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# Prosecutors and Professional Regulation

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# ARTICLES

## Prosecutors and Professional Regulation

BRUCE A. GREEN\*

Much is expected of prosecutors. The bench and bar take the view that prosecutors are “ministers of justice”<sup>1</sup> with a responsibility to uphold higher professional standards than other lawyers,<sup>2</sup> and prosecutors generally agree.<sup>3</sup> But not so much is *required* of them. Few professional conduct provisions specifically target their work,<sup>4</sup> and those provisions are mostly unde-

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\* Louis Stein Professor, Fordham University School of Law; Director, Stein Center for Law and Ethics. This article focuses on three recent matters with which I had some professional involvement and/or personal familiarity, principally through my bar association activities. I have endeavored, perhaps not with full success, to bring as much objectivity and balance to the article as possible. © 2012, Bruce A. Green.

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1. *See, e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that prosecutors have special obligations as representatives “not of an ordinary party to a controversy, but of a sovereignty 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.”); MODEL RULES OF PROF’L CONDUCT R. 3.8, cmt. 1 (2010) [hereinafter MODEL RULES] (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”). *See generally* Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 609 (1999).

2. *See, e.g.*, *People v. Jones*, 44 N.Y.2d 76, 81 (1978) (“[T]he responsibilities of a prosecutor for fairness and open-dealing are of a higher magnitude than those of a private litigant . . . .”); N.Y.S. BAR COMM. ON PROF’L ETHICS, Op. 683 (1996) (“The prosecutor’s ‘quasi-judicial function’ implies special professional obligations that set prosecutors apart from other lawyers.”).

3. *See, e.g.*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 1-1.1 (3d ed. 2009):

The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.

4. *See* ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 150-51 (2007) (“[M]odel rule 3.8 does not adequately address the conduct and behavior of prosecutors . . . . The rule’s inadequacy lies not only in its failure to address critical issues but in the vagueness of its language.”); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573.

manding.<sup>5</sup> Courts often interpret the generally applicable rules of professional conduct as less restrictively applied to prosecutors than to other lawyers.<sup>6</sup> When prosecutors engage in questionable conduct that does implicate professional conduct rules, professional discipline rarely follows.<sup>7</sup> For every case in which a prosecutor is publicly sanctioned for egregious misconduct,<sup>8</sup> there are many more in which prosecutors' questionable conduct goes unpunished.<sup>9</sup> Although the U.S. Supreme Court, in recognizing prosecutorial immunity, assumed that prosecutors are adequately policed by regulators of the bar,<sup>10</sup> in reality, there is no reason for prosecutors to fear professional regulation:<sup>11</sup> in making, interpreting,

5. See Green, *supra* note 4, at 1587-96.

6. See Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 228-35 (2000) (discussing exemptions of prosecutors from ethical restrictions relating to investigations, witness compensation, and conflicts of interest).

7. See Edward M. Genson & Marc W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is it Time to Start Prosecuting the Prosecutors?*, 19 LOY. U. CHI. L.J. 39, 47 (1987); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69 (1995) [hereinafter *Policing Federal Prosecutors*]; David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Current Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, YALE L.J. (2011), [http://yale.academia.edu/DavidKeenan/Papers/1089349/The\\_Myth\\_of\\_Prosecutorial\\_Accountability\\_After\\_Connick\\_v.\\_Thompson\\_Why\\_Existing\\_Professional\\_Responsibility\\_Measures\\_Cannot\\_Protect\\_Against\\_Prosecutorial\\_Misconduct](http://yale.academia.edu/DavidKeenan/Papers/1089349/The_Myth_of_Prosecutorial_Accountability_After_Connick_v._Thompson_Why_Existing_Professional_Responsibility_Measures_Cannot_Protect_Against_Prosecutorial_Misconduct); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275 (2004); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 4 n.9 (2009) (citing authority on ineffectiveness of discipline of prosecutors); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C.L. REV. 721 (2001). There is evidence that internal regulatory mechanisms are equally deferential. See Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537 (2011); see also Bruce A. Green, *Regulating Federal Prosecutors: Let There Be Light*, 118 YALE L.J. Pocket Part 156 (Supp. 2009) [hereinafter *Regulating Federal Prosecutors*] (discussing failure of the U.S. Department of Justice to make its individual disciplinary determinations public).

8. See Zacharias & Green, *supra* note 7, at 12 ("Durham, North Carolina District Attorney Mike Nifong's disbarment in June 2007 was an exceptional instance in which disciplinary regulators imposed meaningful sanctions [for prosecutorial misconduct].").

9. See, e.g., *In re Special Proceedings*, 2011 U.S. Dist. LEXIS 133812 (D.D.C. Nov. 21, 2011) (declining to initiate criminal contempt proceedings against federal prosecutors who disregarded discovery obligations in prosecution of Senator Ted Stevens); *In re Auerhahn*, 2011 U.S. Dist. LEXIS 104717 (D. Mass. Sept. 15, 2011) (declining to discipline federal prosecutor for disregarding discovery obligations); Rudin, *supra* note 7.

10. See *Connick v. Thompson*, 131 S. Ct. 1350, 1362-63 (2011) (stating that as an attorney, a prosecutor "who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment"); *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) ("A prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers"). For a recent refutation of this assumption, see Rudin, *supra* note 7. For a general critique of prosecutorial immunity, see Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509 (2011).

11. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 962 (2009) ("The potential for abuse of discretion calls for more effective mechanisms to oversee and regulate prosecutors' conduct. Many, if not most, other government actors enjoy less power yet are subject to far more regulation than prosecutors are. The comparison suggests that prosecutors are the outliers and that some new regulatory mechanisms are likely to be worth the cost."); Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, in Leslie Levin & Lynn Mather, *LAWYERS IN*

and enforcing rules of professional conduct, the legal profession's regulators are highly deferential to them.<sup>12</sup>

Even so, prosecutors often express mistrust of professional regulators, their rules, and their processes. Twenty years ago, prosecutors' mistrust may have been more understandable. Prosecutors perceived, probably unfairly, that the organized bar had been captured by defense lawyers who were seeking to use professional regulation to impose limits on criminal investigative authority that the law did not otherwise recognize. Today, this perception is even further from the reality, but it has persisted in the rhetoric prosecutors employ in discourse regarding their professional conduct, even in contexts such as rule-making where prosecutors are not representing one side in an adversary process but purport to express personal views. This article explores prosecutors' public attitude toward professional regulation, beginning with a brief account of their responses to perceived over-regulation two decades ago, then offering three recent illustrations, and finally exploring the significance of prosecutors' rhetorical challenges to external regulatory efforts. It suggests that the rhetoric reflects a departure from prosecutors' professional obligation to act in the public interest and that the rhetoric may have various negative repercussions, including a likely negative impact on the culture of prosecutors' offices.<sup>13</sup>

### I. A BRIEF MODERN HISTORY

Regulation of the bar in the United States has principally been the province of state courts, which admit lawyers to practice in their states, adopt professional conduct rules to govern those lawyers, and oversee the disciplinary processes used to sanction members of the state bar who violate the rules.<sup>14</sup> Federal courts have the authority to establish professional conduct rules governing lawyers—including prosecutors—in federal litigation, but they largely rely on state-court rules and state-court disciplinary processes.<sup>15</sup> State courts in turn rely substan-

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PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 289 (2012) (concluding that “[p]otential civil and criminal liability and professional discipline play little or no role” in influencing prosecutors’ decisions regarding disclosures to the defense).

12. Professional regulators might be deferential to prosecutors for various reasons, including that they are confident in the ability of prosecutors’ offices to regulate themselves and that they are reluctant to engage in confrontations with politically powerful prosecutors’ offices. See Zacharias & Green, *supra* note 7, at 52-57 (2009) (discussing why disciplinary agencies would be reluctant to proceed against prosecutors who act incompetently).

13. This is not to suggest that prosecutors have a monopoly on rhetorical excess—they do not. See, e.g., Alafair Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2019 (2010).

14. State courts’ regulatory role is far from exclusive, however. See James M. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 60 (2006); Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 566 (2005); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

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

tially on the work product of the American Bar Association (“ABA”) in setting standards of professional conduct.<sup>16</sup>

The ABA has evolved over time since its late nineteenth century origin as a representative of the professional elite.<sup>17</sup> Today, it has over 400,000 members and seeks to speak on behalf of the entire U.S. legal profession to promote the good of the profession and public.<sup>18</sup> Since its inception, a principal objective has been to articulate, codify and promote professional standards for lawyers and judges.<sup>19</sup>

Although most of the ABA’s model professional conduct rules are written for lawyers generally, they have always reflected the prevailing understanding that lawyers serving as prosecutors have a unique professional role that implicates special professional responsibilities.<sup>20</sup> The current codification, the *Model Rules of Professional Conduct*,<sup>21</sup> includes various provisions applicable to all lawyers including prosecutors, but also includes one provision, Model Rule 3.8, which is specifically directed at prosecutors, as did the 1970 *Model Code of Professional Responsibility*<sup>22</sup> and, before that, the 1908 *Canons of Professional Ethics*.<sup>23</sup> However, the prosecutorial ethics rule in the 1970 *Model Code* included only two

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16. See Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 110-11 (2009) (suggesting that “[t]o avoid capture by the bar, or the appearance of capture, state supreme courts need to involve themselves more fully than they traditionally have in the code-drafting process”). Although the ABA is a private professional association, prosecutors have acknowledged that “in some respects [it has] served as a quasi-governmental entity” and “has been permitted to play a unique role in the development of law,” and that its model professional conduct rules in particular “have traditionally won strong acceptance in the legal, judicial, and political communities . . . due in no small part to the widely held belief that the rules are a consensus product of many decades of dedicated and thoughtful attention to problems in legal ethics.” Prosecutors and the ABA, A Report to the President of the ABA by the Advisory Committee on the Prosecution Function (Jan. 8, 1992) at 11, 15 (on file with the author).

