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BRADLEY T. TENNIS

## Uniform Ethical Regulation of Federal Prosecutors

**ABSTRACT.** Federal prosecutors are subject to a bewildering array of ethical regulations ranging from state ethical codes to local rules adopted by federal courts to the internal policies of the Department of Justice. The inconsistent and overlapping application of these ethical rules has led to regulatory confusion that has inhibited the development of clear ethical expectations for federal prosecutors. To ensure the consistent enforcement of federal criminal law, a uniform system of ethical regulation—dividing regulatory authority amongst the courts, the Department of Justice, and a yet-to-be-created independent ethical review commission—should be adopted to replace the existing regulatory framework.

**AUTHOR.** Yale Law School, J.D. expected 2011; Stanford University, M.S. 2008; Harvey Mudd College, B.S. 2006. I would like to thank Professors Jerry L. Mashaw and Robert W. Gordon for introducing me to the topic, for highlighting the unique ethical considerations bearing on federal government lawyers, and for their guidance as this paper began to take shape. I am especially grateful to John Lu, Caitlin O'Brien, and Rachel Saltzman for their thoughtful comments on earlier drafts.



## **NOTE CONTENTS**

<b>INTRODUCTION</b>	146
<b>I. THE REGULATORY LANDSCAPE FOR FEDERAL PROSECUTORS</b>	148
A. Controversy Surrounding the Ethical Regulation of Federal Prosecutors	149
B. The McDade Amendment	152
<b>II. REFORMING MCDADE</b>	154
A. Solutions Prioritizing State Law	154
B. A Uniform National Code for All Lawyers	159
<b>III. THE CASE FOR A NATIONAL SYSTEM OF ETHICAL REGULATION FOR     FEDERAL PROSECUTORS</b>	164
<b>IV. FRAGMENTING REGULATORY AUTHORITY</b>	171
A. Who Makes the Rules?	172
B. Investigation and Enforcement	178
<b>CONCLUSION</b>	182

## INTRODUCTION

In 1995, the Department of Justice launched “Operation Senior Sentinel” to uncover and dismantle telemarketing rings that were making fraudulent offers or bill collection calls to elderly citizens.<sup>1</sup> In one instance, a fraudster convinced an elderly woman to forward nearly \$30,000 as an “up front fee” to recover \$84,000 that she had lost in a previous scam.<sup>2</sup> To root out telecommunications fraud targeting the elderly, the Department of Justice enlisted the cooperation of AARP members, who became undercover witnesses for the FBI, recording conversations with telemarketers suspected of fraudulent activity.<sup>3</sup> The effort was wildly successful, leading to over four hundred indictments within the first few months.<sup>4</sup>

On May 9, 1992, a gunman shot and killed four people sitting on the porch of their home in Detroit; Loreal Roper, a three-year-old girl, was among them.<sup>5</sup> One of the victims, Alfred Austin, had been “marked for death” by a drug trafficking ring, the “Best Friends,” after a defense attorney warned that Austin was planning to cooperate with the authorities.<sup>6</sup> Subsequently, a woman approached the federal prosecutors investigating the case and informed them that her son, a defendant represented by counsel, wished to cooperate but was afraid that his attorney would inform the Best Friends.<sup>7</sup> Prosecutors contacted the man and, after corroborating his story, moved for a new attorney to be appointed.<sup>8</sup> The cooperation of this man was a key break in the case, ultimately leading to the arrest and conviction of Loreal’s killer.<sup>9</sup>

Under ethical regulations in place today, which make federal government lawyers “subject to State laws and rules” of any state in which they engage in

1. *Telescams Exposed: How Telemarketers Target the Elderly: Hearing Before the S. Spec. Comm. on Aging*, 104th Cong. 7 (1996) (statement of Sen. Harry Reid).
2. *Id.* at 57 (statement of Kathryn Landreth, United States Attorney, District of Nevada).
3. *Id.* at 97-98 (statement of Charles L. Owens, Chief, Financial Crimes Section, Federal Bureau of Investigation).
4. *Id.*
5. *The Effect of State Ethics Rules on Federal Law Enforcement: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 65 (1998) [hereinafter *McDade Hearing*] (statement of Richard L. Delonis, President, National Association of Assistant United States Attorneys).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

“attorney’s duties,”<sup>10</sup> it is doubtful that federal prosecutors would be able to participate in programs such as Operation Senior Sentinel in those states that prohibit the recording of telephone conversations without the consent of both parties.<sup>11</sup> Nor would the Department of Justice be able to make the sort of ex parte contact with represented persons that led to the conviction of Loreal Roper’s killer in certain states, despite DOJ policies to the contrary.<sup>12</sup>

Federal prosecutors are subject to a bewildering array of ethical regulations ranging from state ethical codes to local rules adopted by federal courts to the internal policies of the Department of Justice. The inconsistent and overlapping application of these ethical rules has led to regulatory confusion and has inhibited the development of clear ethical expectations for federal prosecutors. Consequently, prosecutors may find themselves subject to ethical sanction for good-faith mistakes as to what ethical regulations require<sup>13</sup> or may shy away from legitimate exercises of prosecutorial authority where the ethical constraints are unclear.

It is imperative to develop ethical standards that take proper account of the position of federal prosecutors within our legal system.<sup>14</sup> The criminal justice system is capable of inflicting society’s most severe sanctions and represents the public interest in justice.<sup>15</sup> Moreover, the role that the modern American prosecutor plays in the administration of that system is unique, not fully analogous to either a neutral factfinder or a zealous advocate.<sup>16</sup> The current regulatory framework is insensitive to the practical and ethical distinctions between federal prosecutors and other lawyers. A uniform, national ethical

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10. 28 U.S.C. § 530B(a) (2006).

11. See *McDade Hearing*, *supra* note 5, at 64-65.

12. A number of states permit contact with represented parties provided that the contact is “authorized by law.” Federal prosecutors often may be able to argue that their contacts are authorized. See Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2091 (2000) [hereinafter Note, *Federal Prosecutors*]. However, Florida has foreclosed this argument by removing the “authorized by law” exception. See FLA. RULES OF PROF’L CONDUCT R. 4.2; Note, *Federal Prosecutors*, *supra* at 2091. Such a rule would have prevented the federal prosecutor from soliciting the cooperation of the defendant in Loreal Roper’s case.

13. See Ryan E. Mick, Note, *The Federal Prosecutor Ethics Act: Solution or Revolution?*, 86 IOWA L. REV. 1251, 1287 & n.206 (2001).

14. See, e.g., *In re Doe*, 801 F. Supp. 478, 479-80 (D.N.M. 1992) (“[W]e must understand ethical standards are not merely a guide for the lawyer’s conduct, but are an integral part of the administration of justice.”).

15. See Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 69 (1995).

16. See *infra* notes 121-123 and accompanying text.

code, tailored specifically to federal prosecutors, is needed to ensure the development of consistent ethical norms consonant with the federal government's interest in serving justice through the criminal law.

Part I of this Note examines the key features of the regulatory scheme governing the conduct of federal prosecutors. Particular attention is paid to the McDade Amendment, which, although it did not effect serious changes in the de facto regulation of prosecutors, has served to highlight and entrench the inconsistencies and regulatory difficulties of the present system. Part II considers some of the proposals for reform that have emerged in the years following the adoption of the McDade Amendment. Although they relieve many of the most serious difficulties of the post-McDade regime, these proposals either fail to ensure consistency in federal criminal enforcement or impinge too greatly on other important normative considerations.

An understanding of the unique structural and political realities of the enforcement of federal criminal law is essential to the development of a substantive body of ethical regulation that adequately balances the need for guiding prosecutorial discretion with the government's interest in vigorously investigating and prosecuting federal crimes. Part III makes the case for a uniform national codification of ethical rules specifically tailored to the demands of federal prosecution. Such a code would allow detailed consideration of the needs of federal prosecutors, permit consistent application and enforcement of ethical rules across jurisdictions, and intrude minimally on the authority of states to regulate lawyers who they have licensed to practice. Finally, Part IV considers the capacity of various institutions—including the Department of Justice, federal courts, and Congress—to develop and enforce such a code and suggests a distribution of rulemaking and enforcement power that allows the development of consistent ethical rules while preserving, as much as possible, traditional claims of regulatory authority.

## I. THE REGULATORY LANDSCAPE FOR FEDERAL PROSECUTORS

Control over the administration of criminal justice has historically been entrusted to a diverse set of actors spanning all branches of government, at both the state and federal level. Even within the executive branch, control over the criminal process was fairly diffuse in the early Republic.<sup>17</sup> Indeed, from the

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17. See generally Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286-303 (1989) (describing the dispersal of supervisory authority of the criminal system among executive branch officials and the potential for private citizens to participate).

creation of the office in 1789 until 1820, federal district attorneys were not subject to the supervision of any executive branch official.<sup>18</sup> Today, the ethical conduct of federal prosecutors remains subject to numerous regulatory bodies, including federal courts, state bar associations, and the Department of Justice itself. Each of these bodies has developed a distinct set of standards and policies that constrain the conduct of federal prosecutors, and each is independently capable of issuing sanctions for ethical violations. As a result, federal prosecutors have no clear guidance to inform their decisionmaking and instead find themselves subject to a host of potentially conflicting ethical regulations and guidelines.

*A. Controversy Surrounding the Ethical Regulation of Federal Prosecutors*

The debate over the appropriate mechanisms for the ethical regulation of federal prosecutors has focused on a conflict between the Department of Justice and the courts over whether the former could suspend the application of the “no-contact rule” to federal prosecutions. The no-contact rule, codified in Rule 4.2 of the *ABA Model Rules of Professional Conduct*, provides that in “representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law.”<sup>19</sup>

In 1989, Attorney General Richard Thornburgh issued a memorandum asserting that Disciplinary Rule 7-104(A)(1) of the *ABA Model Code of Professional Responsibility*,<sup>20</sup> Model Rule 4.2, and their various state professional code analogues were not binding on federal prosecutors.<sup>21</sup> Although Attorney General Thornburgh conceded that compliance with state and local ethical

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18. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 11 (2007).

19. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2010).

20. *Model Code of Professional Responsibility* section 7-104(A)(1) is the predecessor of *Model Rule* 4.2 and substantively quite similar. It provides:

During the course of his representation of a client a lawyer shall not: Communicate or cause another to communicate on the subject of the representation by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

MODEL CODE OF PROF'L RESPONSIBILITY § 7-104(A)(1) (1981).

21. Memorandum from Richard Thornburgh, Att'y Gen., to All Justice Dep't Litigators, *Communication with Persons Represented by Counsel* (June 8, 1989), reprinted in *In re Doe*, 801 F. Supp. 478, 489-93 (D.N.M. 1992) [hereinafter *Thornburgh Memo*].

requirements will rarely be precluded by federal duties,<sup>22</sup> he asserted that federal regulations must control “in the rare instance where an actual conflict arises.”<sup>23</sup> To support this conclusion, the Thornburgh Memo relied primarily on the Supremacy Clause and separation-of-powers principles, arguing that state and local rules cannot interfere with the regulations adopted by the federal government.<sup>24</sup> The Thornburgh Memo’s conclusions were subject to harsh criticism,<sup>25</sup> and the aggressive contention that federal courts could not hold federal prosecutors to a more exacting standard than DOJ regulations even caught the attention of Congress.<sup>26</sup> Ultimately, however, no overriding legislation was adopted.<sup>27</sup>

In 1994, Attorney General Janet Reno officially codified the conclusions of the Thornburgh Memo by issuing a series of comprehensive regulations governing the ethical responsibility of federal prosecutors and establishing disciplinary provisions.<sup>28</sup> These regulations, known collectively as the “Reno Rule,” took a very narrow view of the authority of states to subject federal government lawyers to their own ethical regulations<sup>29</sup> and, in some cases, authorized conduct expressly forbidden by the majority of state ethical codes.

