Lawyer for Children, Agency-Representation Jurisdiction, to author (June 22, 2023, 11:27 AM) (on file with author). As a former prosecutor described

In law school, I was taught that the client was the boss, our job was to win for the client, and the client defines the win. Regardless of who I represent, if the client tells me to argue that the moon is made of green cheese, that becomes my job . . . I have a responsibility to talk to my client about the pros and cons of making such an argument, but at the end of the day, the boss defines the goal and off I go.

E-mail from Former Prosecutor, Agency-Representation Jurisdiction, to author (June 22, 2023, 11:15 AM) (on file with author).

³¹² E-mail from Former Prosecutor, Agency-Representation Jurisdiction, to author (June 22, 2023, 11:39 AM) (on file with author).

³¹³ See, e.g., E-mail from Former Prosecutor, Agency-Representation Jurisdiction, to author (June 22, 2023, 12:31 PM) (on file with author) (describing other ways of disposing of frivolous cases without overruling the agency, such as identifying new jurisdictional issues with the case).

³¹⁴ See William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CALIF. L. REV. 57, 59 (2003) ("[O]rganizations consist of multiple individuals with potentially differing interests, and hence they are prone to internal conflicts that do not arise in individual representation.").

³¹⁵ See *supra* subsection II.B.1.

Within agencies, there can be many layers of bureaucracy between upper-level leadership and on-the-ground workers.³¹⁶ Agencies' official positions and policies may have little bearing on overworked and undertrained caseworkers' daily practice. In New York City, for instance, the Commissioner of the family regulation agency publicly stated: "It is very important that parents understand their rights when [the agency] comes to their homes."³¹⁷ Meanwhile, one caseworker told a reporter, "Rights—no, we never did that. I didn't even know that was a thing" and other caseworkers reported more generally that "their supervisors never told them to advise parents they had the right not to cooperate with a search" of their home.³¹⁸ Prosecutors tasked with bridging this divide between the workforce and management may acquiesce to the front-line personnel they see most regularly, rather than forcefully insisting upon adherence to the policies of a far-removed bureaucrat.³¹⁹

Finally, where prosecutors treat agencies as their clients, lawyers for other parties may not be able to speak freely to caseworkers. Lawyers cannot communicate about the subject of representation with a represented party absent permission of that party's lawyer.³²⁰ Lawyers can, on the other hand, communicate with an unrepresented person so long as they do not hold themselves out as disinterested.³²¹ Some agency-representation prosecutors

³¹⁶ For example, the Los Angeles County Department of Children and Family Services employs "nearly 9,000 staff across 20 regional offices, specialized bureaus, and administration." *Leadership*, L.A. CNTY. DEP'T OF CHILD. & FAM. SERVS., <https://dcfs.lacounty.gov/about/who-we-are/leadership> [<https://perma.cc/LR82-5K5K>] (last visited Oct. 22, 2024). Meanwhile, the California chapter of the National Association of Social Workers has published a handout describing the problem of the disconnect between policy and practice in child welfare. *Bridging the Disconnect Between Policy and Practice in Child Welfare*, NAT'L ASS'N OF SOC. WORKERS, CAL. CHAPTER, https://web.archive.org/web/20240621004132/https://calswec.berkeley.edu/sites/default/files/bridging_the_disconnect_between_policy_and_practice_in_child_welfare_vania_buck_v2_2020-04-21.pdf [<http://perma.cc/ER3Y-JXVS>] (last visited Nov. 19, 2024).

³¹⁷ Arya Sundaram, *A Parent-Empowering Ad Campaign Runs Through the Bronx*, GOTHAMIST (Sept. 5, 2022), <https://gothamist.com/news/a-parent-empowering-ad-campaign-runs-through-the-bronx> [<https://perma.cc/3NY4-69LX>].

³¹⁸ Eli Hager, *Police Need Warrants to Search Homes. Child Welfare Agents Almost Never Get One.*, PRO PUBLICA (Oct. 13, 2022, 8:00 AM), <https://www.propublica.org/article/child-welfare-search-seizure-without-warrants> [<https://perma.cc/H2CM-AGYB>].

³¹⁹ For instance, New York City's family regulation agency implemented a policy directing its staff to decline to move forward with reports of neglect based solely on the parent's marijuana use. N.Y.C. ADMIN. FOR CHILDS. SERVS., DCP ALL STAFF BULLETIN: POLICY AND PRACTICE ON CASES INVOLVING MARIJUANA USE BY PARENTS (Apr. 19, 2019), <https://int.nyt.com/data/documenttools/NYC-ACS-Marijuana-Policy/a429b63aae66fe31/full.pdf> [<https://perma.cc/2WLM-62E8>]. Even after the policy was implemented, I represented parents accused of neglecting their children in court based solely on their use of marijuana. In some of those cases, prosecutors acknowledged to me privately that the case was in violation of their internal rule, even as they moved forward with the cases.

³²⁰ MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS'N 2023).

³²¹ MODEL RULES OF PRO. CONDUCT r. 4.3 (AM. BAR ASS'N 2023).

take the position that lawyers representing parents and children cannot speak to caseworkers without prosecutors' consent, on the theory that the caseworkers are the prosecutors' clients.³²² Yet there are any number of reasons—scheduling visits or appointments, locating a child—that a lawyer for a parent or a child might need information from a caseworker.³²³ Moreover, caseworkers meet with parents between court dates and may ask parents to agree to measures—like undergoing a mental health evaluation, moving their children, or consenting to a permanency goal change—that can have long tails in court.³²⁴ If prosecutors view agencies as their clients, lawyers for parents and children can be boxed out of all of these communications.

Some jurisdictions have implemented regulations or policies allowing counsel for other parties to speak to caseworkers about logistical matters, but not about case planning or legal decisions.³²⁵ But the lines between case planning, legal decisions, and logistics are fuzzy, and caseworkers themselves talk to parents about legal decisions outside of court.³²⁶ Thus, even limited exceptions do not fully resolve the complications of imposing rules of attorney-client relationships in a context where legal and non-legal decisions are so entangled.

C. Checks on Prosecutors and Checks on Agencies

The story often told of the modern criminal prosecutor is one of unchecked power and unmet potential. The prosecutor is presented as a

³²² One prosecutor described parents' and children's counsels' attempts to speak with caseworkers as an ongoing tension. Prosecutor I, *supra* note 145. See also N.Y. STATE BAR ASS'N COMM. ON CHILD. & THE L., STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN 21 (2015) ("In some jurisdictions the attorney [for the child] is permitted free access to foster care/adoption case workers. In others, contact with the caseworker must be arranged through the agency's attorney.").

³²³ See Nanette Schorr, *ACS's Interpretation of the "No Contact Rule" Impedes the Reunification of Families*, 70 FORDHAM L. REV. 441, 441-42 (2001) (describing circumstances in which law guardians for children may speak directly to caseworkers).

³²⁴ See CHILDS. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CASE PLANNING FOR FAMILIES INVOLVED WITH CHILD WELFARE AGENCIES 2 (2018) (noting that a majority of states require agencies to seek the participation of parents in case planning).