17. See generally Jerold S. Auerbach, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN AMERICA* (1976).

18. The ABA currently describes its mission as “[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.” See *Advocacy*, A.B.A., <http://www.americanbar.org/advocacy.html> (last visited June 3, 2012). Although the Association seeks a membership and leadership that are broadly representative of the profession, that does not guarantee that the public interest is not outweighed by the interests of subgroups within the profession or of the profession as a whole. See generally Elizabeth Chambliss & Bruce A. Green, *Some Realism About Bar Associations*, 57 DEPAUL L. REV. 425, 430-47 (2008) (discussing why viewpoint diversity may not mitigate the effect of professional self-interest on the formulation of bar association policies).

19. See generally Auerbach, *supra* note 17, at 40-53.

20. This understanding predates the adoption of the 1908 Canons. See, e.g., *Rush v. Cavanaugh*, 2 Pa. 187 (Pa. 1845) (“[The prosecutor] is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man”). For discussions of *Rush v. Cavanaugh*, see Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 257-58 (1992); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1 (2005).

21. MODEL RULES.

22. MODEL CODE OF PROF’L RESPONSIBILITY DR 7-103 (1983) [hereinafter MODEL CODE].

23. CANONS OF PROF’L ETHICS 5 (1908) (“The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.”).

subsections: one codifying the duty to refrain from prosecuting in the absence of probable cause,<sup>24</sup> and the other requiring prosecutors to disclose favorable evidence to the defense.<sup>25</sup> Although Model Rule 3.8 includes several new subsections, it still covers a relatively narrow range of issues.<sup>26</sup>

Since the 1960s, the ABA has sought to provide further guidance to prosecutors as well as criminal defense lawyers by developing Standards of Criminal Justice addressing a considerably broader range of ethical questions that arise in criminal cases. The drafting process has been ongoing and, to date, the ABA has issued more than twenty sets of Standards, many of which have undergone significant revisions. The current Standards are the product of a thorough process that engages prosecutors, defense lawyers, judges, and their institutional representatives.<sup>27</sup> Unlike the *Model Rules*, the Standards are not designed to be adopted by courts as enforceable rules, but rather to codify a professional consensus among prosecutors, defense lawyers, and judges about how lawyers and others should behave in criminal cases. As the Supreme Court has recognized, courts may look to Standards selectively for assistance in

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24. MODEL CODE DR 7-103(A). The provision was carried over into Model Rule 3.8(a). There are exceedingly few published decisions disciplining prosecutors for knowingly initiating criminal charges without probable cause. A recent one involves the Maricopa County Attorney and his deputy who, a disciplinary judge found, engaged in a course of prosecutorial misconduct and other professional abuses warranting disbarment, of which filing charges without probable cause was scarcely the most serious. Opinion and Order Imposing Sanctions, Matter of Thomas, PDJ-2011-9022 (Ariz. Apr. 10, 2012). Several other decisions invoking the probable-cause rule have involved Iowa prosecutors who, with the knowledge and approval of the trial judge, allowed defendants charged with more serious crimes (as to which there was probable cause) to plead guilty to minor traffic offenses that had no relationship to the defendants' alleged conduct. See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Borth, 728 N.W.2d 205 (Iowa 2007); Iowa Supreme Ct. Att'y Disciplinary Bd. v. Zenor, 707 N.W.2d 176 (Iowa 2005); Iowa Supreme Ct. Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360 (Iowa 2005). Evidently, the practice condemned by the Iowa Supreme Court in these decisions is openly undertaken in many other states. See Mari Byrne, Note, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961 (2010). Another case, *In re Leonhardt*, 930 P.2d 844 (Or. 1997), involved an Oregon prosecutor who secured a grand jury indictment of police officers based on her own unsworn statements, without presenting any witnesses or other evidence. The evidence suggested that her unsworn statements were fabricated. She subsequently covered up the deficiency of the indictments by falsifying grand jury records and lying to the court, leading to her criminal conviction on multiple counts of forgery and tampering with public records. She was then disbarred for a slew of disciplinary violations, including causing criminal charges to be instituted when she knew or it was obvious that the charges were not supported by probable cause. In several other cases, disciplinary charges were brought but not sustained. See Att'y Grievance Comm'n v. Gansler, 835 A.2d 548, 573-74 (Md. 2003); *In re Burrows*, 629 P.2d 820, 826 (Or. 1981); *In re Lucareli*, 611 N.W.2d 754 (Wis. 2000).

25. MODEL CODE DR 7-103(B).

26. See Green, *supra* note 4, at 1575.

27. For discussions of the drafting process, see Kenneth J. Hodson, *The American Bar Association Standards for Criminal Justice: Their Development, Evolution, and Future*, 59 DENV. U. L.J. 3 (1981); Rory K. Little, *The ABA's Project to Revise the Prosecution and Defense Function Standards*, 62 HASTINGS L.J. 1113 (2011); Rory K. Little, *The Role of Reporter for a Law Project*, 4 HASTINGS CONST. L.Q. 747 (2011). The Standards on the Prosecution and Defense Function are currently under revision. For collections of articles on the works in progress, see Symposium: *Roundtable Discussion of the ABA's Standards for Criminal Litigation*, 38 HASTINGS CONST. L.Q. no. 4 (2011); *A Discourse on the ABA's Criminal Justice Standards: Prosecution and Defense Functions*, 62 HASTINGS L.J. no. 5 (2011).

ascertaining what is expected of a professionally competent lawyer.<sup>28</sup>

In the 1980s and early 1990s, several conflicts erupted regarding professional conduct rules and standards that influenced prosecutors' current attitudes. The disagreements related primarily to prosecutors' investigative conduct, particularly in federal cases.

The most pitched battle was over the application of the "no-contact" rules,<sup>29</sup> which restrict all lawyers and their agents from communicating with represented parties.<sup>30</sup> Defense lawyers sought to invoke these rules in criminal cases as a ground for suppressing admissions made by represented defendants in the course of undercover investigations and interviews by investigators and informants acting under prosecutors' direction.<sup>31</sup> In response, the Department of Justice ("DOJ") adopted an administrative regulation meant to exempt prosecutors from the no-contact rules and to substitute a more liberal standard.<sup>32</sup> Congress, in turn, adopted legislation known as the McDade Amendment that superseded the DOJ regulation and subjected federal prosecutors to state professional conduct rules.<sup>33</sup>

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28. See *Strickland v. Washington*, 466 U.S. 688, 688-89 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ('The Defense Function'), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.").

29. These are state professional conduct rules, based on Model Rule 4.2 or Disciplinary Rule 7-104 of the predecessor *Model Code*, which restrict lawyers and their surrogates from communicating with represented persons (including representatives of represented entities) regarding the subject of the representation.

30. See generally Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992); 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, 470-82 (1996); Neil Salon, Note, *Prosecutors and Model Rule 4.2: An Examination of Appropriate Remedies*, 12 GEO. J. LEGAL ETHICS 393 (1999); F. Dennis Saylor, IV & J. Douglas Wilson, *The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. PITT. L. REV. 459 (1992).

31. See, e.g., *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988). See generally Bruce A. Green, *A Prosecutor's Communications With Represented Defendants: What Are the Limits?*, 24 CRIM. L. BULL. 283 (1988) (discussing cases).

32. 28 C.F.R. 77.10(a) (1998) ("Communications With Represented Persons"). For commentary on this controversial regulation, see Jennifer Marie Buettner, *Compromising Professionalism: The Justice Department's Anti-Contact Rule*, 23 J. LEGAL PROF. 121 (1999); Alafair S.R. Burke, Note, *Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate*, 46 STAN. L. REV. 1635 (1994); Neals-Erik William Delker, *Ethics and the Federal Prosecutor: The Continuing Conflict Over the Application of Model Rule 4.2 to Federal Attorneys*, 44 AM. U. L. REV. 855 (1995); Green, *supra* note 30, at 473-82; Jocelyn Lupert, Note, *The Department of Justice Rule Governing Communications With Represented Persons: Has the Department Defied Ethics?*, 46 SYRACUSE L. REV. 1119 (1996); 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 (1996); Robert Sneed, *The "No-Contact" Rule and Prosecutorial Misconduct*, 47 S.C. L. REV. 130 (1995); Richard M. Zarfardino, *Leveling the Playing Field for Federal Prosecutors or an End Around Ethics? An Evaluation of the Thornburgh Memorandum and the Reno Rule*, 43 NAVAL L. REV. 137 (1996).

33. Citizens Protection Act ("McDade Amendment"), Pub. L. No. 105-277, div. A, Sec. 101(b), § 801(a), 112 Stat. 2681 (1998) (codified in relevant part at 28 U.S.C. § 530B (2000)). For discussions of this law, see Gregory B. LeDonne, *Revisiting the McDade Amendment: Finding the Appropriate Solution for the Federal*

The controversy over no-contact rules was largely resolved by federal decisions interpreting them to permit undercover investigations that comport with the Constitution.<sup>34</sup>

During the same time period, several other battles broke out over the regulation of prosecutors. One was over the ABA's adoption of a new professional conduct provision restricting prosecutors' issuance of subpoenas to attorneys.<sup>35</sup> Two others involved the reach of generally applicable rules: the duty of candor in *ex parte* proceedings, which might require prosecutors to disclose exculpatory evidence to the grand jury,<sup>36</sup> and the duty to refrain from deceitful conduct, which might forbid prosecutors' initiation of undercover investigations.<sup>37</sup> Additionally, prosecutors challenged two revisions proposed in 1989 to the ABA Prosecution Function Standards, one relating to attorneys' subpoenas and the other relating to forfeitures of legal fees.<sup>38</sup>

In challenging the adoption or application of professional conduct rules and standards to restrict investigative activities by prosecutors and their agents, federal prosecutors argued in part that the restrictions were unwarranted as a matter of policy. In general, prosecutors argued that the rules in question, for little public benefit, seriously interfered with prosecutors' discretion to employ legitimate law-enforcement investigative methods, such as undercover investigations, to uncover evidence of criminal conduct. The substantive arguments were reasonable and respectful of the regulatory role of courts, disciplinary agencies, and the organized bar, and they largely carried the day. But federal prosecutors made additional assertions that appeared to challenge the basic premise that prosecutors, as lawyers, should be subject to professional regulation.<sup>39</sup> This line of argument essentially stated that professional conduct rules were an illegitimate vehicle for regulating areas of practice that are already addressed by statutes and constitutional case law; that regulatory institutions lacked competence to take adequate account of law enforcement interests or were potentially captive of the

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*Government Lawyer*, 44 HARV. J. ON LEGIS. 231 (2007); Jesselyn Alicia Radack, *The Big Chill: Negative Effects of the McDade Amendment and the Conflict Between Federal Statutes*, 14 GEO. J. LEGAL ETHICS 707 (2001); Zacharias & Green, *supra* note 6.