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22. *Id.* at 491-92. Although Attorney General Thornburgh is facially deferential to state regulators, the broad definition of federal duties, including both federal law and regulations adopted by the Attorney General, suggests that the federal government might take a more assertive role in defining the ethical responsibilities of its lawyers. *Id.* at 492.
  23. *Id.* (internal quotation omitted).
  24. *Id.* at 490 (“Indeed, the Department has consistently taken the position that the Supremacy Clause of the Constitution does not permit local and state rules to frustrate the lawful operation of the federal government.”).
  25. See Note, *Federal Prosecutors*, *supra* note 12, at 2086 (arguing that many federal courts resisted or outright rejected the conclusions of the Thornburgh Memo); Note, *Uniform Federal Rules of Attorney Conduct: A Flawed Proposal*, 111 HARV. L. REV. 2063, 2067 (1998) [hereinafter Note, *Uniform Federal Rules*] (describing the Thornburgh Memo as “extraordinarily controversial”).
  26. See H. COMM. ON GOV’T OPERATIONS, FEDERAL PROSECUTORIAL AUTHORITY IN A CHANGING LEGAL ENVIRONMENT: MORE ATTENTION REQUIRED, H.R. REP. NO. 101-986, at 32 (1990).
  27. Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 213-14 (2000).
  28. See, e.g., Communications with Represented Persons, 59 Fed. Reg. 10,086 (Mar. 3, 1994) (formerly codified at 28 C.F.R. §§ 77.1-12 (1994)).
  29. See Bruce A. Green, *Federal Prosecutors’ Ethics: Who Should Draw the Lines?*, 7 PROF. LAW, Nov. 1995, at 1, 6 (“[T]he regulation expressly forbids state disciplinary authorities and federal courts from enforcing the rules of ethics insofar as they are more restrictive. Indeed, it forbids state disciplinary authorities from sanctioning a federal government lawyer for violating one of the more permissive rules established by the regulation itself, unless and until the Attorney General finds that the lawyer willfully violated the rule.”).

For example, the regulations restricted the no-contact rule to parties deemed to have some ability to influence the decisionmaking of an organization.<sup>30</sup> In substance, the Reno Rule was not a marked departure from the Thornburgh Memo: both promised compliance with state ethical rules in general but contemplated a narrow interpretation of those rules to protect federal interests.<sup>31</sup> However, in one respect, the Reno Rule was an unprecedented expansion of the Department of Justice's role in regulating the conduct of federal prosecutors. Never before had the Justice Department, or indeed any body of lawyers, asserted *exclusive* authority to monitor and regulate any aspect of the conduct of its attorneys.<sup>32</sup>

Like the Thornburgh Memo, the Reno Rule was strongly resisted by the courts; the Eighth Circuit went so far as to invalidate the regulations, finding no statutory basis for a rule exempting federal prosecutors from the local rules that govern the conduct of all other attorneys appearing before federal courts.<sup>33</sup> Resistance to the Department of Justice's bold assertions of regulatory authority in the Thornburgh Memo and the Reno Rule catalyzed the debate on the appropriate scope of ethical constraints on federal prosecutors and the appropriate locus of supervisory authority,<sup>34</sup> culminating with the passage of the Citizens Protection Act (also known as the McDade Amendment) in 1998.<sup>35</sup>

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30. The regulation provides:

A communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for purposes of this part only if the employee is a controlling individual. A "controlling individual" is a current high level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter.

Communications with Represented Persons, 59 Fed. Reg. at 10,101.

31. See *id.* at 10,086 ("[F]ederal attorneys generally continue to be subject to state bar ethical rules where they are licensed to practice, except in the limited circumstances where state ethical rules clearly conflict with lawful federal procedures and practices."); *cf. supra* notes 22-23 and accompanying text (citing similar language in the Thornburgh Memo).
32. See Green, *supra* note 29, at 7 ("In promulgating the new federal regulation, the Department of Justice has asserted an authority it has never previously exercised and that no other body of lawyers (other than judges) has ever been thought to possess: the exclusive authority to make and interpret the ethical rules governing certain areas of their own professional conduct.").
33. See *O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998).
34. See Note, *Uniform Federal Rules*, *supra* note 25, at 2067.
35. See Pub. L. No. 105-277, 112 Stat. 2681-50, 2681-118 (1998) (codified at 28 U.S.C. § 530B (2006)).



### B. *The McDade Amendment*

In 1992 Congressman Joseph McDade was indicted on five counts, including “conspiracy, accepting an illegal gratuity by a public official, and RICO violations,”<sup>36</sup> stemming from allegations that he had accepted campaign contributions in return for favorable treatment for government contractors.<sup>37</sup> Congressman McDade was ultimately acquitted and retained his seat in Congress.<sup>38</sup> Throughout the investigation and trial, Congressman McDade complained that the prosecutors in charge of the case exceeded their authority and engaged in unethical behavior.<sup>39</sup> After the trial, the Congressman introduced a number of bills designed to rein in prosecutorial excess and clarify which branch and level of government possessed the ultimate authority to regulate the conduct of federal prosecutors.<sup>40</sup> After several failed attempts, the McDade Amendment was finally adopted as a rider to the Omnibus Consolidated and Emergency Supplemental Appropriations Act for the fiscal year 1999<sup>41</sup> over some objections on the Senate floor.<sup>42</sup>

The McDade Amendment provides that “[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”<sup>43</sup> At first glance, the McDade Amendment does not appear to do more than restore the balance of regulatory authority that existed before the Thornburgh Memo and Reno Rule. But the text of the statute is susceptible to a number of distinct interpretations that go further. For instance, the requirement that federal prosecutors “be subject to State laws and rules” might be interpreted as an obligation to treat federal prosecutors in the same way as their state counterparts.<sup>44</sup> A literal interpretation of the phrase “to the same extent and in

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36. *United States v. McDade*, No. 92-249, 1992 WL 151314, at \*1 (E.D. Pa. June 19, 1992).

37. See Zacharias & Green, *supra* note 27, at 211.

38. See *Veteran Congressman Acquitted in Bribe Case*, WASH. TIMES, Aug. 2, 1996, at A5.

39. McDade filed a number of motions alleging prosecutorial misconduct, but all were either dismissed or mooted by his acquittal. See Zacharias & Green, *supra* note 27, at 212.

40. See H.R. 3396, 105th Cong. (1998); H.R. 232, 105th Cong. (1997); H.R. 3386, 104th Cong. (1996).

41. Pub. L. No. 105-277, 112 Stat. 2681, 2681-118 to -119 (1998) (codified at 28 U.S.C. § 530B (2006)).

42. See, e.g., 144 CONG. REC. 27,471-72 (1998) (statement of Sen. Orrin Hatch).

43. 28 U.S.C. § 530B(a) (2006).

44. See Zacharias & Green, *supra* note 27, at 216.

the same manner as other attorneys in that State” may go even further, requiring that federal prosecutors be subject to the same regulations incumbent on private attorneys—essentially stripping away any special accommodations made for prosecutors.<sup>45</sup>

Even under a relatively conservative interpretation of the McDade Amendment, the law hinders the ability of a federal prosecutor to determine which ethical regulations govern his conduct. By requiring compliance with the local rules in each jurisdiction in which he engages in “attorney’s duties,” the McDade Amendment potentially introduces a new choice-of-law question. For federal government lawyers who practice solely within a single jurisdiction, the provisions of the Amendment would not significantly alter the pre-existing regulatory landscape.<sup>46</sup> However, federal prosecutors frequently investigate complex cases spanning multiple states and even multiple circuits.<sup>47</sup> Consequently, federal prosecutors may find themselves subject to a wide variety of potentially conflicting ethical codes during the course of a single investigation.<sup>48</sup>

Along the same lines, federal prosecutors may find themselves subject to conflicting rules within a jurisdiction under this new regime. The McDade Amendment expressly holds federal prosecutors subject to the simultaneous application of state ethical regulations *and* the local rules adopted by federal courts.<sup>49</sup> Although these rules are often in substantial alignment,<sup>50</sup> federal courts have vigorously protected their authority to develop unique local rules to govern the conduct of the attorneys appearing before them.<sup>51</sup> The McDade Amendment fails to specify whether state or federal regulations control when they conflict. This uncertainty may have the effect of chilling the exercise of certain prosecutorial functions as prosecutors make the safe decision to abide by the most restrictive of potentially applicable regulations.<sup>52</sup>

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45. *Id.*

46. See Note, *Federal Prosecutors*, *supra* note 12, at 2092.

47. See *McDade Hearing*, *supra* note 5, at 26 (statement of Zachary Carter, United States Attorney, Eastern District of New York) (claiming that it is the norm, not the exception, for investigations in the Eastern District of New York to cross jurisdictional boundaries).

48. See Note, *Federal Prosecutors*, *supra* note 12, at 2092-93.

49. 28 U.S.C. § 530B(a) (2006).

50. See *infra* notes 170-172 and accompanying text.

51. See *infra* note 172.

52. See Note, *Federal Prosecutors*, *supra* note 12, at 2088-89, 2092.

## II. REFORMING MCDADE

The McDade Amendment has drawn considerable criticism in the years since its enactment,<sup>53</sup> and there have been legislative and academic proposals to remedy the considerable regulatory confusion that it has generated. One class of proposals would generally preserve the primacy of state ethical regulations, while permitting federal courts to supersede state rules that impinge on a clear federal interest. A second class of proposals calls for broad unifying ethical codes such as a national ethical regulation binding on all lawyers or a “Federal Rules of Ethics” applicable to all lawyers practicing before federal courts. However, these proposals either fail to achieve the consistent development and enforcement of ethical rules across jurisdictions or do so only by sacrificing other important interests, such as preserving state authority over lawyers appearing before state courts, minimizing the number of ethical standards to which a single lawyer is subject, or ensuring consistent investigation and prosecution of federal crimes across the nation.

### *A. Solutions Prioritizing State Law*

There have been at least ten legislative attempts to replace the McDade Amendment, but none has received significant congressional attention after introduction.<sup>54</sup> Legislative reforms to the McDade Amendment have generally prioritized resolving the choice-of-law issue by attempting to identify a single jurisdiction whose rules would apply in a given situation or by encouraging the harmonization of state and federal rules. Typically, these efforts have also included explicit acknowledgement of the authority of federal courts to enact local rules that supersede state ethical rules in conflict with important federal interests. However, these proposals underserve the unique interests of federal prosecutors by continuing to subject them to state ethical codes that are unlikely to be sensitive to the distinct features of the federal criminal enforcement system.

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53. See, e.g., Paula J. Casey, *Regulating Federal Prosecutors: Why McDade Should Be Repealed*, 19 GA. ST. U. L. REV. 395, 402 (2002) (noting that the McDade Amendment was widely believed to be an “act of revenge on the part of Congressman McDade”); Gregory B. LeDonne, Recent Development, *Revisiting the McDade Amendment: Finding the Appropriate Solution for the Federal Government Lawyer*, 44 HARV. J. ON LEGIS. 231, 234-35 (2007) (noting considerable academic criticism of McDade).