³²⁵ See, e.g., Prosecutor I, *supra* note 145 (drawing the line at other parties' counsel debating the law or threatening motions to caseworkers without prosecutors present); N.M. CODE R. § 8.10.7.9 (LexisNexis 2024) (limiting contact between caseworkers and respondent's counsel to "the exchange of routine information"); Kara R. Finck, *A Robust Defense: The Critical Components for a Reimagined Family Defense Practice*, 20 CUNY L. REV. FN. F. 96, 107-08 (2017) (describing evolution of a New York City policy allowing for some communication between caseworkers and parties' attorneys).

³²⁶ See Prosecutor I, *supra* note 145 (noting that a policy prohibiting legal conversations between attorneys and caseworkers is "hard to police"); Finck, *supra* note 325, at 107-08 (describing practitioners' frustrations with New York City policy before its further amendment).

uniquely powerful figure,³²⁷ who should—but rarely does—serve as a vital check on police investigators.³²⁸ To understand the story of family regulation prosecutors, we must account for their power relative to agency investigators and the checks on each group.

1. The Power of Prosecutors, The Power of Agencies

The criminal legal system illustrates how plea bargaining practices expand prosecutorial power and diminish checks upon it. Legislators enact broad and deep criminal codes, giving police more grounds to arrest and prosecutors more charges to bring, all making it easier to extract pleas.³²⁹ More people plead guilty, with less judicial oversight. In the ninety-plus percent of criminal cases that resolve in pleas, judges examine prosecutors' charging decisions lightly at best.³³⁰ Limited available data appears to show that fewer family regulation cases resolve through non-trial means than criminal cases.³³¹ Though more cases may receive judicial review, that review tends to be cursory.³³² In this regard, family regulation prosecutors may exert less control over case outcomes than their criminal counterparts.

³²⁷ See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 173-74 (2019) (collecting scholarship describing prosecutors' power in terms like "prosecutors . . . are the criminal justice system's real lawmakers" and "prosecutors are the criminal justice system," but arguing that these descriptors may be overblown).

³²⁸ See Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 810 (2020) ("[B]oth the structure of American government and the rule of law itself require prosecutors, like judges, to be independent of those who might otherwise hold them accountable."); Natapoff, *Misdemeanor Declination*, *supra* note 25, at 962 ("Once we take seriously the importance of internal checks and balances within the carceral executive, the prosecutorial declination decision stands out for its unique power."); Vida B. Johnson, *White Supremacy's Police Siege on the United States Capitol*, 87 BROOK. L. REV. 557, 601 (2022) (explaining the argument that prosecutors' alignment with and dependency on police makes them less likely to prosecute police who violate the law); Levine, *supra* note 110, at 757-58 (describing ways in which prosecutors fail to check their law enforcement partners, including "refusing to pursue cases where police have violated a suspect's constitutional rights" and increasing the severity of charges "without checking the evidence presented by police").

³²⁹ See Stuntz, *supra* note 24, at 519-20 (explaining the consequences of broad and deep criminal codes for criminal prosecutions); Bellin, *supra* note 327, at 198-200 (examining the relative power of prosecutors and legislators and arguing that prosecutors "facilitat[e] the goals approved by . . . other actors," including legislatures).

³³⁰ See Barkow, *supra* note 23, at 871 ("In the 95% of cases that are not tried before a federal judge or jury, there are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion to bring charges . . .").

³³¹ See *supra* note 89 and accompanying text.

³³² See Melissa Carter, Christopher Church & Vivek Sankaran, *A Quiet Revolution: How Judicial Discipline Essentially Eliminated Foster Care and Nearly Went Unnoticed*, 12 COLUM. J. RACE & L. 497, 497 (2022) (collecting studies and scholarship showing that agency decisions to remove children from their parents are "not carefully scrutinized by courts" and observing that family court judges "often fail to perform th[e] core function" of "faithfully and rigorously applying the law").

One other feature of the family regulation system may also diminish the power of prosecutors relative to agencies. The vast majority of family regulation investigations resolve without any court filing, as the agency closes the case after investigation or after routing the family into ongoing out-of-court involvement.³³³ This means that even where agency investigators have extensive and ongoing contact with families, prosecutors may never be aware of the case.³³⁴

2. Deference to Agency Clients

Even still, we might expect family regulation prosecutors to provide a crucial check on agency overreach by rigorously reviewing the limited number of cases referred to them and exercising independent discretion over filing decisions. This, after all, is what criminal law norms (if not realities) tell us that prosecutors must do.³³⁵

Instead, most family regulation prosecutors—even some tasked with representing the public interest—represented agencies and viewed their roles as effectuating the goals of the agency, rather than exercising independent judgment over the appropriateness of the agency's goals or the agency's tactics in achieving those goals.³³⁶ Prosecutors might advise an agency about its likelihood of success in court or even encourage an agency to collect more evidence or reconsider its immediate plans, but they do so through the lens of adherence to legal standards rather than the lens of a just path forward for a family.³³⁷ A recent Ninth Circuit case neatly illustrates the extent of caseworkers' control. When a family alleged that caseworkers' removal of their child had violated the family's constitutional rights, the caseworkers asserted that they had absolute immunity from the suit because their decision

³³³ See *supra* notes 74–77 and accompanying text.

³³⁴ This, too, may have a parallel in the criminal legal system. See Bellin, *supra* note 327, at 192 (“Police dominate cases before they get to court, well before other officials get involved. This gives them great freedom to operate outside the justice system—something prosecutors generally lack.” (footnote omitted)).

³³⁵ See Abel, *supra* note 23, at 1770 (“Prosecutors who advocate the separation of powers in plea bargaining often do so because they think prosecutors have a duty to act as checks against police overreach.”); DAVIS, *supra* note 24, at 14–15 (arguing that prosecutors are “presumably best suited” to decide which offenses should be prosecuted, but that the self-regulation of prosecutorial discretion “has been either nonexistent or woefully inadequate”).

³³⁶ See *supra* Section II.B.

³³⁷ See *supra* Sections II.C–D.

to file a case was a “quasi-prosecutorial decision.”³³⁸ The role of actual prosecutors was apparently so insignificant as to be invisible.³³⁹

Though prosecutors pointed to their ethical obligations to present a case with a basis in law as a limit on their actions,³⁴⁰ those obligations do not serve the same checking function as an exercise of independent judgment. Even if the substantive law is narrow and prosecutors closely adhere to their ethical obligations—two big “ifs”³⁴¹—prosecutorial discretion is a broader concept than legal soundness. An action may have some colorable legal basis but still derive from unlawful investigative tactics or improper motives,³⁴² or still not reflect executive enforcement priorities or the best path forward for a child, their family, or their community.

For example, an agency might seek to remove a child when court-ordered supervision of the child could ensure that child’s safety. Even if the agency’s position is legally tenable, a prosecutor exercising independent discretion and acting in the public interest might overrule the agency for reasons ranging from the interests of the child to concerns about state resources.³⁴³ But if the prosecutor treats the agency as their client, they will advance the agency’s position unless they are able to sway their client’s opinion.³⁴⁴ Prosecutorial discretion could swing the other way, too: if an agency wants to send a child back to their parents but prosecutors think such a move will put a child at risk, a prosecutor representing an agency must advance reunification, whereas

³³⁸ *Rieman v. Vazquez*, 96 F.4th 1085, 1089–90 (9th Cir. 2024). The Ninth Circuit rejected the caseworkers’ claim of absolute immunity, noting that the family’s claims turned on allegations that caseworkers committed unlawful *investigative* acts (including fabricating evidence and committing perjury in an affidavit), rather than *prosecutorial* acts, but it did acknowledge that caseworkers “may enjoy absolute immunity from suit when they make ‘discretionary, quasi-prosecutorial decisions to institute court dependency proceedings to take custody away from parents.’” *Id.* at 1090 (quoting *Miller v. Gammie*, 335 F.3d 889, 898 (9th Cir. 2003) (en banc)).