34. See, e.g., *United States v. Carona*, 630 F.3d 917 (9th Cir. 2010).

35. See, e.g., *United States v. Ferrara*, 54 F.3d 825 (D.C. Cir. 1995); *Whitehouse v. U.S. Dist. Court*, 53 F.3d 1349 (1st Cir. 1995); *Baylson v. Disciplinary Bd.*, 975 F.2d 102, 105 (3d Cir. 1992); *Kolibash v. Comm. on Legal Ethics*, 872 F.2d 571, 575 (4th Cir. 1989). See generally Cramton & Udell, *supra* note 30; Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917 (1992).

36. See Green & Zacharias, *supra* note 15, at 384 n.3. The ABA initially interpreted its rule requiring disclosure of adverse facts in *ex parte* proceedings to apply to grand jury proceedings but withdrew this interpretation when it amended the *Model Rules* in 2002. See *id.*; MODEL RULES R. 3.8 cmt.

37. See Green & Zacharias, *supra* note 15, at 385 n.5.

38. See Andrew Sonner, *Witness for the Prosecution*, 6 CRIM. JUST. 1 (Fall 1991).

39. Memorandum from Richard Thornburgh for All Justice Department Litigators Re Communications with Persons Represented by Counsel (June 8, 1989) (unpublished office memorandum) [hereinafter *Thornburgh Memorandum*], reprinted in *In re Doe*, 801 F. Supp. 478, 489-93 (D.N.M. 1992).



defense bar; and that federal prosecutors, as federal officials, should not be subject to state court regulation of the bar.<sup>40</sup> The prosecutors' rhetoric was sometimes heated and hyperbolic. For example, a 1991 press release jointly issued by the DOJ, the National District Attorneys Association, and the National Association of Attorneys General, accused the ABA of lending "aid and comfort" to the defense bar in its "attempt[] to use rules of professional conduct to stymie criminal investigations and prosecutions."<sup>41</sup>

Although commentators tended to regard prosecutors' anti-regulatory rhetoric as arrogant and extreme,<sup>42</sup> they also recognized that there were legitimate concerns to be raised about how ethics rules applied to prosecutors.<sup>43</sup> For instance, professional conduct rules did not necessarily take sufficiently into account ways in which federal prosecutors' work was different not only from that of other lawyers but from that of state prosecutors as well.<sup>44</sup> Professional conduct rules and their disciplinary enforcement also raised some of the same concerns that led the Supreme Court to hold prosecutors immune from civil rights liability—e.g., a risk that prosecutors would become excessively cautious<sup>45</sup> and that external disciplinary proceedings would interfere with their work.<sup>46</sup> Even if it did not justify wholesale exemption from judicial oversight, respect for prosecutors' independence might be relevant to how generally applicable rules were interpreted and what areas of professional conduct should be regulated.<sup>47</sup>

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40. See *id.* at 489 ("[The professional conduct rules forbidding communications with represented persons] have in recent years been broadly interpreted by some defense counsel in an effort to prohibit communications by law enforcement personnel with the target of a criminal investigation, whether or not a constitutional right to counsel has attached. This expansive reading has been advanced in primarily two contexts, motions to suppress evidence developed through such contacts, and disciplinary proceedings against individual Justice Department attorneys at the state level. The effect of these efforts may someday be to achieve through [a professional conduct rule] what cannot be achieved through the Constitution: a right to counsel at the investigative stage of a proceeding. As a practical matter these efforts threaten to become a substantial burden on the law enforcement process.").

41. See Joint Press Release from the U.S. Dep't of Justice, the Nat'l Ass'n of Att'ys General, and the Nat'l District Att'ys Ass'n 1 (Aug. 6, 1991), quoted in John M. Burkoff, *Prosecutorial Ethics: The Duty Not "To Strike Foul Blows,"* 53 U. PITT. L. REV. 271, 275 (1992). See also *Showdown Over Standards of Conduct: Prosecutors See ABA as "Arm of the Defense Bar,"* LEGAL TIMES, Sept. 17, 1990 (quoting U.S. Deputy Attorney General William P. Barr as stating, "[d]efense lawyers are using a professional trade association to try to undo what the courts and state legislature have done to protect citizens from the criminal element"), quoted in Prosecutors and the ABA, A Report to the President of the ABA by the Advisory Committee on the Prosecution Function (Jan. 8, 1992) at p. 4 (on file with the author).

42. See Green, *supra* note 30, at 474-75 & nn.66-67 (citing discussions).

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

44. See Zacharias & Green, *supra* note 7; see also Bradley T. Tennis, Note, *Uniform Ethical Regulation of Federal Prosecutors*, 120 YALE L.J. 144 (2010).

45. See generally Zacharias & Green, *supra* note 12, at 39-41.

46. *Id.* at 43-46.

47. See, e.g., *Massameno v. Statewide Grievance Comm.*, 663 A.2d 317, 336 (Conn. 1995) (observing that "[t]here can be no doubt that 'the doctrine of separation of powers requires judicial respect for the independence of the prosecutor'" and that "[p]rosecutors have enormous discretion in deciding which citizens should be

Further, at least with respect to federal prosecutors, the DOJ had internal rules<sup>48</sup> and an internal disciplinary process<sup>49</sup> that arguably provided an adequate substitute for external regulation in the form of rules and standards. In sum, prosecutors might have perceived that they were special, that the ABA and external judicial regulators did not sufficiently understand and take account of their special role, that as public officials with a public-serving mission they were particularly trustworthy to engage in self-regulation, and that internal guidelines, supervision, training and enforcement sufficed, as proven by the presumed propriety of prosecutorial conduct in areas, such as charging and plea bargaining, that were largely exempt from external regulation.<sup>50</sup>

In the end, prosecutors mostly got their way, a result that might have reinforced the perception that regulatory institutions are sensitive to law enforcement interests and deferential to prosecutors, but that might also have reinforced prosecutors' instinct that professional regulation was a battleground on which they needed to fight to protect their turf. Few courts adopted the proposed attorney subpoena rule or interpreted the no-contact rule or other rules to meaningfully restrict prosecutors' investigations. The ABA withdrew the controversial proposals to revise the Prosecution Function Standards.<sup>51</sup> It also entered into discussions of the no-contact rules with the DOJ, following which the Association's ethics committee issued an opinion concluding that the restriction had more limited application in the context of criminal investigations than other contexts.<sup>52</sup> For a long time thereafter, the ABA refrained from adding new provisions to Rule 3.8, even during the period when its Ethics 2000 Commission comprehensively reviewed and revised the *Model Rules*.<sup>53</sup>

Moreover, the ABA attempted in various ways to address prosecutors' concerns about regulatory capture. It appointed an advisory committee primarily of prosecutors who documented "the growing tensions between prosecutors and

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prosecuted and for what charges they are to be held accountable" and that therefore "in a particular grievance proceeding, a prosecutor subject to investigation may be able to allege that, because of separation of powers principles, different substantive or procedural rules apply to him or her than to the average attorney" (quoting *United States v. Simpson*, 927 F.2d 1088, 1091 (9th Cir. 1991)).

48. See U.S. Dep't of Just. U.S. Attorneys' Manual (2003). For discussion of some of these guidelines, see Ellen S. Podgor, *Department of Justice Guidelines: Balancing Discretionary Justice*, 13 CORNELL J. L. & PUB. POL'Y 167 (2004).

49. See Green, *Policing Federal Prosecutors*, *supra* note 7, at 84-87; Green, *Regulating Federal Prosecutors*, *supra* note 7, at 156-57.

50. Cf. Bibas, *supra* note 92, at 964 (arguing that abuses of prosecutorial discretion should not be addressed through external legal regulation but through internal, institutional solutions, including greater transparency and improvements of office "structure, incentives, and culture"); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 161-66 (2008) (arguing that, even absent external controls, prosecutors can avoid racial bias in charging decisions through "a highly structured and monitored office environment, with a leadership committed to recording and reviewing the reasons for major choices").

51. Sonner, *supra* note 38, at 1.

52. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995).

53. See Green, *supra* note 4, at 574-75.

the ABA”<sup>54</sup> and followed up with a series of recommendations meant to strengthen prosecutors’ voice in the Association and avoid “us[ing] the ethical rules that govern the profession to establish rules of criminal procedure that are more properly the province of judicial rulemaking or legislative action.”<sup>55</sup> In response, the ABA amended the bylaws of its Criminal Justice Section to ensure that prosecutors and defense lawyers rotated as Chair and had equal voices on its governing council, on which representatives of the National District Attorneys Association, the National Association of Attorneys General, and the U.S. Department of Justice were given permanent places.<sup>56</sup> The Criminal Justice Section now promotes itself as “the unified voice of criminal justice,” bringing together and speaking on behalf of all the relevant stakeholders, including prosecutors,<sup>57</sup> and endeavors to address prosecution concerns no less than those of the defense. For example, it recently spearheaded an ABA statement of policy designed to address prosecutors’ concern about unfair harm to their professional reputations from findings of prosecutorial misconduct that derive from simple mistakes.<sup>58</sup> Further, ABA positions on criminal defense tend to be more balanced than those of representative defense organizations, in part, because of prosecutors’ influence and in part because the Criminal Justice Section’s leadership consciously strives for consensus among competing viewpoints.

## II. THREE RECENT EXAMPLES

Prosecutors could have taken comfort in how the various professional conduct controversies of the 1990s were eventually resolved. But recent events suggest that the anti-regulatory rhetoric of that period lives on in today’s prosecutors’ offices and associations. Three examples are offered here: the first involves state prosecutors’ opposition to an ABA interpretation of the rule governing prosecutors’ pretrial disclosures; the second concerns some state and federal prosecutors’ opposition to a rule directed at the rectification of wrongful convictions; and the last regards a state prosecutor’s efforts to preempt a trial judge from examining the ethical propriety of his office’s investigative conduct.