54. See LeDonne, *supra* note 53, at 231 & n.5.

The Federal Prosecutor Ethics Act (FPEA),<sup>55</sup> proposed by Senator Orrin Hatch in 1999, would have essentially restored prosecutors to the status quo ante. The Act would have replaced the section 530B(a) requirement that prosecutors comply with the regulations in “each State where such attorney engages in that attorney’s duties”<sup>56</sup> with a provision requiring adherence to the regulations “of the State in which the Federal prosecutor is licensed as an attorney”<sup>57</sup> (the “home-state” rule). By preventing the application of multiple state codes to a single investigation, FPEA resolves the troubling choice-of-law issues of the McDade Amendment. FPEA also helps to resolve the McDade Amendment’s insensitivity to federal interests and investigation methods by holding state regulations inapplicable “to the extent that [they are] inconsistent with Federal law or interfere[] with the effectuation of Federal law or policy, including the investigation of violations of Federal law.”<sup>58</sup> The determination of whether a given state law interfered with “specific Federal duties related to investigation and prosecution” was to be made by a newly created Commission on Federal Prosecutorial Conduct.<sup>59</sup> The bill also included a number of specific ethical rules, generally lifted from existing regulations, statutory prohibitions, and court decisions, to be enforced by the Attorney General.<sup>60</sup> Although the proposal has received some positive attention in subsequent years,<sup>61</sup> it failed to advance beyond the Judiciary Committee when it was introduced.<sup>62</sup>

In the same year, Senator Patrick Leahy proposed the Professional Standards for Government Attorneys Act.<sup>63</sup> The Act attempted to solve the choice-of-law dilemma by specifying which body of law applies to a lawyer’s conduct depending on the context in which that conduct takes place. Conduct “in connection with a proceeding in or before a court” would be governed by that court’s local rules, and conduct “in connection with a pending or contemplated grand jury proceeding” would be subject to the rules of the court under whose authority the grand jury is convened.<sup>64</sup> Other conduct would be

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55. Federal Prosecutor Ethics Act, S. 250, 106th Cong. (1999).

56. 28 U.S.C. § 530B(a) (2006).

57. Federal Prosecutor Ethics Act, *supra* note 55, § 2(a).

58. *Id.*

59. *Id.* § 2(d).

60. *Id.* § 2(b).

61. See, e.g., Mick, *supra* note 13, at 1255 (asserting that adopting the Federal Prosecutor Ethics Act would be preferable to the McDade regime).

62. See Note, *Federal Prosecutors*, *supra* note 12, at 2093.

63. Professional Standards for Government Attorneys Act of 1999, S. 855, 106th Cong. (1999).

64. *Id.* § 2(a).

governed by a home-state rule supplemented with provisions to resolve conflicts where attorneys are licensed in multiple states.<sup>65</sup> Moreover, the Act expressly urged the Supreme Court to develop a national rule for government lawyers covering contacts with represented persons and required that the Judicial Conference develop an advisory report on the matter.<sup>66</sup> At first blush, this provision appears to do little more than attempt to resolve the controversy surrounding the no-contact rule. However, it has been suggested that the provision should be read more broadly, as an encouragement for developing “uniform ethics rules in areas of particular importance to federal prosecutors.”<sup>67</sup> Senator Leahy’s proposal, though it has also attracted some scholarly support,<sup>68</sup> has not received serious legislative attention.

While these legislative efforts were under consideration, the Judicial Conference of the United States was independently contemplating a response to the McDade Amendment. The Judicial Conference, which is authorized to abrogate or modify a federal court’s local rules of practice and procedure,<sup>69</sup> was primarily concerned with the potential for conflict within jurisdictions – that is, differences between state ethical codes and the rules adopted by individual federal district and appellate courts. A proposal put forth by the Judicial Conference’s Subcommittee on Federal Rules of Attorney Conduct would have automatically aligned the local rules of federal courts and state ethical codes by requiring federal courts to adopt all state ethical codes and any subsequent amendments, a process termed “dynamic conformity.”<sup>70</sup> The process was to be augmented with a mechanism for the adoption of uniform federal rules that were to supersede state regulations in areas where the federal interests are particularly salient.<sup>71</sup> Although there has been no official adoption of a dynamic conformity policy, it has achieved some de facto influence.<sup>72</sup>

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65. *Id.*

66. *Id.*

67. Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 VAND. L. REV. 381, 437 (2002).

68. See, e.g., Note, *Federal Prosecutors*, *supra* note 12, at 2095-96.

69. 28 U.S.C. § 331 (2006). The statutory authority for federal courts to adopt local rules of practice and procedure may be found at 28 U.S.C. § 2071 (2006).

70. See Note, *Federal Prosecutors*, *supra* note 12, at 2094-95; see also Andrew L. Kaufman, Lecture, *Who Should Make the Rules Governing Conduct of Lawyers in Federal Matters*, 75 TUL. L. REV. 149, 162 (2000).

71. See Kaufman, *supra* note 70, at 153.

72. See Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 10 (2005) (“Since 1995, when the issue was framed, federal

The most troubling aspect of the regulatory environment created by the McDade Amendment is the statute's apparent insensitivity to whether the distinctiveness of federal government lawyers might warrant different ethical rules from those adopted by states to regulate ordinary practitioners. The aforementioned proposals would alleviate many of the difficulties of the McDade Amendment by helping to clarify which body of law applies to a given prosecutorial act while still preserving the primacy of state ethical regulations. Federal law must be enforced consistently across jurisdictions,<sup>73</sup> and these proposals explicitly prioritize "[l]ocal control and decentralization."<sup>74</sup>

Any interpretation of the McDade Amendment subjects prosecutors in different jurisdictions to different ethical codes,<sup>75</sup> and there is no reason to suspect that ethical requirements will be consistent from state to state. Before the adoption of the *Model Rules*, legislatures had generally incorporated the *Model Code of Professional Responsibility* into state law without significant change.<sup>76</sup> However, the *Model Rules*, promulgated in 1983, have failed to achieve universal adoption, and many states have materially altered critical sections of the *Rules* when adopting them into law.<sup>77</sup> As a result, there is considerable variability among the ethical codes of different jurisdictions.<sup>78</sup>

The proposals surveyed in this Section prevent confusion as to which law applies to particular conduct, but the use of state ethical regulations to control the conduct of federal prosecutors preserves disuniformity among jurisdictions. Federal prosecutors are particularly likely to work in multiple jurisdictions over

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courts have moved to embrace dynamic conformity by referring increasingly to the state Rules of Professional Conduct rather than the Model rules.”).

73. See Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3-4 (1940) (arguing that the “prestige of federal law” depends on its uniform application); McMorrow, *supra* note 72, at 11-13 (noting that federal courts are at least “supposedly uniform” and that a lack of horizontal uniformity is “anathema to the heart of federal court rule-makers”); Note, *Federal Prosecutors*, *supra* note 12, at 2097 (identifying an interest in national uniformity for the federal court system).
74. Kaufman, *supra* note 70, at 159-62.
75. See *supra* notes 46-47 and accompanying text.
76. See Note, *Federal Prosecutors*, *supra* note 12, at 2083.
77. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1252 (1991) (“Not only was the drafting process [of the *Model Rules*] controversial throughout, the reception of the Rules by the states was as slow and widely resisted as the reception accorded the Code had been rapid and widespread.”); Note, *Federal Prosecutors*, *supra* note 12, at 2083.
78. See McMorrow, *supra* note 72, at 12; Note, *Uniform Federal Rules*, *supra* note 25, at 2065. However, some commentators have suggested that the variability between the substance of ethical rules in different jurisdictions is overstated. See Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 524 (1996).

the course of a single criminal investigation,<sup>79</sup> and subjecting them to different bodies of ethical regulation based on geographical accident is an unnecessary complication. This variation actively inhibits the uniform regulation of federal prosecutors and thereby inhibits the uniform application of federal criminal law.

For example, Michigan's Rules of Professional Conduct permit contact with parties represented by a different lawyer that are "authorized by law";<sup>80</sup> Florida's do not.<sup>81</sup> In another striking example, the Supreme Court of Oregon has interpreted a state ethical rule prohibiting "dishonesty, fraud, deceit, misrepresentation, or false statements" as barring prosecutors from participating in certain sting operations.<sup>82</sup> Moreover, different states have adopted materially different rules governing the offering of inducements to witnesses in exchange for their testimony. Some states have barred any inducement whatsoever;<sup>83</sup> others have permitted the offer of consideration so long as it is not otherwise prohibited by law.<sup>84</sup>

Both the FPEA and the Professional Standards for Government Authority Act, as well as the system considered by the Judicial Conference, purport to contain an escape hatch to manage these inconsistencies: provisions establishing authority of federal bodies to adopt divergent rules in narrow areas of particular federal concern.<sup>85</sup> Considering the controversy over the no-contact rule and the express provision in the Professional Standards for Government Authority Act encouraging the development of a national replacement, a national rule governing contact with represented parties is a likely candidate. However, it is easy to imagine a situation where the need or propriety of adopting a preemptive federal rule is less clear.

State governments and other state regulators may not be sensitized to the needs of federal criminal enforcement and may adopt rules that do not account for the specifics of the federal criminal enforcement system. For example, federal prosecutors are constitutionally required by the Fifth Amendment to

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79. See *supra* note 47 and accompanying text.

80. See MICH. RULES OF PROF'L CONDUCT R. 4.2 (1988).

81. See FLA. RULES OF PROF'L CONDUCT R. 4.2 (2002) (including an exception only for notice or service of process).

82. See *In re Gatti*, 8 P.3d 966, 976 (Or. 2000).

83. See, e.g., FLA. RULES OF PROF'L CONDUCT R. 4-3.4 (2002).

84. See, e.g., N.Y. RULES OF PROF'L CONDUCT R. 3.4 (2009).

85. See Professional Standards for Government Attorneys Act of 1999, S. 855, 106th Cong. (1999); Federal Prosecutor Ethics Act, S. 250, 106th Cong. (1999); LeDonne, *supra* note 53, at 238.

issue indictments through a grand jury.<sup>86</sup> However, prosecutions brought under Florida state law often can be brought on information supplied by the prosecutor, without any indictment by a grand jury.<sup>87</sup> Consequently, Florida state prosecutors are authorized to require an individual immediately to come before the prosecutor to provide information pertinent to an ongoing investigation.<sup>88</sup> To prevent the abuse of this power, Florida has adopted strict ethical rules that would, under the proposals discussed in this Section, become binding on federal prosecutors as well.<sup>89</sup> It is unclear that a special preemptive rule would be warranted to evade the extra restrictions on prosecutorial conduct spawned by the procedural oddities of a single state.

The inconsistencies between the ethical rules of different states give federal regulators essentially two options. First, federal regulators could simply tolerate a certain degree of inconsistency and insensitivity to federal interests – an unpalatable option. In the alternative, federal bodies must adopt a sweeping preemptive code, which would replicate my proposal in effect if not in structure, thus undermining the clear preference for local control that lay behind the proposals in this Section in the first place.

*B. A Uniform National Code for All Lawyers*

The impact of the considerable variability among state ethical codes (and among the interpretations of those codes by regulatory authorities) for all attorneys has been compounded by the explosion in multi-state and multi-jurisdiction practice.<sup>90</sup> Moreover, depending on the nature of the choice-of-law rules for ethical regulations, it is possible for two lawyers working on the same matter to be subject to different rules.<sup>91</sup> The increasing potential for lawyers or organizations practicing in multiple jurisdictions to be subject to a confusing

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86. See U.S. CONST. amend. V.