³³⁹ See *id.* at 1090–91 (including no discussion of the role of prosecutors in the analysis of the caseworkers’ absolute immunity claim).

³⁴⁰ See *supra* notes 264–268 and accompanying text.

³⁴¹ See *supra* Section III.B.

³⁴² See generally Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180 (2013) (describing immigration prosecutors’ discretion to abandon cases where law enforcement violated individuals’ constitutional rights); Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor’s Role*, 47 U.C. DAVIS L. REV. 1591 (2014) (arguing that criminal prosecutors should decline to use evidence that was obtained unconstitutionally, even if it is admissible); Olwyn Conway, *Are There Stories Prosecutors Shouldn’t Tell?: The Duty to Avoid Racialized Trial Narratives*, 98 DENV. L. REV. 457, 505 (2021) (arguing that criminal prosecutors should consider dismissing charges when prosecuting the case would harm the community by perpetuating racialized stock stories and stereotypes).

³⁴³ See, e.g., Prosecutor E, *supra* note 145 (describing role of prosecutors in proactively advocating to expand visitation); Prosecutor K, *supra* note 145 (describing an instance where the prosecutor refused an agency request to bring forward a case, citing the best interest of the child).

³⁴⁴ See *supra* notes 232–243, 247–248 and accompanying text.

a prosecutor with discretion could refuse to make the application on behalf of the agency.³⁴⁵

3. Prosecutorial Discretion, Cabined by Agencies

In jurisdictions where prosecutors are empowered to exercise discretion, they check agency overreach or arbitrariness—to an extent. Prosecutors may decline to file a petition if they feel that there are community-based supports that could guarantee a child's safety instead, or they might request court-ordered supervision rather than a removal.³⁴⁶ Down the road, they may refuse to file a petition to permanently terminate a parent's rights when they do not think doing so would be in the best interest of the child or when they see evidentiary issues with a case due to an agency's tactics.³⁴⁷

Still, these prosecutors' discretion is limited by their access to information, by their ongoing relationships with agencies, and by agencies' ability to independently prosecute cases. Family regulation prosecutors typically only learn of cases from the investigating family regulation agency,³⁴⁸ just as criminal prosecutors typically learn of low-level cases from police.³⁴⁹ But distinct from low-level criminal cases, the information dissymmetry dynamic persists in family regulation cases after filing, as caseworkers continue to gather information on families for the duration of the case.³⁵⁰ Prosecutors get updates on families from caseworkers and base their legal positions on those updates.³⁵¹ In some offices, prosecutors may check in with caseworkers between court dates and push cases along,³⁵² but their own judgment about the wisdom of moves like expanding visitation is inevitably influenced by information gathered and presented by caseworkers.

Moreover, across jurisdictions, the same sets of prosecutors and caseworkers work together closely across multiple cases.³⁵³ As with the police-prosecutor relationship, the ongoing institutional and individual relationships foster consensus-building and may limit prosecutors' appetite for bucking

³⁴⁵ See, e.g., Prosecutor H, *supra* note 145 (describing a situation where the prosecutor opposed the agency's application to return a child home).

³⁴⁶ See, e.g., Prosecutor K, *supra* note 145 (describing efforts to seek alternatives to removal before filing petitions in most cases).

³⁴⁷ See, e.g., *id.* (describing a case where the prosecutor refused to move forward with a termination case because they believed the child could safely be reunified with that father).

³⁴⁸ See *supra* subsection II.C.1.

³⁴⁹ See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1338–40 (2012) (describing overdependence on police investigation in prosecutorial decisions for low-level cases).

³⁵⁰ See *supra* Section II.D.

³⁵¹ See *supra* notes 218–224 and accompanying text.

³⁵² See, e.g., Prosecutor E, *supra* note 145 (explaining that the prosecutor instructs staff to advocate for case progress with the agency).

³⁵³ See *supra* notes 229–231 and accompanying text.

agency's desires.³⁵⁴ If prosecutors do take positions adverse to agencies or overrule agencies' wishes, agencies may still be able to push back by independently making their arguments to judges or by bringing in their own lawyers.³⁵⁵ This sort of investigator-led or independent prosecution is not unheard of in criminal law, where police, private individuals, and attorneys general prosecute cases in some jurisdictions,³⁵⁶ but such practices are generally presented by scholars as aberrational and norm-defying.³⁵⁷

4. The Absence of Other Checks

Compounding the weakness of the prosecutorial check on agencies is the absence or weakness of other checks on agencies.³⁵⁸ In family regulation proceedings, judges themselves play quasi-investigative roles and parents have fewer individual rights and are less likely to have counsel than in criminal court.³⁵⁹ Further, there is no civil *Brady* requirement and prosecutors and agencies may withhold exculpatory information from parents.³⁶⁰ Nor are family regulation agencies immediately accountable to the public, as

³⁵⁴ See Natapoff, *Misdemeanor Declination*, *supra* note 25, at 985-86 (positing that a desire for a good relationship with the police makes prosecutors less likely to decline weak cases); Johnson, *supra* note 328, at 601 (summarizing arguments that criminal prosecutors are hesitant to be in conflict with police due to their close working and personal relationships); Jeffrey T. Wennar, *Enhancing Police and Prosecutors Relationships, Coordination and Processes*, PROSECUTOR, Jan. 2019, at 10, 17 (advocating for prosecutors and police to "work together as a team" to apply the laws "firmly and fairly").

³⁵⁵ See *supra* note 210 and accompanying text.

³⁵⁶ See Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1331-32, 1343 (1998) (listing states in which prosecution by police is permitted); JOHN D. BESSLER, PRIVATE PROSECUTION IN AMERICA 228 (2022) (noting a "split of authority" among states on whether private prosecution is allowed).

³⁵⁷ See, e.g., Natapoff, *Misdemeanor Declination*, *supra* note 25, at 1004 (stating that allowing police to prosecute cases "famously offends separation of powers").

³⁵⁸ See Arons, *supra* note 61, at 1108, 1114 (describing the failure of separation of powers doctrine and outside checks to check state overreach in family regulation cases); see also Cade, *supra* note 37, at 56-58 (contrasting checks on government overreach in criminal prosecutions with the absence of such checks in immigration prosecutions).

³⁵⁹ See Arons, *supra* note 61, at 1078 (describing the judicial role in family regulation proceedings); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27, 32 (1981) (holding that there is no categorical right to counsel for parents in termination of parental rights cases).