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54. Prosecutors and the ABA, A Report to the President of the ABA by the Advisory Committee on the Prosecution Function (Jan. 8, 1992) at 3 (on file with the author).

55. Prosecutors and the ABA, Final Recommendations to the President of the ABA by the Advisory Committee on the Prosecution Function (June 20, 1992) at 5-6, 9-10 (on file with the author).

56. See Janet Levine, *Nothing’s Perfect, But the Brady Standards Could Easily Be Better*, 26 CRIM. JUST. 1, 55 (Winter 2012); ABA CRIMINAL JUSTICE SECTION BYLAWS.

57. See ABA CRIMINAL JUSTICE SECTION, [http://www.americanbar.org/groups/criminal\\_justice.html](http://www.americanbar.org/groups/criminal_justice.html) (last visited June 3, 2012).

58. ABA Resolution 100B (Aug. 2010) (“RESOLVED, That the American Bar Association urges trial and appellate courts, in criminal cases, when reviewing the conduct of prosecutors to differentiate between ‘error’ and ‘prosecutorial misconduct.’”).

## A. THE NDAA, THE ABA, AND MODEL RULE 3.8(D)

A window into some prosecutors' attitudes toward professional regulation is provided by the amicus brief recently filed in *Smith v. Cain*<sup>59</sup> by the National District Attorneys Association ("NDAA")<sup>60</sup> in response to one filed earlier in the same case by the ABA.<sup>61</sup> The Supreme Court was asked in the case whether the New Orleans prosecutor's office violated its constitutional disclosure obligation under *Brady v. Maryland*<sup>62</sup> and its progeny<sup>63</sup> when it failed to disclose information that would have contradicted its witnesses' trial testimony including, among other things, a pretrial statement by the prosecution's key eyewitness stating that he could not identify any of the perpetrators.<sup>64</sup> Although the state argued that the withheld evidence was immaterial, it had an uphill battle—indeed, one Justice asked in oral argument whether the state had considered just confessing error<sup>65</sup>—and the state ultimately lost the case, with only Justice Thomas dissenting.

The competing amicus briefs did not focus on the merits of the case but on Rule 3.8(d) of the *Model Rules of Professional Conduct*,<sup>66</sup> which establishes a disclosure obligation analogous to *Brady*. Rule 3.8(d) requires a prosecutor to disclose evidence and information that tends to negate the guilt of the accused, unless the prosecutor obtains a protective order relieving the prosecution of this obligation. The ABA Standards regarding the prosecution function include a similar provision.<sup>67</sup>

Prosecutors' violations of state ethics rules based on Rule 3.8(d) can result in

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59. 132 S. Ct. 627 (2012).

60. Brief for National District Attorneys Association as Amici Curiae Supporting Petitioner, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145) [hereinafter NDAA Brief].

61. Brief for the American Bar Association as Amici Curiae Supporting Respondent, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145) [hereinafter ABA Brief]. During 2010-11, I chaired the ABA Criminal Justice Section, which sponsored the ABA's amicus brief in this case, and participated in discussions regarding the brief's development.

62. 373 U.S. 83 (1963).

63. *E.g.*, *Cone v. Bell*, 556 U.S. 449 (2009); *Strickler v. Greene*, 527 U.S. 263 (1999); *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985).

64. Brief of the Petitioner at 3, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145) [hereinafter Petitioner's Brief].

65. Transcript of Oral Argument at 20, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145).

66. MODEL RULES R. 3.8(d) provides:

The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

67. ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3-3.11(a) (3d ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.").

professional discipline but do not provide a basis for overturning a conviction. Nonetheless, the Supreme Court had previously referred to Rule 3.8(d) and the corresponding Standard in two opinions,<sup>68</sup> recognizing that they are more demanding than the constitutional obligation under *Brady* in at least one crucial respect: whereas courts find *Brady* violations only when the prosecution failed to disclose favorable evidence or information that was “material” to the defense—i.e., that, in hindsight, might reasonably have produced an acquittal—the disclosure requirement of Rule 3.8(d) demands broader disclosure.<sup>69</sup> Model Rule 3.8(d) calls for prosecutors to make timely disclosure of *all* favorable evidence and information known to the prosecutor, whether or not it is “material” in the constitutional sense.<sup>70</sup> Thus, a prosecutor could avoid close constitutional questions of materiality by complying with the more demanding professional standards.

In 2009, the ABA’s ethics committee, which periodically issues opinions interpreting the *Model Rules*,<sup>71</sup> published an opinion on Rule 3.8(d) reaffirming the Supreme Court’s reading of the Rule,<sup>72</sup> while acknowledging that, in a handful of states, the counterpart to Model Rule 3.8(d) has been held to go no farther than the constitutional imperative.<sup>73</sup> As amicus in *Smith*, the ABA refrained from weighing in on the merits, simply asking “that the Court again

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68. See *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (“Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations.”) (citing MODEL RULES, R. 3.8(d)); *Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995) (observing that *Brady* “requires less of the prosecution than” the ABA Standards).

69. ABA Standing Comm. On Ethics & Prof’l Responsibility, Formal Op. 09-454 (2009) [hereinafter *ABA Formal Op. 09-454*] (“A prosecutor’s constitutional obligation extends only to favorable information that is ‘material,’ i.e., evidence and information likely to lead to an acquittal . . . . Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial’s outcome.”).

70. *Id.*; see, e.g., 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 34-6 (3d ed. 2001 & Supp. 2009) *Matter of Feland*, 2012 ND 174; PETER A. JOY & KEVIN C. McMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 145 (ABA 2009); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 691 n.28 (2005).

71. For discussions of the work of bar association ethics committees, see Ted Finman & Ted Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67 (1981); Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731 (2002).

72. ABA Formal Op. 09-454, *supra* note 69. I was a member of the committee at the time it drafted and adopted this opinion. For a discussion of the opinion, see Bruce A. Green, *Prosecutors’ Ethical Duty of Disclosure—In Memory of Fred Zacharias*, 48 SAN DIEGO L. REV. 57 (2011).

73. The ABA brief acknowledged that there was national variation: one state, California, had not adopted a rule patterned on Rule 3.8(d), although it was considering doing so, ABA Brief, *supra* note 61, at 8 n.14, and in three jurisdictions—Colorado, the District of Columbia, and Ohio—prosecutors who comply with *Brady* apparently are not subject to discipline under the corresponding state rule. *Id.* at 9 n.15. The ABA brief also observed, however, that the Louisiana judiciary had adopted a version of the rule that was more demanding than the *Model Rule*. *Id.* at 9-10. And it discussed the corresponding provision of the ABA Criminal Justice Standards, which is virtually identical to Model Rule 3.8(d), and noted that the NDAA had adopted standards containing a similar provision without a materiality requirement. *Id.* at 13 & n.18.

make clear that a prosecutor's pre-trial ethical disclosure obligations are established by the attorney regulatory codes of the prosecutor's state or jurisdiction, and are separate from and broader than the constitutional standards that control a court's post-trial determination of *Brady* claims."<sup>74</sup>

The NDAA's amicus brief in *Smith* opposed that of the ABA. Although its brief was nominally in support of the prosecution, its explicit purpose was not to defend the particular prosecutor's conduct, nor to argue for the lawfulness of the defendant's conviction, but rather to take issue with Rule 3.8(d), state counterparts, and the corresponding ABA Standard and with the processes and institutions behind their development. Most significantly, the NDAA challenged the very legitimacy of professional conduct rules insofar as they impose obligations on prosecutors beyond those established by the Constitution, statutes, or other law. The challenge was partly based on an exaggeration of the ABA's request: the NDAA portrayed the ABA as attempting "to persuade [the] Court to grant their standards constitutional significance,"<sup>75</sup> whereas the ABA was simply asking the Court to remind prosecutors of their discovery obligations under states' professional conduct rules.<sup>76</sup> Nonetheless, the NDAA correctly understood that if state analogues to Model Rule 3.8(d) were interpreted consistently with their plain language, as the ABA urged, then those state rules would require broader disclosure than the constitutional case law. A prosecutor's violation of such a rule would not provide a basis for an appellate court to overturn a conviction, but a prosecutor at the trial stage would nonetheless be obligated to comply with the rule and could be disciplined for deliberately failing to do so. In this sense, the rule would "confer greater [discovery] rights to defendants than the Constitution does," as the NDAA asserted.<sup>77</sup>

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74. ABA Brief, *supra* note 61, at 6; *accord id.* at 5. The ABA brief did point out, however, that if the New Orleans prosecutors had complied with the state's ethics rules and corresponding ABA and NDAA standards, they would have turned over the evidence in question without regard to whether an appellate court would later consider the evidence to be "material" to the defense. *Id.* at 10, 14-25.

75. NDAA Brief, *supra* note 60, at 7. *See also id.* at 3 (referring to the ABA's "proposal" that the Court "adopt some sort of supplemental standard under the guise of the ABA's proposed model ethics rules, that would . . . bind prosecutors throughout the country"); *id.* at 17-18 ("This Court should not adopt [Rule 3.8(d)] as some extra constitutional obligation"); *id.* at 19 ("The ABA should not be in the business of dictating to the individual states or the federal government discovery policies and procedures that go beyond those adopted in a comprehensive statutory scheme.").

76. Nothing in the ABA's brief suggested that the ABA's *Model Rules* (as distinguished from state rules based them) have any legal authority, that the state courts' professional conduct rules might provide a ground for overturning convictions, or that the Supreme Court had authority to interpret state professional conduct rules. Rather, the ABA's brief acknowledged that the Court's decision would be based on decisions under the due process clause, for which the ABA standards did not establish a baseline, ABA Brief, *supra* note 61, at 4, 6, and which its brief did not address. *Id.* at 6 n. 11. Although the ABA's request that the Court make passing reference to professional conduct rules may have seemed unusual, the Court had taken note of professional conduct rules in prior opinions, *see, e.g.,* *Nix v. Whiteside*, 475 U.S. 157 (1986); *Jones v. Barnes*, 463 U.S. 745 (1983); including in opinions involving prosecutorial discovery. *See* cases cited *supra* note 68.