87. See FLA. R. CRIM. P. 3.140(a)(2) (2002).

88. See *McDade Hearing*, *supra* note 5, at 24 (statement of P. Michael Patterson, United States Attorney, Northern District of Florida).

89. *Id.*

90. See Note, *Uniform Federal Rules*, *supra* note 25, at 2065.

91. See Zacharias, *supra* note 92, at 346-47. Neither the “home-state” rule of the FPEA nor the Professional Standards for Government Authority Act completely resolves the issue. In the first case, it is possible for two prosecutors working on the same matter to be licensed in different states. In the second case, prosecutors working on the same matter may be conducting parallel investigations in different jurisdictions, triggering different ethical regulations under the Professional Standards for Government Authority Act.



and potentially contradictory array of regulations has prompted a second set of proposals, calling for a national code of legal ethics.<sup>92</sup>

However, a uniform system of ethical regulation applied to all lawyers at both the state and federal level is troubling. Submitting all practicing lawyers to a single ethical code is an overreaction that would limit the ability to develop suitably nuanced rules for lawyers practicing in different contexts and unduly undermine the traditional authority of the states to regulate the conduct of lawyers practicing within their borders. Rational construction of ethical regulations requires a clear understanding of the features of the legal system in which the lawyer practices as well as the lawyer's ethical role within that system.<sup>93</sup>

The question of the ethical distinction between state and federal prosecutors, though it has implicitly lurked beneath past debate on the substance of federal regulations and the appropriate locus of regulatory authority, has only recently begun to receive scholarly attention.<sup>94</sup> There is no reason to think that the mandate to seek justice, the basic ethical aspiration from which more detailed ethical regulations for prosecutors are derived, would apply with either greater or lesser force in the federal context.<sup>95</sup> Abstract ethical constraints, derived directly from the universal mandate that prosecutors see that justice is done without reference to a particular enforcement and prosecution regime—such as a duty for a prosecutor to prevent the conviction of the innocent as vigorously as he seeks to convict the

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92. See Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 *FORDHAM URB. L.J.* 969, 974 (1992) (“[I]t is time to think seriously of a national bar, governed by uniform federal norms of professional conduct in all practice contexts . . . .”); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 *TEX. L. REV.* 335 (1994).

93. See Note, *Federal Prosecutors*, *supra* note 12, at 2089 (“Ethics rules should be thought of as an ‘overlay’ that can be intelligently written and applied only after consideration of the powers and responsibilities of the attorneys subject to regulation.”). The variation in state ethical regulations that has emerged since the promulgation of the *Model Rules*, see *supra* notes 76–78 and accompanying text, reinforces the importance of considering both the structure of the legal system into which those regulations are embedded and the policy considerations that have driven that system’s development. There is no reason to suspect that the variability in state ethical codes is the result of arbitrary choices or random drift; rather, there must be structural or policy considerations underlying the decisions to alter the *Model Rules*.

94. See Zacharias & Green, *supra* note 27, at 210 (“The question of whether federal prosecutors are ‘ethically unique’ has simmered beneath the surface of the debate about the Department of Justice’s efforts to exempt itself from state codes. But surprisingly, no one has addressed the conceptual question directly.”).

95. See *id.* at 238.

guilty<sup>96</sup>—apply equally to federal and state prosecutors.<sup>97</sup> These duties are often as nonspecific as the obligation to do justice itself and offer little concrete operational guidance.<sup>98</sup> But where an ethical obligation arises from the realization of the demands of justice within the structure of a particular criminal system or the particular circumstances in which a prosecutor finds himself, regulators may find that state and federal prosecutors should be subject to different ethical constraints.<sup>99</sup>

As an example, consider again the extra restrictions that Florida has adopted to restrain state prosecutors, who are authorized to summon witnesses to provide information that can form the basis for a prosecution.<sup>100</sup> If a national code were to conform to Florida’s regulations, it would unduly burden federal prosecutors who do not enjoy similarly broad counterbalancing powers.<sup>101</sup> On the other hand, if a looser standard were adopted nationally, it would interfere with Florida’s ability to control its own attorneys and might even require the state to change fundamentally its prosecutorial system to accommodate laxer rules. In short, a national ethical code for all lawyers would prove insensitive to the structural considerations that have informed the divergence between the *Model Rules* and the diverse ethical regulations that state governments have actually adopted into law.

Second, the complexity of federal criminal investigations renders a strong version of the no-contact rule (extending protection to low-level or even former members of an organization and applying it even to the pretrial investigatory phase) a more significant burden on federal prosecutors. Successful prosecution of complex corporate fraud or conspiracy cases may rely on the ability of prosecutors to interview or solicit the cooperation of members

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

97. See *Green & Zacharias*, *supra* note 67, at 428 n.178 (noting that federal and state prosecutors might be subject to similar generalized ethical responsibilities, such as truthfulness before a tribunal).

98. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009) (“[The public interest and justice] are [concepts] so diffuse and elastic that they do not constrain prosecutors much, certainly not in the way that an identifiable client would.”).

99. See *McDade Hearing*, *supra* note 5, at 24 (statement of P. Michael Patterson, United States Attorney, Northern District of Florida) (“The development of the legal and ethical restraints on the exercise of prosecutorial authority are inextricably intertwined with the authority and power granted to the prosecutors within that specific criminal justice system.”).

100. See *supra* notes 87-89 and accompanying text.

101. See Note, *Federal Prosecutors*, *supra* note 12, at 2083-84.

of these organizations.<sup>102</sup> Federal prosecutors are also more likely to be personally involved in the investigation leading up to presentation to a grand jury and indictment.<sup>103</sup> By contrast, in the typical case, state prosecutors do not become involved until an arrest has been made and the evidence has been prepared for presentation to a grand jury.<sup>104</sup>

A restrictive version of the no-contact rule may discourage federal attorneys from working with law enforcement officers during the course of an investigation out of concern that they might become involved in a prohibited contact. This chilling effect could have significant repercussions—both for the ability of the federal government to investigate complex organizations and for defendants themselves. Sustained involvement in the investigation from its preliminary stages allows the prosecutor to become more familiar with the evidence, improving the odds of successful conviction and allowing more informed exercises of prosecutorial discretion. Moreover, since prosecutors are more likely than law enforcement agents to be attuned to the extent and application of constitutional protections afforded to suspects, overly restrictive ethical rules relating to pretrial investigation may have the counterintuitive effect of weakening safeguards for defendants overall.<sup>105</sup> The controversy over the Thornburgh Memo and the Reno Rule makes it clear that state and federal regulators have taken decidedly different sides on the question of *ex parte*

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102. See *McDade Hearing*, *supra* note 5, at 30 (statement of Zachary Carter, United States Attorney, Eastern District of New York). There is indeed a plausible case to be made that even *Model Rule 4.2* is overbroad and may actually defeat a prosecutor's ethical obligation to do justice when a party is indirectly represented by counsel retained by his employer. See Thornburgh Memo, *supra* note 21, at 489-93. Considering the categories of offense that may lead to the necessity for contacts with a party who wishes to circumvent corporate counsel—for example, whistle-blowing—this is likely to arise considerably more frequently for a federal prosecutor than for a local district attorney. Although ultimately reversed by the Ninth Circuit, *United States v. Talao*, No. CR-97-0217-VRW, 1999 WL 33599863 (N.D. Cal. June 17, 1999), *rev'd*, 223 F.3d 1133 (9th Cir. 2000), demonstrates the potential for broad prohibitions on *ex parte* contacts to frustrate federal criminal investigations. In *Talao*, the district court found that an *ex parte* interview with a bookkeeper who claimed she was being pressured to testify untruthfully violated California Rule of Professional Conduct 2-100 (California's implementation of *Model Rule 4.2*). *Id.* at \*2-3.

103. See Zacharias & Green, *supra* note 27, at 237.

104. *Id.*; see also Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes To Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 926 (1996) ("State and local prosecutors generally play a less active role in the investigation stage of the criminal case . . .").

105. See *McDade Hearing*, *supra* note 5, at 29 (statement of Zachary Carter, United States Attorney, Eastern District of New York); Note, *Federal Prosecutors*, *supra* note 12, at 2091-92.

contacts with represented parties; it is unlikely that a single national rule for both state and federal prosecutors could satisfy all parties.

Finally, federal investigations more frequently target complex, multi-layered organizations than do state prosecutions.<sup>106</sup> Federal investigations routinely handle matters such as multistate terrorism; drug, fraud, or organized crime conspiracies; fraud against federally funded programs; violations of civil rights laws; complex corporate crime; and environmental crime.<sup>107</sup> The successful prosecution of such matters may require the use of investigative or surveillance techniques rarely required for the typical state prosecution.<sup>108</sup> For instance, narcotics investigations may hinge on evidence such as conversations with the target of the investigation recorded by an undercover investigator—a practice forbidden by the ethical regulations of some states.<sup>109</sup> Again, regulators devising a national code applicable to all prosecutors would be faced with the difficult decision of adopting a rule that hinders the effective enforcement of federal criminal law or a rule that voids the regulatory choices that states have made for themselves.

There is also an independent value in retaining the ability for state bar associations and courts to regulate the conduct of lawyers practicing before state courts. One of the core principles of federalism is the preservation of state autonomy, such that local institutions reflect local preferences and states may serve as laboratories for experimentation with different legal regimes.<sup>110</sup> While some have questioned whether or not experimentation actually takes place in the context of the regulation of professional conduct,<sup>111</sup> a momentary lack of variability is not by itself a sufficient reason to obliterate the potential for the development of legal diversity. A nationally preemptive code for all lawyers would render the independent development of ethical regulations all but impossible.

106. See DAVIS, *supra* note 18, at 158; TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 48 (1998).

107. 145 CONG. REC. 1027 (1999) (statement of Sen. Orrin Hatch).

108. See *McDade Hearing*, *supra* note 5, at 26 (statement of Zachary Carter, United States Attorney, Eastern District of New York); Note, *Federal Prosecutors*, *supra* note 12, at 2090 & nn.80-81.

109. See *In re Gatti*, 8 P.3d 966, 976 (Or. 2000) (forbidding prosecutor involvement in sting operations); *McDade Hearing*, *supra* note 5, at 27 (statement of Zachary Carter, United States Attorney, Eastern District of New York).

110. As Justice Louis Brandeis famously put it: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

111. Burbank, *supra* note 92, at 974. *But see supra* notes 76-84 and accompanying text.

### III. THE CASE FOR A NATIONAL SYSTEM OF ETHICAL REGULATION FOR FEDERAL PROSECUTORS

The McDade Amendment is premised on two key assumptions: first, federal prosecutors should be treated more like their state counterparts and, second, the ethical role of prosecutors is not substantially different from that of an ordinary advocate.<sup>112</sup> Each of the proposals discussed in the previous Part subscribes to at least one of McDade's fundamental precepts. This Note rejects both. Prosecutors occupy a unique position in the legal system, and the substance of the ethical rules binding lawyers is necessarily dependent on both the features of that system and the lawyer's place within it.<sup>113</sup> It is therefore more appropriate to codify ethical regulations for prosecutors separately than to create special exceptions to a generalized ethical code.<sup>114</sup> Moreover, state and federal prosecutors practice in fundamentally different environments, suggesting the need for an ethical code that takes explicit account of the needs of federal prosecutors.