³⁶⁰ See E-mail from Parent Defense Lawyer, Agency-Representation Jurisdiction, to author (June 22, 2023, 10:50 AM) (describing pattern of prosecutors withholding factual information unfavorable to their position, including "recantations and other [B]rady-style disclosures"); see also Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13, 19 (2003) (recognizing that the duty imposed by *Brady v. Maryland*, 373 U.S. 83 (1963), for prosecutors "to share any potentially exculpatory evidence with criminal defense counsel," may not always apply to lawyers outside the context of criminal prosecution, but arguing to extend such an obligation to other government lawyers).

executive agencies.³⁶¹ And while family regulation prosecutors working out of local prosecutor offices, attorneys general offices, or some county attorney offices³⁶² might be subject to some degree of electoral accountability,³⁶³ the same cannot be said of prosecutors who work in-house in agencies or in county counsel offices in much of the country.³⁶⁴

D. *What Should the Role of the Family Regulation Prosecutor Be?*

Family regulation prosecutors do not share a common understanding of their role in a descriptive sense or in a normative sense. This is distinct from the criminal legal system, where prosecutors tend to endorse a shared normative account of the importance of their own independence.³⁶⁵ Some family regulation prosecutors see themselves as agents for their agency-clients and prize “staying in their lane”; others tout their independence and ability to check agencies’ overzealousness and over-lenience.³⁶⁶

Prosecutors’ normative views of their roles map onto their current realities. No prosecutor agitated for any functional change in their jurisdiction’s model or in their own roles.³⁶⁷ Fundamental normative questions—should prosecutors pursue cases in the interest of individual families or communities? Should their loyalty to the agency or to the public interest be paramount? Should agencies be treated as unimpeachable experts? Should agency power be curbed to limit agency abuses?—prompt contradictory answers.

³⁶¹ See Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1770 (2021) (tracing growth of gubernatorial power and control of agencies and arguing that “it has become plausible to speak of agency accountability in the states as one does at the federal level—to talk of agency actions as those of the [Governor’s name] Administration’ rather than of freewheeling agents”).

³⁶² See, e.g., TEX. LOC. GOV’T CODE ANN. § 22.071(b) (2022) (allowing for city attorneys to be appointed or elected).

³⁶³ See, e.g., Ronald F. Wright, Jeffrey L. Yates & Carissa Byrne Hessick, *Electoral Change and Progressive Prosecutors*, 19 OHIO STATE J. CRIM. L. 125, 128-29, 144 (2021) (analyzing prosecutors’ incumbency win rates and finding a recent drop).

³⁶⁴ See Cardozo, *supra* note 302, at 7 (distinguishing between state attorneys general and “their appointed counterparts, such as corporation counsels or city attorneys”); see also, e.g., N.Y.C. CHARTER § 6(a) (allowing the mayor to appoint corporation counsel); *County Counsel*, CAL. STATE ASS’N OF COUNTIES, <https://www.counties.org/county-office/county-counsel> [<https://perma.cc/29SS-EE6Y>] (last visited Oct. 18, 2024) (explaining that county counsel is an appointed position).

³⁶⁵ See *supra* Section I.C.

³⁶⁶ See *supra* Section III.C.

³⁶⁷ One prosecutor operating in a jurisdiction where she was statutorily bound to act in the public interest but under a model where she represented the agency directly argued for a change in her jurisdiction’s statute to harmonize the jurisdiction’s formal and functional approaches. Prosecutor H, *supra* note 145. Another was agnostic as to whether she worked out of a local prosecutor’s office or a county attorney’s office, so long as she continued to directly represent the agency. Prosecutor I, *supra* note 145.

This confusion over the role of prosecutors in the family regulation system owes to the confusion over the purpose and function of the system itself. If we conceive of the family regulation system as a rehabilitative project and family regulation agencies as the benign facilitators of that project, then perhaps the power of those agencies does not need to be checked to the extent that the power of police agencies needs to be checked. To that end, if family regulation court proceedings are in fact places where agencies and parents can speak for themselves and come to consensus-based resolutions, then perhaps agencies should drive in-court decisionmaking and such a role is consonant with agencies' out-of-court roles.

These conceptions do not square with the realities of the family regulation system. It is neither benignly rehabilitative nor collaborative and problem-solving. It is a punitive project of social control, where agencies use their out-of-court intrusions into families' lives to fuel prosecutions of them.³⁶⁸ Ideals of collaboration and informality in court are hard to square with the power imbalances between individual litigants and the state,³⁶⁹ or with parents' limited procedural protections.³⁷⁰

The lack of clarity about the role of prosecutors in the family regulation system speaks to the lack of clarity about the nature of the family regulation system itself and the space between idealized conceptions of it and the realities faced by the hundreds of thousands of families entangled in it every year. The next Part considers what role prosecutors should play in the family regulation system if we begin with a more honest accounting of the purpose and function of the system.

IV. A MORE HONEST APPROACH TO FAMILY REGULATION PROSECUTIONS

Previous recommendations for prosecutorial models of family regulation cases have assumed the family regulation system is rehabilitative,³⁷¹ agencies

³⁶⁸ See *supra* Section I.A.

³⁶⁹ See Amy Sinden, "Why Won't Mom Cooperate?": *A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 354 (1999) (noting that when parents and agencies disagree in court, parents—typically mothers—are often blamed); see also *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 43 (1981) (Blackmun, J., dissenting) (observing that "the [s]tate . . . will marshal an array of public resources to establish that the parent-child separation must be made permanent" and describing those resources).

³⁷⁰ See *supra* Section I.C.

³⁷¹ See Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 746 (explaining the rehabilitative assumption); AM. BAR ASS'N, STANDARDS OF PRACTICE, *supra* note 63, at 2 (describing family regulation agency standards as intended to benefit children and families).

have expertise that deserves deference,³⁷² and agencies act cohesively and consistently.³⁷³ But the history of the family regulation system and the experiences of families and prosecutors within it upset those assumptions. The recommendations set forth here proceed from a very different set of assumptions: the family regulation system is punitive,³⁷⁴ agencies' expertise is in investigations as much as in rehabilitation,³⁷⁵ and family regulation agencies are diffuse and personnel within them take actions driven by resource constraints, interpersonal dynamics, and bias in addition to agency policy.³⁷⁶

Those diverging assumptions lead to a different recommendation: move the lawyers prosecuting family regulation cases to local prosecutors' offices, give discretion to those prosecutors, and sever the attorney-client relationship between prosecutors and agencies.

This, I acknowledge, is a counterintuitive proposal. It swims against the torrent of scholarship rightfully decrying unchecked prosecutorial power in criminal cases. What is more, formal distinctions between prosecutorial models in family regulation cases are not decisive, as the preceding Part shows. Nevertheless, I suggest that this shift would create new checks on agency overreach and serve the expressive value of recognizing family regulation prosecutions as just that—prosecutions. But so long as the family regulation system continues to run on carceral logic, firewalling support for families struggling from societal problems behind punishment of individual parents, the benefits of any reforms to prosecution models will be marginal. Ultimately, we must provision for the welfare of children without relying on systems of prosecution and punishment.

A. *The Value of an Explicitly Prosecutorial Model*

Placing family regulation prosecutors in local prosecutors' offices and tasking them with representing the public interest and exercising independent discretion over initial filing and ongoing legal decisions would serve to check arbitrary agency decisionmaking, ease ethical concerns, and increase accountability.

³⁷² See Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 806-07 (giving examples of agencies' services and specialized knowledge); AM. BAR ASS'N, STANDARDS OF PRACTICE, *supra* note 63, at 3 (describing reliance on and value of agency's expertise).