77. NDAA Brief, *supra* note 60, at 13 (quoting *Ariz. Bar Op.* 94-07).

Although most professional conduct rules do not merely codify existing law, the NDAA's implicit premise was that state courts' professional conduct rules may not legitimately demand more from prosecutors than the Constitution requires. Indeed, the brief suggested—albeit without elaboration—that it may be unconstitutional for state court judges to adopt professional conduct rules imposing additional obligations and restrictions on prosecutors, because such rules may violate “the separation of powers doctrine” or, in the case of federal prosecutors, “the Supremacy Clause of the United States Constitution.”<sup>78</sup> In other words, prosecutors, as executive branch officials, should be exempt from state-court rules of professional conduct that do more than mirror preexisting legal obligations.

In addition to questioning the legitimacy of independent professional obligations, the NDAA's brief also challenged the legitimacy of the ABA's role in their development. It characterized the ABA as “a private organization that does not speak for prosecutors,”<sup>79</sup> an observation whose meaning and import is unclear. The NDAA could not have been saying that the ABA excluded prosecutors as members; however, it may have meant that, unlike the NDAA, the ABA does not speak *exclusively* for prosecutors, or that it failed adequately to convey or take into account prosecutors' concerns. It portrayed the ABA as an advocate for narrow, partisan interests<sup>80</sup>—“a left-wing lobbying group”<sup>81</sup>—in implied contrast to the NDAA, whose constituents are publicly elected or appointed officials. The brief quoted the 1992 ABA advisory committee's interim report which noted, with concern, that many prosecutors perceive “that the ABA has become captive to the narrow adversarial interests of the criminal defense bar.”<sup>82</sup> The NDAA implied both that prosecutors' perception of the ABA twenty years ago was accurate<sup>83</sup> and that the perception persisted, despite the ABA's subsequent corrective measures, to which the brief made no reference.<sup>84</sup>

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78. *Id.* at 14 (quoting *Ariz. Bar. Op. 94-07* (dissenting opinion)). The NDAA brief was quoting from the dissenting opinion of a 1994 Arizona state bar ethics opinion. The committee's opinion noted “the ethical duty to disclose” under Model Rule 3.8(d), on which the state court's rule was based, “is broader than the constitutional due process obligation.” *Ariz. Bar Op. 94-07* (1994) at n.3. The dissent took issue with the committee insofar as it suggested that a state ethics rule for prosecutors might exceed constitutional obligations. *See also* *ABA Op. 09-454* (“The [Supreme Court] decisions establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct.”).

79. NDAA Brief, *supra* note 60, at 3.

80. *Id.* at 4 (“[The ABA] is a private organization. The people of the United States have no voice in the election of its officers or in the determination of its policies. While at times it has been given deference as the voice of American's lawyers, . . . the ABA has its own interests and its own agenda.”).

81. *Id.* at 5 (quoting Christopher Cox).

82. *Id.*

83. Even 20 years ago, the ABA would have disputed claims that it was doing the defense bar's bidding, and today, the characterization is belied by the Criminal Justice Section's balanced leadership and its efforts to serve as the legal profession's “unified voice” on criminal justice issues. *See infra* at 881-82.

84. *See* NDAA Brief, *supra* note 60.

Against this background, the NDAA sought to portray Model Rule 3.8(d)—which had been adopted by the overwhelming majority of state courts—as the product of the ABA’s partisan advocacy on behalf of criminal defense interests. The Rule, in the group’s view, failed adequately to take account of law enforcement interests in two respects. First, the NDAA argued that compliance with the rule, as interpreted by the ABA, would impose an impossible administrative burden on prosecutors.<sup>85</sup> It did not explain why this claim was not belied by various state laws and prosecutors’ office policies calling for “open file” discovery, which is far broader than what the ABA Rule requires.<sup>86</sup> Second, the NDAA maintained that the Rule “fails to fully take into account factors . . . such as the integrity of investigations and the safety of witnesses,”<sup>87</sup> which, it suggested, are better accommodated by the constitutional case law and statutes.<sup>88</sup> The brief did not explain why this concern was not adequately addressed by the Rule’s provision authorizing prosecutors to withhold favorable evidence pursuant to a protective order in unusual cases where disclosure might result in obstruction of justice or threats to witnesses.<sup>89</sup> Nor did it explain how the ABA had managed to persuade the courts of virtually every state to adopt such a supposedly unbalanced rule and why prosecutors had not opposed its adoption at the time.<sup>90</sup> Further, the brief failed to acknowledge that at the time of the events of *Smith v. Cain*, the NDAA’s own disclosure standard “omit[ted] the constitutional standard’s materiality limitation.”<sup>91</sup>

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85. NDAA Brief, *supra* note 60, at 2. The brief’s reference to “the [impossible] burden” created by the ABA echoes the Supreme Court’s reference in *United States v. Bagley*, 473 U.S. 667, 676 n.7 (1985), to the “impossible burden on the prosecutor” that would result from a “[constitutional] rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant.” The reference overlooks a significant distinction between the *Brady* obligation and the obligation under provisions based on Model Rule 3.8(d), namely, that the professional conduct rule requires prosecutors to disclose only favorable evidence and information that they know, whereas the constitutional case law requires disclosure of any materially favorable evidence in law enforcement agencies’ possession. While the professional conduct rule is more demanding in one respect, it is substantially less demanding in another, namely, that it does not require prosecutors to seek out information of which they are not already aware. See ABA Formal Op. 09-454, *supra* note 69. In jurisdictions where prosecutors are required by law to make “open file” discovery, and other jurisdictions where prosecutors do so as a matter of office policy or individual discretion, prosecutors routinely provide more written information than the professional conduct rule requires.

86. See, e.g., Burke, *supra* note 13, at 2126-27; Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

87. NDAA Brief, *supra* note 60, at 4; *accord id.* at 18.

88. *Id.* at 18-19.

89. See MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (1980); see ABA Op. 09-454, *supra* note 69.

90. For criticism of the processes leading to state courts’ adoption of these rules, see Green, *supra* note 72, at 90-91.

91. ABA Formal Op. 09-454, *supra* note 69, at 5 n.22. See *id.*, quoting NDAA, National Prosecution Standards § 53.5 (2d ed. 1991) (“The prosecutor should disclose to the defense any material or information within his actual knowledge and within his possession which tends to negate or reduce the guilt of the defendant pertaining to the offense charged.”). This provision was subsequently eliminated in favor of one simply calling on prosecutors to comply with their discovery obligations under the law. See NDAA, National Prosecution



Finally, the NDAA's brief expressed apprehension about the disciplinary process, and in particular about the possibility that disciplinary obligations would lead defense lawyers "to threaten [prosecutors] with bar complaints" for failing to disclose favorable evidence, with the result that "[p]rosecutors will be chilled by the thought of defending a bar complaint to the detriment of law enforcement."<sup>92</sup> The logic of this argument was that the state disciplinary agencies to which state courts delegated authority to review grievances could not be trusted to weed out defense lawyers' unmeritorious complaints about the inadequacy of prosecutors' disclosures but would nevertheless require prosecutors to respond to them; that defending against these complaints would burden or distress prosecutors; and that prosecutors would therefore be overly cautious (presumably by disclosing more evidence than required) to avoid having to defend against baseless complaints. However, the brief pointed to no evidence that over the past forty years, state rules had in fact led to either a glut of complaints by defense lawyers or to excessive prophylactic disclosures by prosecutors.<sup>93</sup> Nor did it point to anything to counter the conventional assumption that defense lawyers under-report, rather than over-report, prosecutors' misconduct in order to stay in prosecutors' good graces for their own and future clients' benefit.

In the end, the Court issued a straightforward opinion holding that the prosecution had withheld material evidence.<sup>94</sup> Unsurprisingly, it did not refer one way or the other to prosecutors' ethical obligations. Whether the NDAA's brief

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Standards § 4-9.1 (3d ed. 2009) ("A prosecutor should, at all times, carry out his or her discovery obligations in good faith and in a manner that furthers the goals of discovery, namely, to minimize surprise, afford the opportunity for effective cross-examination, expedite trials, and meet the requirements of due process. To further these objectives, the prosecutor should pursue the discovery of material information, and fully and promptly comply with lawful discovery requests from defense counsel.").

92. NDAA Brief, *supra* note 60, at 14 (quoting Ariz. Op. 94-07). The actual rarity of disciplinary proceedings based on prosecutors' alleged disclosure violations may largely be attributable to the enormous time and administrative expense that they entail, as illustrated by a pending District of Columbia disciplinary case in which a hearing committee recently recommended that a lawyer for the prosecution be publicly censured for failing to disclose material, exculpatory evidence to the defense. Report and Recommendation of Hearing Committee Number Nine, *Matter of Kline*, Bar Dkt. No. 522-09 (Mar. 28, 2012). The initial proceedings, including two days of testimony, took a year from the filing of charges to the three-member committee's issuance of a 48-page opinion, which is reviewable first by the Board of Professional Responsibility and then by the District of Columbia Court of Appeals. Bar Counsel will now have to contend not only with the respondent's arguments but with those of the government, which filed an *amicus* brief before the Board, challenging the committee's alternative finding that even if the evidence was not "material," the prosecutor had to disclose it because it was exculpatory. Brief and Appendices of Amicus Curiae United States of America in Support of Respondent Andrew J. Kline, *Matter of Kline*, Bd. Dkt. No. 522-09 (June 7, 2012). Given the modesty of the likely sanction for prosecutorial nondisclosures, the amount of effort needed to pursue these charges, and the proliferation of more serious allegations against private lawyers, it seems unlikely that Bar Counsel would be encouraged by success in *Matter of Kline* to pursue similar disciplinary charges in the future.

93. The implication may have been that, until now, no one took the state professional conduct rules seriously, whereas that would change if the Supreme Court and other courts began to take notice of them.