Some commentators have offered a somewhat more muted proposal than a nationally preemptive code for all lawyers. They have advocated a "Federal Rules of Ethics" governing only lawyers appearing before federal courts, analogous to the Federal Rules of Civil Procedure, Rules of Criminal Procedure, or Rules of Evidence.<sup>115</sup> Limiting the scope of a uniform federal code to federal courts would solve the most pressing problem with nationalizing the regulation of legal ethics by obviating the need for difficult considerations concerning whether existing state rules are adequate or new rules, sensitive to the needs of federal criminal enforcement, should be extended to all prosecutors. Moreover, it would preserve the authority of states to regulate the conduct of attorneys practicing before state courts.

However, while addressing many of the concerns discussed above, the proposal is not without its own drawbacks. The creation of preemptive ethics

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112. See Zacharias & Green, *supra* note 27, at 216-22.

113. See *supra* note 93 and accompanying text.

114. Other commentators have also suggested the possibility of separate codification for rules regulating prosecutors. See, e.g., DAVIS, *supra* note 18, at 161; Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1604. However, these suggestions have generally been vague and precatory. This Note, on the other hand, makes the case for a preemptive national collection of regulations limited solely to federal prosecutors.

115. See, e.g., LeDonne, *supra* note 53, at 242; Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 FORDHAM L. REV. 125, 127-28 (1991) (hypothesizing a future in which the ethical regulation of lawyers is carried out by a national disciplinary board). A similar proposal was briefly considered by the Judicial Conference, but "it quickly stalled as overkill." McMorrow, *supra* note 72, at 17.

rules for federal courts would prioritize uniformity across all federal courts at the expense of uniformity among all courts within the same jurisdiction.<sup>116</sup> That is, uniform rules for federal courts would resolve confusion regarding the appropriate ethical standards for lawyers practicing exclusively before federal courts—such as federal prosecutors—at the expense of lawyers who appear before *both* state and federal courts. It is less than clear that the benefits of simplifying the practice of federal government lawyers would outweigh the additional complications that a new set of ethical regulations would impose on other lawyers.

Although it may be undesirable to subject all lawyers—or even all lawyers appearing before federal courts—to a single national code of legal ethics, a coherent system of national regulation designed specifically to guide the discretion of federal prosecutors may prove desirable. A uniform system of ethical regulation solely for federal prosecutors would allow consistent regulation of the behavior of federal prosecutors (and thereby make the enforcement of criminal law more consistent as well) without unduly disturbing other normative goals. Preemptive rules narrowly focused on federal prosecutors would preserve the states' interest in regulating attorneys who may practice before state courts and would avoid increasing the number of regulatory frameworks to which other lawyers are subject.

Much of the commentary on the ethical regulation of prosecutors appears to be premised on the assumption that a prosecutor should, in general, be treated similarly to any other lawyer in an adversarial proceeding. Consequentially, the discussion on the ethical obligations of prosecutors has generally focused on defining special powers and limitations of the prosecutorial role and on determining how ethical codes should be modified to accommodate them.<sup>117</sup> This suggests the existence of a default set of rules common to all lawyers from which regulators should carve out exceptions and build in additional restrictions for prosecutors. There is no reason why this must be the case. Prosecutors are not ordinary lawyers, and attempts to conceptualize their ethical responsibilities—and, implicitly, solutions to their ethical lapses—within the comfortable framework of an adversarial proceeding

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116. See Zacharias, *supra* note 92, at 370.

117. See, e.g., Green, *supra* note 114, at 1573-74 (noting that the work of prosecutors differs from that of other lawyers and suggesting that the *Model Rules* might need to be made more restrictive in certain areas and less restrictive in others as a consequence); Note, *Federal Prosecutors*, *supra* note 12, at 2095-96 (advocating regulation of federal prosecutors that would essentially track state law, which universally subjects prosecutors to generalized ethical standards containing minor exceptions and additions related to prosecutorial conduct).

between zealous advocates, undoubtedly the foundation of the *Model Rules* and the state ethical codes derived from them, disserve prosecutors' distinct ethical role.

The role of a prosecutor is unique within the American legal system.<sup>118</sup> Rather than representing an individual client, the prosecutor acts as a representative of the state "whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."<sup>119</sup> This observation has been condensed into a longstanding overarching ethical mandate common to all prosecutors: the exhortation to "do justice."<sup>120</sup> That the prosecutorial role is not simply to advocate zealously the state's case, but rather to serve the interests of justice has long been recognized by the judiciary,<sup>121</sup> the legal academy,<sup>122</sup> and practicing lawyers.<sup>123</sup> Given the clear difference in role between a prosecutor and an advocate for a private client, the seeming reluctance to consider the role of prosecutors as unique for the purpose of ethical regulation is puzzling. A separate regulatory system would allow more careful consideration of the interests of prosecutors as set against

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118. See Green, *supra* note 15, at 71 ("The interests and experiences of prosecutors are in many respects unique and, as a consequence, prosecutors frequently view the propriety of their own behavior differently from others within the organized bar including, but not limited to, criminal defense attorneys.").
119. *Berger v. United States*, 295 U.S. 78, 88 (1935). *Berger* has been described as the "locus classicus for discussion of the extraordinary duties of a prosecutor." CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 760 (1986).
120. See, e.g., Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 *FORDHAM URB. L.J.* 607, 612 (1999) (characterizing the "duty to seek justice" as the traditional source of the prosecutorial ethos).
121. See, e.g., *Newman v. United States*, 382 F.2d 479, 481 (D.C. Cir. 1967) ("An attorney for the United States, as any other attorney, however, appears in a dual role. He is at once an officer of the court and the agent and attorney for a client . . ."). Professor Green has identified a number of early cases in California and Michigan characterizing the prosecutor's role as "quasi-judicial." See Green, *supra* note 120, at 613-14 nn.17-18.
122. See Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 *A.B.A. J.* 1159, 1218 (1958) ("[A] prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged."). *But see* JOHN W. SUTHERS, *NO HIGHER CALLING, NO GREATER RESPONSIBILITY: A PROSECUTOR MAKES HIS CASE* 70 (2008) (characterizing prosecutors as advocates and contrasting their role with that of a judge as an independent, "neutral arbiter of the law").
123. See, e.g., *MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt.* (2010) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

the need to constrain the application of their discretion, which may be underserved in the development of generalized ethical rules.<sup>124</sup>

Institutional differences between state and federal prosecutors may also counsel separate codification. First, while state prosecutors are generally elected,<sup>125</sup> U.S. Attorneys are appointed by and serve at the pleasure of the President.<sup>126</sup> Because of their location in a centralized hierarchy within the Department of Justice, U.S. Attorneys have an occupational ethical responsibility to carry out the directives of a superior that is not incumbent on directly elected prosecutors.<sup>127</sup> In particular, federal prosecutors are bound to follow the prescriptions of the U.S. Attorneys' Manual as well as the orders of the Attorney General.<sup>128</sup> Prosecutorial misconduct is generally considered to stem from an overabundance of discretionary authority,<sup>129</sup> and ethical regulations are intended to circumscribe that discretion. The diffuse political accountability of elected state prosecutors has not served as an adequate check on abuses of prosecutorial discretion.<sup>130</sup> It may be the case that direct accountability to a specific principal officer allows more narrowly tailored and immediate responses to ethical lapses. Consequently, the need to impose

124. See, e.g., *McDade Hearing*, *supra* note 5, at 73 (statement of John Smietanka, Former Principal Assoc. Deputy Att'y Gen.) (“[At] the level of the rulemaking committees . . . there is no one who is representing the prosecutorial point of view.”). The problem is compounded by the lobbying strength of the private bar. See, e.g., *infra* note 158 and accompanying text (describing a concerted lobbying effort by the white-collar defense bar to overturn a DOJ policy concerning conditions on offers of leniency to corporate officers).

125. As of 2007, only four states (Delaware, New Jersey, Rhode Island, and Connecticut) retain a system of appointed prosecutors. The remaining forty-six states provide for the direct election of state prosecutors. See DAVIS, *supra* note 18, at 10–11.

126. See 28 U.S.C. § 541 (2006). Assistant U.S. Attorneys are directly appointed by the Attorney General and subject to removal by him. See 28 U.S.C. § 542 (2006).

127. See SUTHERS, *supra* note 122, at 114 (noting that state district attorneys and attorneys general in most states “have no supervisors and are ultimately only accountable to the people who elected them”).

128. DAVIS, *supra* note 18, at 158; see also SUTHERS, *supra* note 122, at 112 (noting that while federal prosecutors were originally intended to wield a certain degree of independent discretion, they are increasingly subjected to “various prosecution and crime-prevention initiatives . . . that leave little room for the exercise of discretion”). For example, following the attacks of September 11, 2001, U.S. Attorneys were directed to make the investigation and prosecution of terrorism their highest priority. See *id.* at 111. But see Bruce A. Green & Fred C. Zacharias, “The U.S. Attorneys Scandal” and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 214–15 (2008) (discussing the limits of the authority of the Attorney General to direct the behavior of federal prosecutors).

129. Green & Zacharias, *supra* note 128, at 189.

130. See DAVIS, *supra* note 18, at 11–12.



external restrictions on ethical decisionmaking may be somewhat lessened for federal prosecutors.

On the other hand, it is easy to imagine situations in which there is a clear tension between a federal prosecutor's independent judgment of what justice requires and his or her ethical responsibility to effectuate the policies and instructions of principal officers.<sup>131</sup> For example, the Attorney General may direct federal prosecutors to refrain from offering defendants more lenient treatment than the law requires. Is the prosecutor ethically bound to obey the directive?<sup>132</sup> Although the degree to which political principals *should* be able to direct the actions of federal prosecutors is a matter of policy,<sup>133</sup> it is imperative that ethical rules for federal prosecutors be sensitive to the organizational structure of the Department of Justice—a consideration unlikely to weigh heavily in debates at the state level.

Second, defendants in federal cases are often far better equipped to mount a competent defense. Federal defendants are more often able to afford their own private counsel, and even those who cannot are provided federal defenders who are, as a general matter, abler and better funded than state public defenders.<sup>134</sup> Consequently, the need for ethical rules intended to mitigate the resource and information asymmetries between the prosecutors and defense

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131. See Green & Zacharias, *supra* note 128, at 197 (noting that the Attorney General, who directly supervises U.S. Attorneys, “is subject to different kinds of political pressures” from those facing federal prosecutors).

132. See 5 U.S.C. § 301 (2006); Green & Zacharias, *supra* note 128, at 214-15.

133. Compare Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 921 (2009) (advocating “structural reforms” to “allow political actors to control their agents”), with Jackson, *supra* note 73, at 3-4 (“[The federal prosecutor’s] responsibility . . . for law enforcement and for its methods cannot be wholly surrendered to Washington, and ought not to be assumed by a centralized Department of Justice. . . . [I]t is an unusual case in which his judgment should be overruled. . . . At the same time we must proceed in all districts with that uniformity of policy which is necessary to the prestige of federal law.”), and Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 789-91 (1999) (noting a congressional interest in regional variability in prosecutorial policies).