³⁷³ See Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 806 (arguing that agencies are "best situated to apply the system's goals in a coherent and pragmatic manner"); AM. BAR ASS'N, STANDARDS OF PRACTICE, *supra* note 63, at 3 (describing one benefit of agency representation model as "consistent decision making and interpretation of laws").

³⁷⁴ See *supra* Section I.A.

³⁷⁵ See *supra* Sections I.B & II.F.

³⁷⁶ See *supra* Sections II.D, II.E & III.B.

Two initial (and interrelated) notes: First, why local prosecutors' offices? Perhaps these same benefits could be realized by granting prosecutors discretion and rejecting the agency-representation model while keeping prosecutors in county counsel offices or even in agencies. But there is expressive value in placing prosecutors within local prosecutors' offices. This move would situate family regulation prosecutions as one strand of a larger carceral net. The family regulation system tends to be cast as a gentler alternative to the criminal legal system.³⁷⁷ Accordingly, litigants in it have been overlooked and afforded fewer protections than in criminal legal proceedings.³⁷⁸ Yet the stakes of family regulation cases are sky-high.³⁷⁹ At stake is the integrity of the parent-child relationship, of extended families, of entire communities. In one prosecutor's words: "*I tell people all the time I'd rather go to prison than have someone take my kid away.*"³⁸⁰ Moving the prosecution of family regulation cases to local prosecutors' offices would affirm that the family regulation system is not a benign intervention and that cases within it must be treated as gravely serious matters, worthy of the attention paid to criminal prosecutions and criminal prosecutors. Call this an antidote to criminal law exceptionalism.³⁸¹ No less than police, family regulation agencies warrant skepticism, scrutiny, and careful checking mechanisms, rather than deference.

Second, the elephant in the room: Why give *more* power to prosecutors, when so much has been said about the need to curb prosecutorial power to stem the tide of mass incarceration and reduce racial disparities in the criminal legal system? Why assume that family regulation prosecutors will exercise their discretion to check family regulation agencies, when criminal prosecutors so often rubberstamp police decisionmaking? Over the past

³⁷⁷ See Roberts, *Abolishing Police*, *supra* note 54 (expressing concern over proposals to divest from police and invest in family regulation systems).

³⁷⁸ See, e.g., *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27, 32 (1981) (claiming a "presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom" and holding that there is no blanket right to counsel for parents in termination of parental rights cases).

³⁷⁹ See *id.* at 59 (Stevens, J., dissenting) ("A woman's misconduct may cause the State to take formal steps to deprive her of her liberty . . . [including] incarcerat[ing] her for a fixed term, and . . . permanently depriv[ing] her of her freedom to associate with her child . . . [O]ften the deprivation of parental rights will be the more grievous . . ."); *id.* at 40, 42 (Blackmun, J., dissenting) (positing that "there can be few losses more grievous than the abrogation of parental rights" and rejecting the "insensitive presumption that incarceration is the only loss of liberty sufficiently onerous to justify a right to appointed counsel").

³⁸⁰ Prosecutor K, *supra* note 145.

³⁸¹ See Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1385-87 (2022) (critiquing the long history of treating criminal law as exceptional and instead framing criminal law as but one instantiation of the "punitive logics embedded in a host of U.S. institutions, from housing policy to employment law . . .").

several decades, scholars have documented how an ever-widening net of liability, coupled with a shrinking trial rate, has empowered criminal prosecutors to charge and adjudicate virtually unchecked.³⁸² And though these prosecutors are held out as a check on police overreach normatively,³⁸³ empirical research shows that particularly in low-level cases, prosecutors almost always agree with police charging decisions.³⁸⁴ Prosecutors are embedded in a carceral system.³⁸⁵ Perhaps unsurprisingly, “Prosecutors prosecute.”³⁸⁶

Scholars confronting criminal prosecutorial power have proposed any number of solutions, including external measures like subjecting prosecutors’ decisions to more searching judicial review, enacting legislative charging guidelines, limiting or abolishing plea-bargaining, and narrowing prosecutorial immunity,³⁸⁷ and internal measures like reorganizing prosecutors’ offices, incentivizing more rigorous initial screening by line-level prosecutors, and installing progressive prosecutors.³⁸⁸ Absent from this long list: any proposals seeking to grant *police* rather than prosecutors control over prosecutions. Indeed, scholars react to those little-studied jurisdictions where police *do* control criminal prosecutions with alarm.³⁸⁹ Whatever many valid

³⁸² See Stuntz, *supra* note 24, at 509 (discussing the lawmaking and adjudication power of prosecutors); Barkow, *supra* note 23, at 871 (holding that federal prosecutors are the final adjudicators in the vast majority of cases).

³⁸³ See *supra* note 23 and accompanying text; Natapoff, *Misdemeanor Declination*, *supra* note 25, at 941 (describing prosecutorial discretion as a potentially potent intrabranch check and acknowledging the weakness of that check in practice).

³⁸⁴ Natapoff, *Misdemeanor Declination*, *supra* note 25, at 980.

³⁸⁵ See I. Bennett Capers, *Still Against Prosecutors*, 13 CALIF. L. REV. ONLINE SYMP. 95, 102 (2022) (“Because the system itself is predicated on carceral logics, even a progressive prosecutor who sets out to do ‘justice’ is likely to fail.”); Cade, *supra* note 37, at 47 (describing the core mission of prosecutors as law enforcement).

³⁸⁶ Cade, *supra* note 37, at 47.

³⁸⁷ See, e.g., Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 302 (2005) (arguing for “[j]udicial oversight of sentence bargaining”); PFAFF, *supra* note 32, at 210-12 (arguing for guidelines for prosecutors); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2009 (1992) (arguing for the abolition of plea-bargaining); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1560-61 (1981) (arguing for limits on plea bargaining discounts for sentencing); Natapoff, *Misdemeanor Declination*, *supra* note 25, at 1000 (arguing that prosecutorial immunity should not be absolute when prosecutors are merely “rubber-stamping” police decisions).

³⁸⁸ See, e.g., Barkow, *supra* note 23, at 895-06 (arguing for greater internal supervision and separation of functions); Natapoff, *Misdemeanor Declination*, *supra* note 25, at 993-99 (arguing for prosecutors to more rigorously screen arrests); Rinat Kitai-Sangero, *Plea Bargaining as Dialogue*, 49 AKRON L. REV. 63, 77-78 (2016) (similar); EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION xxv-xxix (2019) (considering whether the progressive prosecutor movement can end mass incarceration).

³⁸⁹ See Natapoff, *Misdemeanor Declination*, *supra* note 25, at 1004 (noting that between ten and fourteen U.S. jurisdictions allow police to handle misdemeanor prosecutions, observing that this phenomenon receives little scholarly attention, and concluding, “[t]his arrangement completely

concerns we might have about prosecutorial power, the solution surely is not to abdicate that power to police—and yet, that is essentially what many jurisdictions have done in the family regulation context.