94. See *Smith v. Cain*, 132 S. Ct. 627 (2012).

discouraged the Court from alluding to prosecutors' ethical duty, however, or whether the Court simply saw no reason to do so, is unknown.<sup>95</sup>

#### B. STATE AND FEDERAL PROSECUTORS AND THE POST-CONVICTION DISCLOSURE RULE

A second example of prosecutors' anti-regulatory rhetoric is the reaction of some prosecutors' representatives to new state rules of professional conduct based on ABA Model Rules 3.8(g) and 3.8(h).<sup>96</sup> Sections (g) and (h) were added to Model Rule 3.8 in 2008 to give meaning to prosecutors' obligation to rectify wrongful convictions.<sup>97</sup> To some extent, they merely codify judicial pronouncements regarding prosecutors' post-conviction obligations.<sup>98</sup> For instance, Model Rule 3.8(g) requires a prosecutor to disclose and investigate new evidence that is

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95. Why the NDAA decided to take a public, and seemingly gratuitous, swipe at the ABA, at a time when the ABA was seeking to cultivate good relations with prosecutors and their national representatives, including the NDAA, is also unclear. Conceivably, organizations representing subgroups such as prosecutors see a political benefit to distinguishing themselves from a national organization of lawyers by demonstrating that they alone speak for the unique interests of their constituency. But there are many specialty, as well as state and local, bar associations representing subgroups of lawyers, and in general, they seek to work cooperatively with the ABA.

96. MODEL RULES R. 3.8(g) provides:

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority, and
- (2) if the conviction was obtained in the prosecutor's jurisdiction,
  - (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
  - (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

Rule 3.8(h) provides: "When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction."

97. See Stephen A. Saltzburg, *Changes to Model Rules Impact Prosecutors*, 23 CRIM. JUST. 1 (2008) ("The additions to Rule 3.8 reflect the long-standing concern among prosecutors, defense counsel, judges, and academics about the risk that any criminal justice system, even working at its best, may produce wrongful convictions, and the importance of remedying such convictions in the face of important newly discovered evidence."). As Professor Saltzburg's column notes, I had a hand in the Rules' development in my role, with Professor Ellen Yaroshefsky, as co-chair of the Criminal Justice Section's ethics committee.

For additional discussions of these provisions and their development, see ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 391 (7th ed. 2011); Wayne D. Garris, Jr., *Current Development, Model Rule of Professional Conduct 3.8: The ABA Takes a Stand against Wrongful Convictions*, 22 GEO. J. LEGAL ETHICS 829 (2009); Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009); Michele K. Mulhausen, Comment, *Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)*, 81 U. COLO. L. Rev. 309 (2010).

98. See Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 471 & n.25 (2009) (citing authority); see also *Warney v. Monroe County*, 587 F.3d 113, 125 (2d Cir. 2009) ("The advocacy function of a prosecutor includes seeking exoneration and confessing error to correct an erroneous conviction. Thus prosecutors are under a continuing ethical obligation

“material” and “credible” and that establishes “a reasonable likelihood” that a convicted defendant is innocent. Model Rule 3.8(h) requires a prosecutor to attempt to set aside a conviction if he obtains “clear and convincing evidence” of the defendant’s innocence. The ABA adopted these provisions without controversy after extensive participation by prosecutors in their development<sup>99</sup> and regarded them as recognizing a modest—indeed minimal—set of obligations.<sup>100</sup> So far, the courts of eight states, including Tennessee, Washington and Wisconsin, have incorporated a version of one or both provisions into their rules of professional conduct,<sup>101</sup> and the NDAA has incorporated a comparable provision into its own Standards.<sup>102</sup>

In some states, prosecutors’ institutional representatives have endorsed the adoption of new provisions based on Model Rules 3.8(g) and (h). In Wisconsin, for example, it was the state’s District Attorneys Association that initially petitioned the state supreme court to adopt such provisions.<sup>103</sup> Among other things, the organization’s submission observed that prosecutors have a unique role as “ministers of justice” and a duty “to seek justice” that sets them apart from other lawyers. This distinctive duty makes most other professional conduct rules, which are based on “the lawyer-client paradigm,” “minimally helpful” to

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to disclose exculpatory information discovered post-conviction. Any narrower conception of a prosecutor’s role would be truly alarming.”) (citing MODEL RULES R. 3.8(g) & (h)).

99. See Saltzburg, *supra* note 97.

100. See Green & Yaroshefsky, *supra* note 98, at 471-72.

101. The other states are Colorado, Delaware, Idaho, New York, and North Dakota. See ABA, *CPR Policy Implementation Committees Variety of the ABA Model Rules of Prof’l Conduct*, R. 3.8(g), (h) (July 24, 2012), [www.americanbar.org/content/dam/aba/administrative/professional-responsibility/3\\_8\\_g\\_h.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional-responsibility/3_8_g_h.authcheckdam.pdf). Additionally, the Arizona Supreme Court was recently petitioned to include the provisions; California’s State Bar Board of Governors has incorporated the amendments in a set of proposed rules that it has submitted to the California Supreme Court. The Arizona petition identifies and responds to five concerns raised by state prosecutors. Petition of Larry Hammond and Keith Swisher at 5-10, *In re* Petition to Amend ER 3.8 of the Ariz. Rules of Prof’l Conduct (Rule 42 of the Arizona Rules of Supreme Court) (Ariz. Sup. Ct. Nov. 1, 2011). Among the concerns raised were that prosecutors were being singled out for a disclosure obligation when other lawyers also encounter exculpatory information, *id.* at 7-8; that prosecutors do not need the rule, because they will take action in any event when presented with strong evidence of innocence, *id.* at 9; and that the proposed obligations seem inconsistent with existing law. *Id.*

102. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 8-1.8 (3d ed. 2009):

When the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should notify the appropriate court, unless the court authorizes a delay, in addition to the defense attorney, or the defendant (if the defendant is not represented by counsel) and seek the release of the defendant if incarcerated. If the prosecutor becomes aware of material and credible evidence which leads him or her to reasonably believe a defendant may be innocent of a crime for which the defendant has been convicted, the prosecutor should disclose, within a reasonable period of time, as circumstances dictate, such evidence to the appropriate court and, unless the court authorizes a delay, to the defense attorney or to the defendant, if the defendant is not represented by counsel.

103. Petition of Wisconsin District Att’y Ass’n, *In re* the Amendment of Supreme Court Rules Chapter 20 Rules of Prof’l Conduct for Att’y’s (Wis. Sup. Ct.).

prosecutors.<sup>104</sup> In particular, “by nature of the position, a prosecutor has a unique role and special responsibility to rectify the wrongful conviction of an innocent person.”<sup>105</sup> By codifying this responsibility, the proposed provisions would “protect the rights of criminal defendants who may have been wrongfully convicted and also protect the public by alerting authorities that the actual perpetrator may still be at large,” and thereby “serve to increase public confidence in . . . [the] criminal justice system.”<sup>106</sup> Moreover, according to the Wisconsin prosecutors, the proposal was “consistent with prevailing policies and practices”<sup>107</sup> and “the overwhelming majority of prosecutors across the country have acted to remedy wrongful convictions when they became known,” although “some have not.”<sup>108</sup> Similarly, in Tennessee, the state’s District Attorneys General Conference strongly supported the adoption of new provisions based on the ABA models in order to “set[] a clear standard for prosecutors,” “increase confidence in our criminal justice system,” and promote “a greater understanding of the unique role of prosecutors to see the truth over and above winning a case.”<sup>109</sup>

As the post-conviction innocence rules’ endorsement by various state prosecutors reflects, one could hardly characterize these rules as an attack on prosecutors or as an attempt to stymie criminal law enforcement efforts. These provisions are very different from the no-contact rule, the attorney-subpoena rule, and other rules over which prosecutors and defense lawyers had fought several decades earlier. Those earlier rules, although serving other significant objectives, generally impeded prosecutors’ ability to gather probative evidence that promoted reliable verdicts. In contrast, Model Rule 3.8(g) and (h) promoted the reliability of verdicts by calling for disclosure and investigation of important new evidence that might establish the wrongfulness of a conviction.

Nonetheless, in several other states, prosecutors’ representatives vigorously opposed the new provisions, not based on drafting preferences, but conceptually and on a wholesale basis. For instance, in Washington, the Washington Association of Prosecuting Attorneys (“WAPA”) raised two concerns similar to those

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104. *Id.* at 1 & n.1.

105. *Id.* at 2; *see also id.* at 3 (“[T]he prosecutor’s duty to seek justice not only requires the prosecutor to take precautions to avoid convicting innocent individuals but also requires action when it appears likely that an innocent person was convicted.”).

106. *Id.* at 5.

107. *Id.*

108. *Id.* at 3.

109. Comments of the Tennessee District Attorneys General Conference at 2, *In re: Petition for the Adoption of Amended Tennessee Rules of Prof’l Conduct*, No. M2009-00979-SC-RL1-RL, \*2 (Tenn. Sup. Ct. Nov. 30, 2009); *see also* Lucian T. Pera, *Proposed, Approved, Revealed . . . and Explained*, 46 TENN. B.J. 12, 14 (2010) (observing that “the [Tennessee] Supreme Court sided with the TBA [Tennessee Bar Association] and the Tennessee District Attorneys Generals Conference, and rejected the position of the three incumbent United States Attorneys” and that their “disagreement led to the most fascinating moment of the June 2010 oral arguments on the TBA’s rules petition, when arguments on this proposal were made to the Supreme Court by a veteran state prosecutor for the TBA and the DAs Conference and by a sitting U.S. Attorney in opposition”).

in the NDAA's amicus brief in *Smith v. Cain*.<sup>110</sup> First, WAPA questioned the legitimacy of state ethics rules' expansion of prosecutors' discovery obligations. In a letter opposing the proposed post-conviction innocence rules, WAPA characterized them as "an attempt to utilize the attorney disciplinary apparatus to create new substantive rights . . . that defendants have not been able to achieve [for themselves] through the courts or the legislature."<sup>111</sup>

Unlike in *Smith v. Cain*, where prosecutors argued that constitutional disclosure obligations fully occupied the field, prosecutors suggested this time that it was the constitution's silence that precluded further regulation. WAPA stressed that convicted defendants have no constitutional right to be told of newly discovered exculpatory evidence,<sup>112</sup> that "[n]either police nor prosecutors have an obligation" under the law to investigate the possibility of a wrongful conviction,<sup>113</sup> and that convicted defendants have no right to court-appointed counsel.<sup>114</sup> Therefore, WAPA asserted, the effect of the proposed rule would be to expand prosecutors' obligations and defendants' rights, which they argued was an illegitimate role for a professional conduct rule.