134. See Justin F. Marceau, *Un-Incorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns That Underlie Modern Criminal Procedure Reforms*, 98 J. CRIM. L. & CRIMINOLOGY 1231, 1261 (2008) (“It is widely known that the resources available to lawyers representing indigent defendants in the federal court system are, in many instances, vastly superior to what is available to indigent defendants in the state system.”); Marc Sackin, Note, *Applying United States v. Stein to New York’s Indigent Defense Crisis: Show the Poor Some Love Too*, 73 BROOK. L. REV. 299, 330 n.188 (2007) (“[F]ederal defenders . . . have lighter case loads and greater resources, and [have greater] opportunity to investigate . . . than their state public defender counterparts.”).

counsel is less pressing in the context of federal prosecutions. For instance, prophylactic disclosure rules requiring that prosecutors identify all exculpatory evidence and disclose it to defense attorneys on their own initiative—common in state ethical codes—may be an undue burden on prosecutors in complex federal criminal prosecutions and unnecessary for the defense.<sup>135</sup>

The rift between the state and federal criminal systems is further exemplified by differing rules on the offering of inducements. In *United States v. Singleton*, the Tenth Circuit vacated a conviction after finding that the prosecutor had violated a federal law prohibiting offering anything of value to a witness for his testimony.<sup>136</sup> In dicta, the court noted that the witness inducement likely also violated *Kansas Rule of Professional Conduct* 3.4(b), which prohibits offering “unlawful inducements” in order to secure witness testimony.<sup>137</sup> The commentary to Rule 3.4(b), which had been incorporated by the Kansas Supreme Court, provides that “[t]he [Kansas] common law rule . . . is that it is improper to pay an occurrence witness any fee for testifying . . . .”<sup>138</sup>

The decision was reversed on a en banc rehearing by the Tenth Circuit, which held that the federal prohibition on offering inducements could not stand as it interfered unreasonably with the effective execution of the duties of federal prosecutors.<sup>139</sup> The difficulty of obtaining evidence in a complex criminal case, a far more common scenario in federal criminal enforcement, militates against the prohibition on offering inducements to witnesses for testimony.<sup>140</sup> Although the conflict between state and federal regulation was not discussed by the majority as the decision was rendered before the McDade Amendment took effect,<sup>141</sup> *Singleton* is illustrative of the potential for state ethical regulations to conflict materially with the balance struck, at the federal level, between the government’s interest in punishing crime and in restraining unethical conduct by prosecutors. A national system of ethical regulation limited to federal prosecutors would serve the need for federal prosecutors to

135. See Green & Zacharias, *supra* note 67, at 427.

136. See *United States v. Singleton*, 144 F.3d 1343, 1358-59 (10th Cir. 1998), *rev’d en banc*, 165 F.3d 1297 (10th Cir. 1999).

137. 144 F.3d at 1344.

138. *Id.* at 1359 (citing KAN. RULES OF PROF’L CONDUCT R. 3.4(b) cmt. (1997)).

139. See 165 F.3d 1297, 1302.

140. See Zacharias & Green, *supra* note 27, at 238.

141. However, a dissenting opinion reiterates the common law interpretation of “illegal inducements” as adopted by the Kansas Supreme Court, noting that the McDade Amendment (which was not yet in force) clearly signaled congressional intent that federal prosecutors be held to state ethical standards. 165 F.3d at 1313-14 (Kelly, J., dissenting).

gather evidence while preserving longstanding state ethical codes and interpretations in state prosecutions.

Concerns about the relative benefits of state-federal uniformity within a jurisdiction—as opposed to uniformity across all federal courts<sup>142</sup>—do not directly apply to a uniform code solely for federal prosecutors. Although some commentators have noted that it would be problematic, in general, to subject different lawyers in the same action to different ethical rules,<sup>143</sup> the concern does not apply with full force in criminal prosecutions. While opposing advocates in a civil action occupy essentially the same role, a prosecutor and a defense attorney can hardly be imagined as similarly situated, limiting the justification for ensuring that they conform to the same ethical standards. Moreover, prosecutors and defense attorneys are already subject to different codes of conduct both because of existing special accommodations for and restrictions on prosecutors, such as *Model Rule 3.8*,<sup>144</sup> and because of constitutional constraints on prosecutorial discretion.

Even were the relative merits of horizontal and vertical uniformity determinative, the balance tips in favor of consistency across federal courts. The need for consistent interpretation and application of federal law is particularly pressing in the context of criminal law, which implicates society's most severe sanctions and engages the public interest in justice far more than ordinary civil suits do. Criminal sanctions are a form of moral reprobation and may implicate a defendant's liberty, as well as his property. Since federal prosecutors appear exclusively before federal courts,<sup>145</sup> the creation of a national code of legal ethics for federal prosecutors allows the government interest in uniform administration of federal law to be satisfied without disturbing the existing regulatory regime for any other group of lawyers.

Note, however, that separate rules for federal prosecutors may indirectly increase the regulatory confusion for defense attorneys who practice before

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142. See Green, *supra* note 78, at 526-27 & n.333.

143. See Kaufman, *supra* note 70, at 161-62 (“One problem with crafting rules for federal government lawyers, however, is that their work very often is performed in a context where there is a private lawyer adversary. To avoid the problem of having different professional rules apply to lawyers in a single transaction or litigation, federal professional rules would have to govern private lawyers too, thus imposing on private lawyers the potential of having two different sets of professional rules apply simultaneously in matters with state and federal ramifications.”). Professor Kaufman’s concern is somewhat blunted in the criminal context, where prosecutors and defense attorneys serve fundamentally different roles and, consequently, are already subject to disparate ethical regulations.

144. *Model Rule 3.8* contains special provisions governing the prosecutorial function. See MODEL RULES OF PROF’L CONDUCT R. 3.8 (2010).

145. See Zacharias & Green, *supra* note 27, at 242.

both state and federal courts. In jurisdictions where federal courts have adopted state ethical codes as local rules, these attorneys might find themselves litigating against prosecutors subject to different ethical regulations. Consequently these attorneys may benefit from additional protections in state courts—such as prophylactic mandates for prosecutors to supply the defense with information or prohibitions on certain investigatory techniques.<sup>146</sup> This concern is ultimately unpersuasive: where state codes and federal court local rules differ, defense attorneys are already subject to this disparity.

A national code tailored specifically to federal prosecutors would allow regulators to take the distinct interests of federal prosecutors into account without directly disturbing the ethical regulation of other classes of lawyers. Further, it would help to ensure consistent criminal enforcement across jurisdictions. The following Part will explore considerations as to where the authority to develop and enforce national ethical regulations for federal prosecutors should be lodged.

#### IV. FRAGMENTING REGULATORY AUTHORITY

The introduction of a national standard governing the ethical conduct of federal prosecutors necessitates a reexamination of the disciplinary institutions to which they are currently subject. It seems axiomatic that complete uniformity of regulation requires both a single set of rules and a single institution responsible for their interpretation and application.<sup>147</sup> This suggests two related questions: who should be responsible for drafting and updating a national ethical code for federal prosecutors and who would be responsible for enforcing it? Although it would help to ensure alignment between the overriding purpose of ethical rules and their application, there is no reason that the institution that develops the rules needs to be responsible for enforcement.<sup>148</sup> This Part will consider the relative strengths and weaknesses of various potential regulators—including the federal courts, Congress, and the Department of Justice—with respect to their capacity both for developing a robust system of ethical regulation and for enforcing it. Ultimately, it is clear that regulatory authority over federal prosecutors must be fragmented. For reasons of consistency, this allocation of authority must minimize the potential overlap of rulemaking and enforcement responsibilities.

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

147. See Green, *supra* note 78, at 525-26.

148. See Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 *FORDHAM L. REV.* 355, 414 (1996).

The division of authority suggested in this Part is not the only possible one and may not even be the best from a normative standpoint. The purpose of this Part is rather to demonstrate that it is possible for a national code of ethics for federal prosecutors to be developed so as to minimize the overlap of authority between regulators and account for their peculiar strengths and weaknesses. Consequently, this discussion elides, to some extent, the considerable political and administrative difficulties that would accompany transitioning to a federalized system for regulating federal prosecutors. Rather than focusing on implementation specifics, this Part undertakes a broad discussion of the strengths and weaknesses of potential regulators and attempts to locate at least a plausible dividing line between the authority of each to make and enforce regulations governing prosecutorial conduct.

A. *Who Makes the Rules?*

Consistent ethical regulation requires that each aspect of a prosecutor's conduct be regulated by only one authority and that those regulations be enforced by only one authority. However, the creation and enforcement of rules have always been divided among multiple authorities: federal prosecutors might find themselves subject to disciplinary action by their departmental superiors, federal courts, or state bar associations.<sup>149</sup> Worse, the current regulatory framework admits considerable overlap amongst regulators. It is not uncommon for a prosecutor's conduct to be examined by a court and then have the issue referred to a separate disciplinary board, such as a state bar association or the Office of Professional Responsibility (OPR).<sup>150</sup> Though other commentators have been wary of attempting to define bright-line rules for determining when federal prosecutors should be disciplined by federal courts, the Department of Justice, or by Congress,<sup>151</sup> the consistent application of ethical rules to federal prosecutors demands just such a division. A national code premised on ensuring uniform application and interpretation must include clear rules for which regulatory authority has preemptive (or exclusive) authority in any given situation.

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149. See *McDade Hearing*, *supra* note 5, at 60-63 (statement of Richard L. Delonis, President, National Association of Assistant United States Attorneys).

150. See, e.g., Green, *supra* note 15, at 86-87 (discussing the disciplinary action taken against the prosecutor in *United States v. Isgro*, 751 F. Supp. 846 (C.D. Cal. 1990), *rev'd*, 974 F.2d 1091 (9th Cir. 1992), who was subject to both a public sanction by the judiciary and an internal investigation by the OPR).

151. See, e.g., Green & Zacharias, *supra* note 67, at 386.

The most straightforward solution would be for Congress to intervene and craft a body of substantive ethical regulations for federal prosecutors or issue guidelines to another regulator, such as the Attorney General.<sup>152</sup> Congress has the constitutional authority to issue broad national regulations with preemptive effect, which would do much to ensure national uniformity.<sup>153</sup> However, to date Congress has rarely exercised its authority to regulate directly the conduct of federal prosecutors in a meaningful way.<sup>154</sup>

Even if Congress were to take a more active role in shaping a national ethical code, it is not institutionally suited to the task. First, the proper construction of ethical rules is critically dependent on a clear understanding of the appropriate balance between the needs of federal law enforcement officials and the rights of defendants and targets of federal investigations.<sup>155</sup> Although Congress is a deliberative body and has superior access to expert testimony,<sup>156</sup> it may not have the professional judgment necessary to make a reasoned decision.<sup>157</sup> Practicing prosecutors and those who interact with them regularly, such as judges or other DOJ attorneys, are in a considerably better position to accurately predict the impact of a given ethical provision. Second, Congress, as a political body, has a tendency to be a reactive rather than a prospective regulator. The McDade Amendment itself is a primary example of this type of behavior: surely the conditions that ostensibly justified the enactment existed prior to Congressman McDade's prosecution, but it was not until a high-profile incident that Congress was moved to act. Finally, Congress is particularly susceptible to the efforts of organized lobbying groups,<sup>158</sup> which may exacerbate the existing problem of defense bar influence over the ethical

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152. The Federal Prosecutor Ethics Act takes this approach: outlining nine specific behaviors that the Attorney General was bound to prohibit when developing a more detailed regulatory regime. Federal Prosecutor Ethics Act, S. 250, 106th Cong. § b(1) (1999).