The point is not that prosecutorial discretion is a panacea. Rather, it is that prosecutorial discretion is at least preferable to uncabined investigator discretion. Prosecutorial discretion can serve as a modest check on investigators' biases and overzealousness, particularly in conjunction with the reforms advocated for by criminal law scholars. Even now, criminal prosecutorial discretion appears to curb some racial disparities in sentencing,³⁹⁰ and some federal and state prosecutors exercise their discretion to screen charges more aggressively and systematically decline to prosecute certain categories of charges.³⁹¹ I offer prosecutorial discretion as a pragmatic proposal that takes as given “our status quo system of pervasive disparities, sweeping police powers, and a Court that is passive in checking disparate impacts”³⁹² and answers the question: what can we do with the system we have now, while we envision a better future?

1. Checking Agency Power and Representing the Public Interest

A move to a more traditional prosecutorial model will generate greater checks on family regulation agencies' vast power. Under this model, prosecutors would be tasked not with directly representing agencies but instead with acting in the public interest and exercising their own discretion accordingly.

The “public interest” must mean more than the best interest of the child in this particular case, a hyper-discretionary and myopic benchmark.³⁹³ Prosecutors should also consider the interests of the child's family and the child's community. This set of considerations, in turn, would require that prosecutors account for the racist and classist history and purpose of the

eliminates any intrabranched checking of the charging decision by permitting the law enforcer to serve as the adjudicator”); see also Horwitz, *supra* note 356, at 1367 (arguing that police prosecution is bad public policy).

³⁹⁰ See Hannah Schaffer, *Prosecutors, Race, and the Criminal Pipeline*, 90 U. CHI. L. REV. 1889, 1892 (2023) (“I find that prosecutors have increasingly used their discretion in recent years to *reduce* racial disparities by penalizing the prior convictions of white defendants more than Black defendants.”).

³⁹¹ See Natapoff, *Misdemeanor Declination*, *supra* note 25, at 973 (noting that federal prosecutors decline about one-third of felony cases and that some state prosecutors screen individual misdemeanors rigorously and categorically decline to prosecute certain crimes).

³⁹² Schaffer, *supra* note 390, at 1955 (arguing that while prosecutorial discretion cannot check systemic biases in the criminal legal system, it may yet be a practical way to mitigate racial disparities in charging and sentencing).

³⁹³ See, e.g., *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 45 n.13 (1981) (Blackmun, J., dissenting) (criticizing the “best interests” standard as offering “little guidance” to judges).

family regulation system, just as criminal prosecutors should³⁹⁴—and sometimes do³⁹⁵—account for structural and personal racial and class biases. Prosecutors should carefully probe whether an agency’s allegations amount to issues of child safety or instead reflect the biases or frustrations of caseworkers expecting “compliance” from parents.³⁹⁶ This approach of considering historic context already has a place in family regulation law through the Indian Child Welfare Act.³⁹⁷

A wider view of the public interest could allow prosecutors to prioritize the prosecution of certain classes of cases—for instance, allegations of physical abuse over allegations of neglect—and decline to prosecute other classes of cases—for instance, allegations of marijuana use by parents or absence of material resources.³⁹⁸ This approach could do more to ensure consistency than the misplaced hope that agencies, and their thousands of employees through many layers of bureaucracy, will adhere to policies consistently and dispassionately.³⁹⁹

Thus equipped, prosecutors could render their own judgments as to appropriate legal steps in a case, considering not only whether a certain action is legally baseless or likely to succeed but also whether that action is in the public interest. Though agencies would still play outsized roles, as discussed at greater length below, prosecutors could decline outright to file petitions they view as unnecessary to ensure a child’s safety or motivated by caseworkers’ biases or frustrations rather than safety concerns or agency policy. They could decline to take those actions unilaterally, without escalating up a caseworker’s chain of command, attempting to come to consensus with agency personnel, or giving in to pressure to take the action

³⁹⁴ See, e.g., Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 821, 823 (2013) (arguing that prosecutors should use their power and discretion to reduce racial disparities in charging and plea-bargaining decisions).

³⁹⁵ Shaffer, *supra* note 390, at 1892.

³⁹⁶ Prosecutors expressed awareness of this dynamic, but under an agency-representation model, that awareness may not lead to any change in their actions. Prosecutor G, *supra* note 145.

³⁹⁷ See generally Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47 (2008) (positioning the Indian Child Welfare Act as “partial reparations for human rights violations committed against Native peoples and their children”); see also Jessica Dixon Weaver, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 109, 145 (2008) (arguing for the passage of an equivalent law for Black children).

³⁹⁸ This sort of prioritization by agencies is not without precedent. See, e.g., N.Y.C. ADMIN. FOR CHILDS. SERVS., *supra* note 319. Whether agency personnel adhere to that prioritization is a different matter. *Id.* (describing agency attorneys’ inability to cajole the agency into adhering to its own policy).

³⁹⁹ See Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 806 (arguing that agency control of filing decisions would lead to greater consistency in agency actions and stricter adherence to agency policies).

that their client wished to take despite their own best judgment or ethical concerns.

The examples I have given demonstrate how prosecutors could ratchet down agencies' impulses. Other scholars have expressed concerns that a move to a local prosecutor model could have the opposite effect, allowing prosecutors steeped in the culture of the criminal legal system to bring a punitive perspective to a rehabilitative process.⁴⁰⁰ That concern is well-founded in the juvenile delinquency context, where prosecutors tend to be more punitive when making filing decisions than actors employed by agencies.⁴⁰¹

There is reason to think that prosecutions of family regulation cases would be different, in large part because in the normal course family regulation prosecutors would only be presented with an opening to *ratchet down* rather than *ratchet up* state intervention on families. This is a key difference from the juvenile delinquency context, owing to the pre-filing role of agencies in both systems. In juvenile delinquency proceedings, most cases begin with an arrest by police.⁴⁰² Thus, the filing decision is typically the first point of contact with a child for prosecutors and agency personnel alike. In family regulation cases, by the time filing decisions are made, family regulation agencies have already conducted investigations, concluded that court intervention is warranted, and referred the case for prosecution. In this context, prosecutors can only ratchet down a filing decision. The only chance they have to ratchet up is in the very rare instance where a case arrives to them independent of the agency.⁴⁰³

In those rare instances where prosecutors initiate cases absent agency involvement, or in the more typical situation where prosecutors and agencies differ on the appropriate next steps after filing, agencies would have ample opportunity to push back on prosecutors. This is because prosecutors would still have to rely on agencies to investigate and conduct out-of-court work,⁴⁰⁴

⁴⁰⁰ *Id.* at 802 (“Locating charging decisions in elected prosecutors’ offices likely leads to the overvaluation of punitive or deterrence goals and the subordination of rehabilitative goals . . .”).

⁴⁰¹ *See id.* at 779 (describing the increase in the percent of children prosecuted, rather than diverted, in the juvenile system as prosecutors’ charging authority increased).

⁴⁰² *What is Juvenile Justice?*, ANNIE E. CASEY FOUND. (Apr. 8, 2024), <https://www.aecf.org/blog/what-is-juvenile-justice> [<https://perma.cc/W3FK-PKU4>] (“While the vast majority of referrals come from police, youth also can be referred by educators, parents, alleged crime victims or other members of the community.”).

⁴⁰³ *See supra* notes 212–215 and accompanying text (describing one prosecutor’s experience receiving referrals from non-agency sources).