The Washington prosecutors also expressed concern about "the Bar disciplinary process."<sup>115</sup> WAPA's letter observed that "anyone can file a grievance with the Bar Association" and predicted that the adoption of the proposed rules "will trigger a significant number of grievances from convicted felons" that will ultimately be dismissed.<sup>116</sup> Like the NDAA's amicus brief in *Smith*, WAPA's letter was implicitly questioning the fairness or competence of disciplinary authorities, who prosecutors could not trust to weed out unworthy complaints.

In Tennessee, the three U.S. Attorneys, speaking jointly on behalf of the DOJ, sounded similar alarms.<sup>117</sup> First, they argued that the proposed rules expanded on, or were inconsistent with, other law,<sup>118</sup> and were therefore illegitimate, and that the balance between defense and prosecution should be

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110. Letter of Thomas A. McBride, Executive Secretary, Washington Ass'n of Prosecuting Att'ys to Arthur Lachman, Chair, Rules of Prof'l Conduct Comm. (Aug. 5, 2009).

111. *Id.* at 2.

112. *Id.* at 3 (citing *Dist. Attorney's Office for the 3d Judicial Dist. v. Osborne*, 557 U.S. 52 (2009)).

113. *Id.* at 2.

114. *Id.* at 3.

115. *Id.* at 4.

116. *Id.*; *see also id.* at 5 ("[T]he real outcome of the proposed rule changes will be to increase grievances and disciplinary litigation involving prosecuting attorneys without resulting in changes to the actual conviction [sic] or a better measure of justice.").

117. Memorandum of James R. Dedrick, United States Attorney, E.D. Tenn., et al., to Mike Catalano, Clerk, Tenn. Appellate Courts, re: Objections to Adoption of Proposed Tenn. Rules 3.8(g) and (h) (Dec. 14, 2009).

118. They argued that the disclosure requirement may conflict with various confidentiality obligations imposed on federal prosecutors by federal statute or criminal procedure rule, *id.* at p. 4, and that the requirement that prosecutors investigate and seek to remedy wrongful convictions was inconsistent with state and federal laws and rules that "allocate to the defendant the burden of investigating and raising claims of newly discovered evidence." *Id.* at 5.

addressed by legislation, not by state court rules of professional conduct.<sup>119</sup> Second, the federal prosecutors predicted that adopting the proposed rules “would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors,”<sup>120</sup> thereby diverting prosecutors “from prosecuting crime to investigating convicts’ claims of ‘new’ evidence in order to defend their law licenses.”<sup>121</sup>

The courts in Washington and Tennessee ultimately adopted versions of the ABA models, and to date, there have been no reports from any of the six states that have adopted rules based on Model Rules 3.8(g) and (h) that the provisions have led to disciplinary complaints, administrative burdens or other problems. Yet courts of other states have been slow to follow suit, no doubt in part because of prosecutors’ opposition. The *in terrorem* effect of prosecutors’ hostility conceivably goes beyond discouraging courts from adopting these particular rules; it discourages bar associations from promoting any new ethics rules for prosecutors. In effect, prosecutors tell the bar, “If we can stop courts from adopting provisions that codify what we all agree we should do, imagine what a fight we will wage against something we really don’t like.” Conceivably, that is the objective behind some prosecutors’ opposition.

### C. QUEENS COUNTY PROSECUTORS AND TRIAL COURT OVERSIGHT

The final example involved the Queens County, New York District Attorney’s unsuccessful effort to preempt a state trial judge from considering the propriety of the prosecutor’s office’s conduct in interviewing arrested defendants before arraignment.<sup>122</sup>

The story in brief is as follows:<sup>123</sup> a defendant was arrested after a street fight and, before his arraignment, he was interviewed on videotape by two prosecutors

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119. *Id.* (“Rule 3.8(g) and (h) are simply not designed to be compatible with existing laws and procedures, altering the balance already struck in existing law without being subjected to the rigors of or accountability to a formal legislative process.”); *see also id.* at 2 (“Proposed amendments based on Model Rule 3.8(g) and (h) are likely meeting with a lack of acceptance because state bar disciplinary authorities . . . regard it as something more appropriately addressed by legislatures.”).

120. *Id.*

121. *Id.* The prediction may seem to be at odds with prior experience. The federal prosecutors argued that the proposed rules were unnecessary because prosecutors who suppress evidence of a convicted defendant’s actual innocence are already subject to discipline for “engaging in conduct prejudicial to the administration of justice.” *Id.* at 2 (citing TENN. RULE OF PROF’L CONDUCT R. 8.4(d)). But the federal prosecutors did not point to any evidence that disgruntled prisoners were flooding disciplinary agencies with innocence claims under existing disciplinary rules. Such claims would seem unlikely in any event, for a variety of reasons, including that disciplinary agencies could be expected to dismiss them out of hand absent a prior judicial finding of prosecutorial misconduct and because prisoners have little incentive to complain since the disciplinary process could not afford them any relief. In any event, there have been no reports of floods of complaints in the six states that have now adopted rules based on Model Rules 3.8(g) and (h).

122. *Brown v. Blumenfeld*, 930 N.Y.S.2d 610 (N.Y. App. Div. 2011).

123. The following facts are derived from the trial court’s submission in opposition to the District Attorney’s petition. *See* Memorandum of Law of Respondent the Honorable Joel L. Blumenfeld in Opposition

and a detective. The interview was preceded by a series of scripted statements and *Miranda* warnings.<sup>124</sup> The defendant moved to suppress the statements he made in the interview and, following a hearing, he argued that the interview had been both unconstitutional and unethical. To help address the ethical question, the trial judge deciding on the motion appointed a legal ethics professor with a background in criminal practice<sup>125</sup> to provide an opinion pursuant to the procedure set out in the judicial code. The professor's opinion concluded that the prosecutors violated provisions of the state's professional conduct rules in that their script misleadingly implied that (a) the prosecutors and the detective were disinterested, (b) there was an urgency and the defendant would gain an advantage by speaking immediately, and (c) the defendant's story would not be investigated unless he immediately provided his account.

The District Attorney's Office ("the DA" or "the Office") moved to strike the professor's report as irrelevant to the question whether the defendant's statements were voluntary. The Office asserted that the professional conduct rules could not be the basis of a suppression order because they "are not law" but "are largely aspirational" and merely "provide guidance to the profession," and that even considering the ethical propriety of the Office's interviewing practices "is wholly misplaced . . . and highly prejudicial to the People." The Office then filed a lengthy legal memorandum with accompanying factual and expert submissions. Ultimately, the trial judge refused to strike the independent expert's report, holding that ethics rules may be relevant to the suppression motion, and also invited further briefing on the impact of a potentially applicable rule. Rather than defending the Office's interview policy before the trial court, however, the DA filed a petition asking the intermediate appellate court to enjoin the trial judge "from considering and ruling upon [the] alleged disciplinary rule violation" and to strike the law professor's expert report from the public record.

In part, the DA's petition questioned trial courts' authority to regulate the conduct of prosecutors appearing before them, even though trial courts customarily oversee lawyers' professional conduct pursuant to their supervisory authority over both the proceedings and the attorneys appearing in them.<sup>126</sup> In civil cases,

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to the Petition, In re Brown v. Blumenfeld, Dkt. No. 2010-09688 (Nov. 19, 2010) [hereinafter Blumenfeld Brief].

124. Among the statements were: "If your version of the events of that day is different from what we heard, this is your opportunity to tell us your story. If there is something you would like us to investigate concerning this incident, you must tell us now so we can look into it."

125. The professor, Ellen Yaroshefsky of Cardozo Law School, was then chair of the ABA Criminal Justice Section's Committee on Ethics, Gideon and Professionalism. I had previously served with her as one of the original co-chairs of that committee, and we have served as co-authors and in other professional collaborations.

126. For example, in rejecting the DA's application, the appellate court noted that it is not "the only court authorized to consider or make a finding with respect to whether an attorney has engaged in professional misconduct" and that "trial-level courts often make such findings." Brown v. Blumenfeld, 930 N.Y.S.2d at 617 n.5. In addition to defending his inquiry pursuant to the court's supervisory authority over the conduct of lawyers in the case before it, see Blumenfeld Brief, *supra* note 123, at 30, the trial judge noted that "New York

for example, trial courts often disqualify lawyers whose representation violates conflict of interest standards and can impose sanctions, including disqualification or suppression of evidence, for professional improprieties in gathering evidence.<sup>127</sup> Further, trial courts regularly inquire into lawyers' conduct *sua sponte*, and are not limited to doing so in response to a motion.<sup>128</sup> Nevertheless, the DA characterized the trial court's inquiry as overreaching,<sup>129</sup> based, in part, on separation of powers considerations.<sup>130</sup>

Further, the DA took the position that, in contrast to a disciplinary agency, a trial court lacks the institutional competence to investigate and rule on a prosecutor's professional conduct and that such an inquiry would be unfair in at least three respects.<sup>131</sup> First, a judge who initiates an inquiry into a prosecutor's conduct is inherently biased because the judge is cast in the dual role of accuser and arbiter.<sup>132</sup> Second, suppression hearings do not afford prosecutors all the

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courts have regularly examined ethical rules in determining whether a defendant's statement should be suppressed on constitutional grounds. *Id.* at 29, 35-39. Various bar associations and academics filed amicus briefs in support of the trial court's authority to inquire into the propriety of the prosecutors' conduct on these grounds. I was a signatory to one of those amicus briefs.