153. See Mick, *supra* note 13, at 1290-91.

154. See Barkow, *supra* note 133, at 917.

155. See *supra* note 93 and accompanying text.

156. See Mick, *supra* note 13, at 1290-91.

157. See Green & Zacharias, *supra* note 67, at 437-38 (“[I]t is doubtful that Congress can helpfully specify the substantive criteria the rulemakers should employ. The considerations bearing on whether to adhere to, or depart from, states rules simply are too multifaceted . . .”). It follows that Congress would be even more unhelpful in devising the actual content of the rules.

158. See Zacharias, *supra* note 92, at 393-99 (noting that Congress may find it particularly difficult to craft an “intelligent legislative product” in the face of organized interest groups challenging the somewhat speculative predictions of potential regulatory effects made by academics and prosecutorial agencies).

rules governing prosecutorial conduct.<sup>159</sup> Instead, it would be preferable for Congress to delegate as much rulemaking authority as possible to allow actors with a better understanding of the complexities of federal criminal prosecution to determine whether and how rules for federal prosecutors should differ from existing state codes.

The candidate with the strongest claim to expertise in the intricacies of federal prosecution is the Department of Justice itself. There are certainly benefits to developing an ethical code via administrative rulemaking overseen by the Department of Justice. Given both the flexibility and broad solicitation of stakeholder input typical of administrative rulemaking, as well as the Department of Justice's considerable experience with federal criminal enforcement, such a code is likely to be highly detailed<sup>160</sup> and to take account of the unique requirements of prosecuting federal crimes.

Concerns about objectivity and political susceptibility, however, make the Department of Justice an unpalatable choice to draft a code of ethics for federal prosecutors. Certainly the Department of Justice may make regulations governing the conduct of its employees, including federal prosecutors, through the normal administrative notice-and-comment process.<sup>161</sup> Thus far, this authority has generally been applied only to fill gaps in the local rules adopted by federal courts or state regulatory regimes,<sup>162</sup> and the Department of Justice should avoid the temptation to use it to regulate broadly, as some scholars have suggested.<sup>163</sup> The Department of Justice may have some difficulty crafting unbiased ethical regulations<sup>164</sup> and may be particularly prone to err in regulating aspects of prosecutorial conduct that other regulators may not be able to observe or easily sanction. This is not simply a hypothetical concern. Regardless of one's own opinion of the propriety of exempting federal prosecutors from the no-contact rule, the battle over regulatory supremacy sparked by the Thornburgh Memo and Reno Rule demonstrates that other potential regulators have concerns as to the Department of Justice's objectivity and the scope of its regulatory authority.

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159. The influence of the defense bar is well illustrated by the battle over the Thompson Memo. See *infra* notes 165-166 and accompanying text.

160. See Green, *supra* note 78, at 470.

161. See 5 U.S.C. § 301 (2006).

162. See Green, *supra* note 78, at 469.

163. See, e.g., Casey, *supra* note 53, at 424.

164. See Green, *supra* note 29, at 7-8 ("One might question the Department's objectivity. How can prosecutors, engaged in the competitive enterprise of gathering incriminating evidence, objectively determine how much weight to give the respective interests of the government and the individual and how the balance should be struck?").

Moreover, the political accountability of the Attorney General may interfere with the ability of the Department of Justice adequately to protect prosecutorial interests in the face of concerted lobbying by private bars. For example, in 2003, the Department of Justice implemented the Thompson Memo, which, among other things, provided incentives for corporations to waive attorney-client privilege to aid in the identification of individual wrongdoers.<sup>165</sup> Following concerted campaigning by the white-collar defense bar and the introduction of overriding legislation by Senator Arlen Specter, the Department soon changed its position, issuing a blanket proscription on considering a corporation's agreement to a waiver.<sup>166</sup>

It is important to note that the Department of Justice, notwithstanding the clear potential for actual or perceived bias, cannot reasonably be denied the authority to promulgate its own internal ethical rules and discipline prosecutors for violations of either internal or external rules. Such an arrangement would prove an unjustifiable violation of the Department's autonomy and ability effectively to carry out the prosecution of federal crimes. To be sure, the Department of Justice, as the employer of federal prosecutors, must maintain some form of internal disciplinary process. This suggests that any regulatory system for federal prosecutors must contain some provision for restraining the Department of Justice's internal authority to set its own overriding policies. The simplest solution is to permit the Department of Justice to place additional restrictions on the conduct of its attorneys but withhold the authority to enact regulations, such as the Reno Rule, that loosen or abrogate any externally imposed ethical limitation.

The federal courts are another potential body to which Congress might delegate regulatory authority. Federal courts are granted the authority to adopt local rules regulating the conduct of attorneys who appear before them by virtue of Federal Rule of Civil Procedure 83.<sup>167</sup> Accordingly, federal courts could adopt collectively (or the Supreme Court could impose) a uniform set of local court rules governing the ethical conduct of federal prosecutors.<sup>168</sup> In 1995, the Judicial Conference considered recommending a national code for all attorneys appearing before federal courts but rejected the proposal as an

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165. See Barkow, *supra* note 133, at 918.

166. *Id.* at 918-19.

167. FED. R. CIV. P. 83(a)(1).

168. Burbank, *supra* note 92, at 973 ("Imported disuniformity is a self-inflicted wound; the federal courts have chosen to borrow and to do so on a decentralized basis. Surely, the federal judiciary has the means to solve the problem, one way or another, by requiring federal uniformity.").



overreaction to the regulatory disharmony among federal courts.<sup>169</sup> A narrower code that focused solely on federal prosecutors would not implicate the state's authority to regulate lawyers who appear before state courts and so may prove more palatable.

However, there is good reason to suspect that federal courts will prove reluctant regulators in this area. First, owing perhaps to the traditional supremacy of state authority to license lawyers (and therefore to regulate the conduct of practicing attorneys),<sup>170</sup> many district courts have instead directly adopted state ethical codes as their local rules,<sup>171</sup> even though they are under no obligation to do so.<sup>172</sup> Second, federal courts have traditionally been wary of intervening in the regulation of criminal prosecution, which is generally viewed as a core executive function.<sup>173</sup> This concern is unpersuasive for two reasons: as a historical matter, the prosecutorial role cannot be said to be a solely executive function;<sup>174</sup> and the separation of powers among the branches of the federal government is not, and should not be, absolute.<sup>175</sup> Regardless of these critiques, separation-of-powers principles have often rendered courts unwilling to police the conduct of prosecutors aggressively without a clear delegation of authority.<sup>176</sup> While narrowing the scope of a national code to only federal

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169. See McMorrow, *supra* note 72, at 17.

170. See *id.* at 9 (“States are the initial source of the right to practice law. This first order power gives state supreme courts, and the courts who report to them, a strong and powerful role among the multiple institutions that shape the legal profession.”) (citation omitted).

171. Note, *Uniform Federal Rules*, *supra* note 25, at 2066–67.

172. See Green, *supra* note 15, at 74. Indeed, federal courts have aggressively protected their authority to set their own rules distinct from those adopted by the state. Professor Zacharias has identified a number of cases in which federal courts have explicitly noted that their own ethical regulations control. Zacharias, *supra* note 92, at 340 n.24.

173. Some commentators have gone so far as to suggest that, under a strict view of separation-of-powers principles, any judicial regulation of prosecutors may be unconstitutional. See WOLFRAM, *supra* note 119, at 30; Edward C. Carter III, *Limits of Judicial Power: Does the Constitution Bar the Application of Some Ethics Rules to Executive Branch Attorneys?*, 27 S. ILL. U. L.J. 295, 309–10 (2003) (arguing that *Model Rules* 3.8(f), 4.2, and 8.4(c) cannot be applied to federal prosecutors without violating separation-of-powers principles). But see Krent, *supra* note 17, at 312 (“Such enhanced executive control may represent sound policy grounded in concern for both effective and fair criminal law enforcement. But sage policy should not be confused with constitutional mandate.”).

174. See *supra* notes 121–123 and accompanying text.

175. See Krent, *supra* note 17, at 282.

176. See, e.g., *Newman v. United States*, 382 F.2d 479, 482 (D.C. Cir. 1967) (“The remedy [for prosecutorial misconduct] lies ultimately within the establishment where power and discretion reside. The President has abundant supervisory and disciplinary powers—including summary dismissal—to deal with misconduct of his subordinates; it is not the

prosecutors or an express mandate from Congress in the form of an amendment to the Rules Enabling Act<sup>177</sup> may encourage the federal courts to take a more aggressive stance,<sup>178</sup> it would be preferable to entrust the development of a detailed code to a less wary entity.

In addition to their direct rulemaking authority, federal courts also have a parallel, independent source of authority to control the conduct of federal prosecutors: the supervisory powers doctrine, which permits individual courts to regulate the administration of the criminal system.<sup>179</sup> In principle, decentralized judicial regulation may permit more “textured” development of ethical regulations than is possible when a complete code is developed through the consensus of a wide variety of interest groups, as would be the case in administrative rulemakings or codes developed by the Judicial Conference.<sup>180</sup> However, supervisory authority is limited by the “harmless error” doctrine, which limits courts under their supervisory authority to offering remedies for prosecutorial misconduct only for those ethical lapses that are clearly prejudicial to the defendant.<sup>181</sup> This rule therefore similarly limits the ability of courts to develop nuanced distinctions between ethical and unethical behavior. Moreover, the Supreme Court has intimated that the supervisory powers doctrine may apply only to the conduct of prosecutors before courts.<sup>182</sup>

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function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers.”) (citation omitted).

177. 28 U.S.C. §§ 2071-77 (2006).

178. See Green & Zacharias, *supra* note 67, at 452 (suggesting that congressional encouragement may help courts focus on the merits of ethics regulation).

179. Although the existence of the supervisory powers doctrine has been questioned in the past, most commentators today accept it and instead question its scope. See Fred C. Zacharias & Bruce A. Green, *Federal Court Authority To Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1310-11 (2003).

180. See ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* 67 (1981) (suggesting that judicial review of guilty pleas will lead to “a textured common law of prosecutorial authority”).

181. See *United States v. Hasting*, 461 U.S. 499, 506 (1983) (“Supervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error.”).

182. See Zacharias & Green, *supra* note 27, at 242; see also *Wayte v. United States*, 470 U.S. 598, 607 (1985) (suggesting that judicial review of charging decisions was inappropriate both because “factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake” and because routine judicial review of charging decisions may “chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to

One potential solution is for Congress to fragment rulemaking and primary enforcement authority along this line suggested by the supervisory powers doctrine by explicitly reserving to the federal courts authority to promulgate rules and standards regulating certain, specified aspects of the prosecutorial function that had potentially invoked the courts' supervisory authority. Conduct that cannot trigger the invocation of a court's supervisory powers should be regulated by an independent commission of the sort contemplated in an early draft of the McDade Amendment<sup>183</sup> or the FPEA.<sup>184</sup> Such a body would retain the deliberative and information-gathering strengths of Congress but would be somewhat more isolated from political interference. Along the same lines, the commission must remain independent of the Department of Justice to prevent the appearance of bias. An administrative commission whose members have prosecutorial or law enforcement experience would be well situated to address issues outside the competence of the federal courts, such as investigatory behavior or the ethical application of charging discretion.