⁴⁰⁴ *See DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 207–08 (1989) (Brennan, J., dissenting) (arguing that “the State’s knowledge of an individual’s predicament and its expressions of intent to help him can amount to a limitation on his freedom to act on his own behalf or to obtain help from others,” and going on to observe that a state’s “law invites—indeed, directs—

so agencies would still make the out-of-court decisions that shape the evidence received by judges. Agencies, too, could still turn to their in-house counsel or lawyers from other state offices to represent them and advocate for their position.⁴⁰⁵

Jurisdictions might also experiment with explicitly granting prosecutorial discretion as a one-way ratchet, with prosecutors empowered to override agencies to *restrain* state intervention in families but not to amplify it.⁴⁰⁶ In this model, prosecutors could not unilaterally make decisions to separate families. Instead, prosecutors and agencies would have to agree to initiate a case against a family or seek orders separating a family after filing. Put differently, agencies could retain veto power over these decisions. Prosecutors could unilaterally decline to file a case or decline to seek later orders separating a family or reducing visitation—or unilaterally elect to take legal steps to return a child home or expand visitation. In the final of these scenarios, the agency would still play a large role in shaping the family's trajectory, because the agency would still present information to prosecutors and serve as the primary source of evidence in court.

Moving prosecutors outside agencies and granting them discretion is not the only possible way to check agency overreach. Josh Gupta-Kagan, in his examination of family regulation prosecution, sets forth a thorough and thoughtful argument that prosecutors *directly representing agencies* could provide a meaningful check on agencies by counseling their clients to adhere to internal guidelines and policies and by opening agencies up to judicial review of their adherence to these policies.⁴⁰⁷ This argument finds further support in administrative law scholarship.⁴⁰⁸ However, it is an argument easier to make in the hypothetical than in reality. Gupta-Kagan's description of the prosecutor–agency relationship is a formal accounting rather than a functional one, and he notes the need for further empirical study.⁴⁰⁹ Thus, when he describes the checking potential of an agency-representation model, he does so assuming a world where agencies actually act rehabilitatively rather

citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse”).

⁴⁰⁵ See *supra* notes 248–252 and accompanying text (describing instances where agencies sought legal representation from non-prosecutor government lawyers).

⁴⁰⁶ Some jurisdictions already allow for a one-way ratchet in a *more* invasive direction, allowing agencies to review cases that prosecutors declined to initiate, see, for example, WYO. STAT. ANN. § 14-3-204(a)(viii) (2023), or allowing prosecutors to review cases that agencies decline to initiate. See, e.g., N.C. GEN. STAT. § 7B-305 (2023).

⁴⁰⁷ Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 798–823.

⁴⁰⁸ See, e.g., Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1564 (2007) (“[L]egal advice from within the executive branch [is] an essential component of efforts to safeguard civil liberties, the constitutional allocation of governmental authority, and the rule of law.”).

⁴⁰⁹ Gupta-Kagan, *Family-Court Prosecutors*, *supra* note 19, at 797.

than punitively, judges have an appetite for checking agency power, and agencies and prosecutors are amenable to counseling *away from* instead of *toward* filing.⁴¹⁰ The descriptive accounts in this Article and elsewhere shows the gap between that potential and our current reality.⁴¹¹ Prosecutorial discretion vested in prosecutors representing the public interest is at the very least a reality-tested, albeit imperfect, means of checking investigators' power.⁴¹² Further, opening a debate—suggesting that family regulation prosecution is a topic worthy of scholarly interest and debate—is itself a goal of this Article.

2. Reducing Ethical Quagmires

Moving prosecutors to local prosecutors' offices and empowering them to solely represent the public interest also eases the ethical problems identified in the previous Part.⁴¹³ Prosecutors would not need to balance their loyalty to their client against their loyalty to the public interest, as they would serve no client other than the public interest. Nor would prosecutors need to balance their ethical obligations forbidding frivolous legal actions against their loyalty to their employers, as they would not work for agencies. Prosecutors would also be freed of the complicated task of organizational representation of the many-headed hydrae that are family regulation agencies,⁴¹⁴ as they would no longer represent agencies. And because prosecutors would no longer represent agencies or caseworkers as clients, other lawyers in the family regulation system could freely speak with caseworkers so long as they properly identified themselves, opening up a key line of communication—a seemingly small change that would be a boon for families and allow lawyers to meet federal recommendations for high-quality legal representation for parents.⁴¹⁵

Even if jurisdictions retain their direct-representation models, we should consider how to better hold prosecutors to their ethical obligations. Though the decision to pursue a frivolous claim at a client's behest is reportable to the bar, defense attorneys may not feel comfortable lodging such reports in the

⁴¹⁰ *Id.* at 799, 812, 821.

⁴¹¹ See *supra* Part II; see also Arons, *supra* note 61, at 1061, 1072-73 (describing the failure of courts to check agencies' illegal home searches).

⁴¹² See *supra* notes 390-392 and accompanying text.

⁴¹³ See *supra* Section III.B.

⁴¹⁴ See Mack, *supra* note 47 (describing the family regulation system as a "hydra").

⁴¹⁵ ADMIN. FOR CHILD., YOUTH & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., ACYF-CB-IM-17-02, HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS 14 (2017) ("Attend and participate in case planning, family group decision-making and other meetings a client may have with the child welfare agency.").

small world of the family regulation system.⁴¹⁶ Further, the odds of such bar complaints leading anywhere are slim.⁴¹⁷ Stakeholders—parent-defense organizations, judges, agency heads, and prosecutors themselves—presumably have a shared interest in the legitimacy and ethicality of family regulation proceedings. Several reforms could better protect those interests and supplement formal grievance proceedings with the bar. First, prosecutors and agencies could streamline the process for line-level prosecutors to overrule agencies’ decisionmaking when there is no legal basis for an application. Second, prosecutors’ offices could internally track those caseworkers who repeatedly requested unsupported actions and review their cases more closely.⁴¹⁸ And third, prosecutors and the defense bar could develop a reporting system through which the defense bar (rather than individual defense lawyers) could lodge complaints about particular prosecutors, to be referred and reviewed by supervisors in prosecutors’ offices.

3. Increasing Accountability

Finally, a new model could do more than shift power between prosecutors and agencies; it could also give the public greater control over family regulation prosecutions by increasing prosecutors’ electoral accountability. While electoral accountability for local criminal prosecutors has often been more myth than reality, recent successes—and failures—at the ballot box by so-called progressive prosecutors show that the public has some appetite, at least, for exerting control over prosecutions in their communities.⁴¹⁹ As the family regulation system becomes increasingly visible and skepticism of it grows, thanks to the tireless efforts of families and activists,⁴²⁰ we might

⁴¹⁶ See, e.g., Interview with Family Defense Attorney (Dec. 4, 2023) (notes on file with author) (describing the challenges of responding to ethical violations by prosecutors).

⁴¹⁷ Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 292 (2007) (finding only forty-four cases between 1970 and 2003 where prosecutors faced disciplinary proceedings for misconduct that negatively affected criminal defendants); Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 894 (2015) (“Courts and ethics bodies rarely sanction prosecutors, and the rare disciplinary measures tend to be mere slaps on the wrist.”).

⁴¹⁸ For a discussion of criminal prosecutors maintaining analogous “bad cop” or “Brady lists”, see Rachel Moran, *Brady Lists*, 107 MINN. L. REV. 657 (2022).

⁴¹⁹ See Wright et al., *supra* note 363, at 128, 144 (finding that more “progressive prosecutors” have been elected, although incumbent prosecutors won re-election in 87% of races and that there appears to be a “growing popular interest in and control over local criminal justice policy”).

⁴²⁰ See, e.g., Michael Fitzgerald, *Rising Voices for ‘Family Power’ Seek to Abolish the Child Welfare System*, IMPRINT (July 8, 2020, 11:45 PM), <https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/4514> [<https://perma.cc/2TMB-MWBM>] (highlighting activists and families who are raising awareness of the family regulation system’s flaws, leading to greater public scrutiny); Molly Schwartz, *Do We Need to Abolish Child Protective Services?*, MOTHER JONES (Dec.

imagine a future in which voters demand more equitable and less draconian approaches to family regulation as well, and demand that prosecutors act as that downward ratchet.

At base, this argument for local prosecutors charged with acting in the public interest and vested with discretion challenges a dichotomy that positions agencies as rehabilitative, on one side, and prosecutors as punitive, on the other. As prosecutors, caseworkers, and parents know all too well, agencies punish parents for their poverty, their race, their emotions, and their refusal to accede to caseworkers' demands.⁴²¹ This is not to say that prosecutors are pure in their rehabilitative intentions. It is to say that having any check on agency power is preferable to no check.

B. *The Limits of an Explicitly Prosecutorial Model*

Even with these advantages, a shift to a local-prosecutor, public-interest model would not resolve the fundamental tension between the family regulation system's purported purpose and its actual function or rid it of the carceral logic that animates it. The interviews conducted for this Article reveal that prosecutors working under a local prosecutor model still work closely with agencies, try to reach consensus with them before taking action, and tie rehabilitation to surveillance and compliance.⁴²² Prosecutors, too, may be farther removed from the communities whose interests they seek to represent than agency personnel.⁴²³ Further, the indeterminacy of legal

10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services> [<https://perma.cc/PP89-96QH>] (noting the growing debate over whether the current family regulation system serves the best interest of families or exacerbates challenges for marginalized communities).

⁴²¹ See, e.g., Newman, *supra* note 72 (recounting a survey of caseworkers that found that "symptoms of poverty are frequently punished as signs of neglect" and that "Black and brown parents are treated at every juncture as if they are not competent parents capable of providing acceptable care to their children"); Dinah Ortiz-Adames, *Battle Bonded in Family Defense*, MEDIUM (May 17, 2018), <https://medium.com/@bronxdefenders/battle-bonded-in-family-defense-9875c1c12f97> [<https://perma.cc/R77C-D65E>] (describing her frustration with caseworkers and caseworkers' unyielding expectations for compliance).

⁴²² See *supra* Sections II.D–E.

⁴²³ Anecdotally, approximately three-quarters of the prosecutors interviewed for this project presented as white women, even as almost all worked in jurisdictions where white children make up a minority of children in foster care. Caseworkers, particularly in urban areas, are more likely to be Black. See NAT'L CHILD WELFARE WORKFORCE INST., CHILD WELFARE WORKFORCE DEMOGRAPHIC TRENDS (2000–2010): SNAPSHOT OF THE FRONTLINE CHILD WELFARE CASEWORKER 1 (2011), https://ncwwi.org/files/Workforce_Demographic_Trends_May2011.pdf [<https://perma.cc/S4VU-L2DF>] (noting that the average frontline family regulation worker nationally is a white female, although if she works in an urban setting she is more likely to be Black); Newman, *supra* note 72 (noting that most caseworkers in New York City are Black). See generally Mulzer & Urs, *supra* note 45 (tracing the role of white women as "child-savers" inside and outside the family regulation system, from the Progressive Era to the present day). A similar trend has been

standards in family regulation cases augments prosecutorial power.⁴²⁴ And to invite the elephant back into the room: the criminal system shows all too well the dangers of investing vast and unchecked power in prosecutors and of reifying myths of prosecutors as ministers of justice who act independently of the police.

Rather than seeing the move to a local prosecutor model as an end goal, I set it forth as an interim step that more honestly accounts for the purposes of the family regulation system and places greater checks upon agency actions within it. The larger goal must be the deconstruction of our carceral approach to child wellbeing.

As more than one prosecutor observed, the family regulation system is a last-gasp intervention,⁴²⁵ one unable to offer sufficient support or resources to families to prevent their crises and unable to solve the much larger societal problems that drive families into it. That list of problems can be set out in longhand—a lack of affordable housing and inadequate material support for families; failing schools and the absence of universal childcare; an inability to access medical care, mental healthcare, and substance abuse treatment—or in shorthand—racial capitalism.⁴²⁶ Honestly accounting for the carceral logic of the family regulation system is not a sufficient goal, nor even is ridding the family regulation system of its carceral logic. A more meaningful goal is this: meeting the needs of all families, full stop, outside any individualized system of rehabilitation or punishment.

observed in the criminal legal system, where prosecutors' offices are less diverse than police forces. Roger A. Fairfax, Jr., *Prosecutors, Ethics, and the Pursuit of Racial Justice*, 19 OHIO STATE J. CRIM. L. 25, 31-32 (2021).

⁴²⁴ Gupta-Kagan, *Confronting Indeterminacy*, *supra* note 73, at 220 (describing nebulousness of the legal standard of "neglect"); Stuntz, *supra* note 24, at 509 (noting that criminal codes cover "everything" and thus delegate vast power to prosecutors); *see also* Hallett, *supra* note 37 (criticizing reforms that expand immigration prosecutors' discretion rather than narrowing substantive immigration laws).

⁴²⁵ Prosecutor E, *supra* note 145 ("[What's] heartbreaking [is] the scarcity of resources and all of the problems. We still have to be mindful of what is our job, we are only really allowed to do our job Our system is totally clogged up and very flawed."); Prosecutor K, *supra* note 145 ("I think that a lot of the issues in child welfare cases can be addressed by front loading efforts. I think that we've put a lot of effort into trying to put little band aids on it [T]he hardest thing to deal with that really no one has a fix for is that a lot of people just don't have support.").

⁴²⁶ *See* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 3, 14 n.60 (2019) (citing CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 2 (2d ed. 2000)) (defining racial capitalism as the economic structure endemic to the United States, under which capital accumulation and the exploitation of labor are facilitated by racial hierarchy and the deep inequalities produced by that hierarchy).

CONCLUSION

Considering the family regulation system's astonishing sweep,⁴²⁷ the near silence around the role of family regulation prosecutors is remarkable. This Article urges us to engage: to recognize the stakes of family regulation prosecutions, to grapple with their purpose and function, and to consider who should speak for the state as it seeks a court's imprimatur to intervene violently on families' lives.

Through its initial descriptive, theoretical, and normative insights, this Article raises and refines questions about the proper roles of prosecutors and agencies and the division of discretion and power between those two entities. These questions require further empirical research to better understand prosecutorial practices across the country and how those practices affect families' autonomy and wellbeing. That research, in turn, must fuel a more robust, more informed, and more nuanced discussion not just about which approaches to prosecution best safeguard children and protect families' autonomy within the family regulation system, but also how to move away from a prosecutorial approach to child welfare.

⁴²⁷ Kim et al., *supra* note 50, at 277 (finding that thirty-seven percent of children in the United States are subjected to a family regulation investigation before age eighteen).