### *B. Investigation and Enforcement*

The proper allocation of authority to ensure consistent enforcement of a national code is less clear. It has been suggested that an overabundance of disciplinary authorities may contribute to the underenforcement of ethical regulations as each actor assumes that another will take primary responsibility,<sup>185</sup> but it is clear that no single authority is capable of assuming sole responsibility for overseeing the behavior of federal prosecutors. Accordingly, the ultimate goal should be a cooperative joint venture designed to minimize conflict among regulators.<sup>186</sup> It is critical, however, that cooperation not imply duplication of enforcement authority. Enforcement authority may be split into investigative and sanction-issuing functions, and these may be divided among potential regulators to ensure that the most capable body has primary authority at each stage of the disciplinary process.

A uniform national system of regulation for federal prosecutors can be created only by a federal agency, but the authority to enforce the code and discipline lawyers for violations might well be left to the existing system of

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outside inquiry"); *United States v. Russell*, 411 U.S. 423, 435 (1973) (noting that the enforcement of criminal law is an activity primarily entrusted to the executive branch and warning lower courts to tread lightly in regulating law enforcement activities).

183. See Citizens Protection Act of 1998, H.R. 3396, 105th Cong. § 203 (1998).

184. See Federal Prosecutor Ethics Act, S. 250, 106th Cong. (1999).

185. See, e.g., Green, *supra* note 15, at 91.

186. See Green & Zacharias, *supra* note 67, at 387 n.8 (citing Kaufman, *supra* note 70, at 164).

state disciplinary boards. State enforcement would be minimally disruptive to the existing disciplinary framework and would help to mitigate perceptions of self-dealing by federal agencies and organizations.<sup>187</sup> However, the degree to which state boards are actually willing to engage in disciplinary actions against federal prosecutors is a matter of some debate.<sup>188</sup> Moreover, the referral of federal prosecutors to state disciplinary boards for ethical violations may undercut the development of national uniformity that was the impetus for a national standard in the first place. Even if a uniform set of rules and standards is adopted, each state would still be free to pursue its own enforcement strategy, potentially leading to a de facto balkanization of ethical rules akin to the situation currently facing federal prosecutors.<sup>189</sup>

State disciplinary boards also may be unable to issue suitably targeted sanctions. Although the secrecy of disciplinary boards makes it difficult to ascertain the scope of punitive sanctions that they have issued,<sup>190</sup> the options appear to be limited. A prosecutor found to have violated state ethical standards might be publicly or privately reprimanded, suspended, or even disbarred.<sup>191</sup> A public reprimand, though surely damaging to a prosecutor's reputation,<sup>192</sup> is ultimately a fairly mild sanction. On the other hand, suspension or disbarment is a severe punishment, suited only to the most serious of ethical lapses. The lack of a clear middle ground may render state authorities unable to deter prosecutorial misconduct that cannot be effectively controlled by reprimand or fines but does not warrant suspension. In sum, bolting the existing state disciplinary system onto a new federalized regime would likely continue the existing disharmony between jurisdictions and may

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187. See Little, *supra* note 148, at 415.

188. See Green, *supra* note 15, at 89-91 (discussing some of the reasons that state disciplinary boards receive few complaints about federal prosecutors and issue sanctions even more rarely); Kaufman, *supra* note 70, at 159-60 (suggesting that state administrative systems would be unwilling to take on the additional burden of enforcing a federal system of ethical regulation). *But see* Todd S. Schulman, Note, *Wisdom Without Power: The Department of Justice's Attempt To Exempt Federal Prosecutors from State No-Contact Rules*, 71 N.Y.U. L. REV. 1067, 1075-76 (1996) (finding that defense attorneys have "not hesitated" to refer federal prosecutors to state disciplinary boards).

189. See Zacharias, *supra* note 92, at 397.

190. See Green, *supra* note 15, at 88.

191. See AM. BAR ASS'N, CTR. FOR PROF'L RESPONSIBILITY, STANDING COMM. ON PROF'L DISCIPLINE, SURVEY ON LAWYER DISCIPLINE SYSTEMS 5-8 (2003) (providing data on the incidence of each type of sanction across jurisdictions).

192. See Green, *supra* note 15, at 81 ("The impact of a public reprimand on the record at trial or, more significantly, in a published opinion, should not be underestimated. Prosecutors are jealous of their reputations, including their reputations for probity.").

not be sufficiently nuanced to permit the development of finely contoured ethical rules.

The Office of Professional Responsibility is, in some respects, in a prime position to supervise federal prosecutors. A disciplinary proceeding conducted before the OPR will have superior access to the facts necessary to obtain a complete understanding of the circumstances surrounding the case. Moreover, of the available regulators, the OPR is likely to be the most sensitive to needs and constraints unique to federal prosecutors. Finally, since federal prosecutors are DOJ employees, the OPR has considerable flexibility in crafting disciplinary sanctions appropriate to the severity of the misconduct.

Nonetheless, the OPR suffers from transparency problems that limit its ability prospectively to guide the behavior of prosecutors. Proceedings are conducted largely in secret, and the results are often unpublished, even within the Department of Justice itself.<sup>193</sup> If prosecutors are unable to observe how ethical regulations are interpreted and applied in different factual circumstances, it will be difficult for clear expectations to develop. Second, the same concerns regarding the inability of the Department of Justice to determine objectively its own ethical standards counsel against granting the Department of Justice preemptive authority to discipline federal prosecutors. Even if the proceedings could be reliably conducted without bias towards the Department's own employees, reliance on self-regulation would stoke the perception of the "fox guarding the henhouse."<sup>194</sup> Continuing to improve the disclosure of investigations and opinions, even if only internally within the Department of Justice, is necessary if the OPR is to take a prominent role in prosecutorial discipline.

The recognition of federal court authority to regulate attorney behavior further complicates the enforcement regime. Any ethical misstep that produces prejudicial error to a defendant in an ongoing proceeding must necessarily invoke the federal courts' enforcement authority, as only the courts may provide procedural relief to the wronged defendant. Although the issuance of procedural relief is surely a reputational blow to the prosecutor found to have

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193. See *id.* at 85 ("Because the OPR did not publicize its determinations, even within the Department of Justice itself, but limited itself to identifying and privately sanctioning wrongdoers within the Department, the OPR was also ineffective in guiding federal prosecutors as to the bounds of appropriate conduct and deterring prosecutorial misconduct."). Although the Department of Justice has adopted a policy of issuing public statements when it finds that misconduct has occurred or when the investigated attorney so requests, the underlying facts remain secret, limiting the utility of disclosure. See *id.* at 86.

194. Little, *supra* note 148, at 415; see also DAVIS, *supra* note 18, at 158 (contending that many attorneys would be reluctant to refer a prosecutor to the OPR on the assumption that the disciplinary proceeding would be biased).

violated ethical standards and a necessary step to ensure that justice is done, courts are ill suited to provide the sort of targeted sanction needed for clear ethical guidance.<sup>195</sup>

Courts may be wary of spelling out the precise bounds of a prosecutor's misconduct or the requirements of an ethical rule. For example, *United States v. Williams*<sup>196</sup> considered a district court requirement that prosecutors disclose exculpatory evidence to a grand jury. In vacating the district court's requirement, the Supreme Court was not clear as to whether its holding was based on excessive interference with the prosecutor or with the independence of the grand jury.<sup>197</sup> Even if the reasoning of the Court were clear, the Court's understanding of a regulation may diverge significantly from the text's facial requirements.<sup>198</sup> Although appellate review may, in principle, unify divergent interpretations within and between circuits, the limitations of review suggest that considerable fragmentation would persist.

Moreover, the ability of courts to tailor penalties to the severity of the violation is fairly limited. Although courts may dismiss an indictment, suppress evidence, or quash a subpoena, such procedural relief for defendants is relatively rare.<sup>199</sup> Even rarer is the imposition of criminal contempt.<sup>200</sup> Personal sanctions for the offending prosecutor appear to be the favored remedy.<sup>201</sup> Some commentators have suggested that informal judicial remedies,

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195. See *infra* notes 199-202 and accompanying text.

196. 504 U.S. 36 (1992).

197. Zacharias & Green, *supra* note 179, at 1316-17; see also *United States v. Hammad*, 858 F.2d 834, 840 (2d Cir. 1988) (holding that certain uses of informants may satisfy the "authorized by law" clause of section 7-104(A)(1) (the predecessor of *Model Rule* 4.2), but declining to establish precisely what those uses might be).

198. See Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 74 (2009) ("Courts in the supervisory setting have developed and implemented doctrinal understandings that are not necessarily consistent with the codes. An ethics rule may forbid contemplated conduct or appear to authorize the conduct, but judges evaluating the propriety of attorneys' actual behavior do not always defer to the codes' standards; a court may tolerate professional conduct that appears to be forbidden by a rule or proscribe conduct that appears to be permitted.").

199. See Green, *supra* note 15, at 78-79. Some courts have directly expressed a preference for disciplinary action against the offending prosecutor over procedural remedies such as the suppression of evidence. See, e.g., *Suarez v. State*, 481 So. 2d 1201, 1206-07 (Fla. 1985) (arguing that disciplinary action, rather than the "indirect sanction of the exclusionary rule," was the appropriate response to a violation of the no-contact rule).

200. See Green, *supra* note 15, at 81.

201. See, e.g., *United States v. Hasting*, 461 U.S. 499 (1983) (holding that the reversal of a conviction for prosecutorial misconduct was improper and suggesting personal sanctions instead).

such as unfavorable scheduling or discovery orders, may be sufficient to restrain overzealous prosecutors,<sup>202</sup> but such remedies have only a diffuse deterrent effect and are disconnected from the violation. It is clear that federal courts lack the remedial flexibility of the OPR or even a state disciplinary board.

Accordingly, prosecutors whose conduct has triggered the issuance of procedural relief should be referred to the OPR, which both has access to relevant mitigating information (in the form of internal policies, undisclosed evidence or facts, etc.) and may issue narrowly targeted sanctions, for determination of an appropriate sanction. At the very least, referral to the OPR provides a public reprimand, in the form of a judicial opinion finding an ethical violation, with the possibility of a further, targeted penalty. The case of a “harmless error” should be handled in the same way. In both cases, the court takes primary authority to investigate and make determinations as to violations of rules that it is tasked with developing.

Ethical violations in the context of prosecutorial functions that do not implicate the court’s supervisory authority, covered by rules promulgated by the independent ethics review commission, should be investigated and adjudicated by that commission. If a violation is found, the case should be referred to the OPR for determination of an appropriate sanction. In each case, the investigatory function and subsequent determination of a violation should be carried out by the single institution responsible for promulgating the rule that the prosecutor stands accused of violating. Doing so would ensure that the interpretation and application of ethical rules are consistent with the intent of the drafters.

## CONCLUSION

The regulation of the ethical decisionmaking of federal prosecutors implicates the interests of a wide variety of institutions, at both the federal and state levels. The conflicting ethical codes to which federal prosecutors are subject create unnecessary regulatory turmoil and may chill legitimate exercises of prosecutorial power. A national ethical code, specifically tailored to the unique features and constraints of the enforcement of federal criminal laws, may help to alleviate these problems, but the choice of who should author and enforce these regulations requires the resolution of difficult policy questions. These questions have no easy answers, but it is clear that uniformity requires that prosecutors be subject to the authority of only a single regulator for each

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202. See, e.g., Green, *supra* note 15, at 71.

aspect of the prosecutorial function. The division of rulemaking, investigatory, and disciplinary authority offered in this Note is by no means the only possible one. However, the distribution that I have suggested limits disruption to the existing regime while still encouraging uniform development and application of ethical rules for federal prosecutors and minimizes conflict between various supervisory authorities.