127. With regard to disqualification of lawyers for violating conflict of interest standards, *see, e.g.*, *GSI Commerce Solutions, Inc. v. BabyCenter LLC*, 618 F.3d 204 (2d Cir. 2010); *Tekni-Plex, Inc. v. Meyner*, 674 N.E.2d 663 (N.Y. 1996); *see generally* RICHARD E. FLAMM, *LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES* (2003); Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *FORDHAM L. REV.* 71 (1996). With regard to the imposition of sanctions for improprieties in evidence gathering, *see, e.g.*, *Papanicolou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080 (S.D.N.Y. 1989); *see generally* FLAMM, *supra*, at 282-302.

128. *See, e.g.*, *General Mill Supply Co. v. SCA Serv., Inc.*, 697 F.2d 704, 711-12 (6th Cir. 1982) (“[C]ourt[s] should *sua sponte* raise ethical problems involving danger to a just, speedy, and inexpensive remedy, even if the parties do not.”); *Pa. Water Works Supply Co. v. Bucks Cnty. Bank & Trust Co.*, Civ. A. No. 91-2814, 1991 U.S. Dist. LEXIS 11610, at \*2 (E.D. Pa. 1991) (“[C]ourts allow the opposing party to raise conflicts of interest of counsel, because of the need to uphold the integrity of the judicial process, and because the court, charged with the responsibility of supervising the bar, has the authority, in any event, to raise ethical questions *sua sponte*.”).

129. Memorandum of Law of Richard A. Brown, District Attorney of Queens County, *Brown v. Blumenfeld*, 930 N.Y.S.2d 610 (N.Y. App. Div. 2011), at 23 [hereinafter *Queens DA Memo*] (“Judge Blumenfeld far exceeded his authority in this case by improperly *sua sponte* expanding the scope of the suppression hearing . . . [and] injecting the issue of the District Attorney's ethics into the suppression motion before this had ever been raised by the defense.”); *id.* at 26 (“[The judge] exceeded his authority by improperly expanding the scope of defendant's suppression hearing and assuming the role of an advocate at that hearing.”).

130. *Id.* at 35 n.18 (“A judge cannot give himself a ‘roving commission’ to determine whether a district attorney has acted ethically or not [because] ‘each department should be free from interference, in the discharge of its peculiar duties, by either of the others.’”) (quoting *People ex rel. Burby v. Howland*, 155 N.Y. 270, 282 (1898)).

131. *Queens DA Memo.*, *supra* note 129, at 24 (the court's inquiry occurs “in a forum in which [prosecutors] have no opportunity for a fair investigation, hearing and determination by a competent authority, and no possibility for appellate review of any such decision”). The District Attorney's recognition of disciplinary agencies' authority to review the prosecutors' conduct is somewhat inconsistent with the prosecutors' suggestion that separation of powers considerations exempt the prosecutors' conduct from judicial review and wholly inconsistent with their suggestion in the trial court that professional conduct rules are not law, but are aspirational.

132. *Id.* at 31 (“[The judge] transformed the simple suppression hearing pending before him into a shadow grievance hearing, unconstrained by any procedural rules, where Judge Blumenfeld sits as both the accuser and



procedural rights or protections they would enjoy at a disciplinary hearing.<sup>133</sup> Third, a finding of prosecutorial misconduct, unless it became the basis for a suppression order, is not appealable.<sup>134</sup> In addition to listing these three specific inequitable results, the DA portrayed the inquiry into the prosecutors' conduct as itself an improper assault on their individual reputations.<sup>135</sup> That is, the DA implied that individual prosecutors would be irreparably harmed personally by such an inquiry even if the trial court ultimately concluded that they acted ethically. The DA failed to explain why this is so, and the answer is far from obvious, given not only that the conduct would have been vindicated but that the individual prosecutors would have been acting in accordance with their office's official policy guidelines. One might think that it was the reputation of the office and the District Attorney that were principally at stake.<sup>136</sup>

Ultimately, the appellate court denied the "extraordinary remedy" sought,<sup>137</sup> noting that although trial courts do not have formal authority to discipline lawyers for professional misconduct, they are authorized to consider and make

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the Judge of the District Attorney's conduct, and where the [prosecutors] are afforded none of the rights and protections to which they should normally be entitled to defend against the very serious accusations levied against them."). The prosecutors pointed to the court's appointment of a law professor to give an expert opinion on the professional propriety of the prosecutors' conduct as evidence of bias. *Id.* at 33 (The judge "did not solicit or receive Prof. Yaroshefsky's report for a proper purpose . . . , but, rather, because he wanted to insert an *issue* into the case—and, worse, to do so from a particular *vantage point*, which was far from neutral") (emphasis in original). They reasoned, in part, that the professional conduct rules "are written to be plainly understood by all lawyers so as to permit self-regulation" and therefore the judge "was more than capable of understanding the law in this area without the assistance of expert advice." *Id.* at 34 n.15.

133. See *supra* text accompanying note 132; Queens D.A. Memo., *supra* note 129, at 51 ("The rules that govern professional conduct [establish] an appropriate forum and an established procedure for addressing and deciding allegations of professional conduct," and the appropriate "forum is *not* a suppression hearing; and that procedure is *not* to have a hearing court solicit and rely upon conclusions of law of law professors, or other alleged 'experts.'") (emphasis in original).

134. See *supra* text accompanying note 132. This argument is implicitly repudiated by the Ninth Circuit's recent decision in *United States v. Lopez-Avila*, 2012 U.S. App. LEXIS 2987 (Feb. 14, 2012), in which the court, finding that the prosecutor engaged in impermissibly misleading conduct, named the prosecutor and remanded, in part, for the trial court to determine whether to sanction her.

135. Queens DA Memo., *supra* note 129, at 24 ("The court's past and impending actions . . . trample the rights of the District Attorney and his Assistants to not have their integrity publicly and baselessly impugned."); *id.* at 51 ("Even *entertaining* the question of whether the People's Central Booking Interview Program violates the rules of ethics is . . . highly prejudicial . . . to all of the individual Assistant District Attorneys, personally, who have conducted Central Booking interviews under the program.") (emphasis in original); see also *id.* at 40 (stating that the judicial code provision allowing a judge to seek expert advice is not "a vehicle by which an alleged 'expert' can unabashedly attack and impugn the integrity of a public official in a document that *automatically* becomes part of the *public record*") (emphasis in original).

136. The state district attorneys association filed an amicus brief supporting the District Attorney's application. Although adopting more restrained rhetoric, it joined in the argument that it was unfair to require prosecutors "to defend against charges of misconduct or ethical violations in the context of a run-of-the-mill, ordinarily non-appealable, suppression motion" because the context "denies a prosecuting attorney the opportunity to fully defend against serious accusations of ethical breaches with no avenue of appellate review." Brief of Amicus Curiae Dist. Attorneys Ass'n of the State of N.Y., *Brown v. Blumenfeld*, A.D. # 2010-9688 (Dec. 13, 2010), at 8.

137. *Brown v. Blumenfeld*, 930 N.Y.S.2d 610 (N.Y. App. Div. 2011).

findings “with respect to whether an attorney has engaged in professional misconduct,” and, indeed, often do so.<sup>138</sup> In this case, in particular, the propriety of the prosecutor’s conduct was potentially relevant under state law to the admissibility of the defendant’s confession.<sup>139</sup> The appellate court acknowledged that prosecutors were legitimately concerned about their reputations, and that there was a possibility that the trial judge might make an erroneous determination that could not be challenged on appeal,<sup>140</sup> but held that these concerns were not sufficient grounds to prevent the trial judge from reviewing and commenting on the professional propriety of a lawyer’s conduct in a criminal case any more than in a civil lawsuit.<sup>141</sup>

### III. THE SIGNIFICANCE OF PROSECUTORS’ PUBLIC HOSTILITY TOWARD PROFESSIONAL REGULATION

#### A. SOME OBSERVATIONS REGARDING PROSECUTORS’ ANTI-REGULATORY RHETORIC

Prosecutors, their offices, and their representatives do not have a single attitude toward professional regulation and regulators. The conflicting responses to Model Rules 3.8(g) and (h) make that clear. Like the prosecutors in the ABA leadership who helped develop and endorse these provisions, the Tennessee and Wisconsin state prosecutors’ associations saw as a good thing professional conduct rules which codify the standards that prosecutors expect of themselves and each other regarding rectifying wrongful convictions, because such rules educate prosecutors and establish a positive prosecutorial culture. These associations evidently considered it beneficial to work with the organized bar to develop provisions, based on the ABA models, that make sense for prosecutors in their state, given its particular practices and procedures. The Washington state prosecutors’ association and the Tennessee federal prosecutors, in contrast, perceived the new provisions as threatening, and saw more benefit in opposing them than in negotiating, compromising, or offering revisions that met their

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138. *Id.* at 617 n.5.

139. *Id.* at 618.

140. *Id.* at 618-19.

141. Having been freed to do so, on February 16, 2012, the trial judge conducted a hearing regarding the ethical propriety of the prosecutors’ conduct. Daniel Wise, *Suppression Hearing Takes Up Ethics of Practice in Queens D.A. Office*, N.Y.L.J., Feb. 22, 2012, at 1. On April 17, 2012, the trial judge issued a lengthy opinion finding that the prosecution had engaged in improper conduct by falsely promising to investigate whatever account the defendant provided. As a sanction, the judge ordered that the defendant’s post-arrest statement could not be used in the prosecution’s direct case. *People v. Perez*, 2012 N.Y. Misc. LEXIS 1767; 2012 NY Slip Op 22103 (N.Y. Sup. Queens Cnty, Apr. 17, 2012). Less than two weeks later, the DA petitioned the appellate court for an order barring enforcement to the trial court’s decision, and the court heard argument soon after. Daniel Wise, *Concerns Emerge in Argument About Ethics of D.A. Questioning*, N.Y.J.J., June 25, 2012, at 1.

concerns.<sup>142</sup> The focus of this article is, of course, on the rhetoric of prosecutors, like the latter, who express hostility to professional regulation. But it is important to acknowledge that many prosecutors are not so hostile, and indeed welcome constructive professional regulation.

In addressing the aspects of professional regulation in the three examples, prosecutors were not functioning exclusively as advocates, and aside from the Queens County scenario, they arguably were not functioning as advocates at all. Prosecutors notably have other functions, including as “administrators of justice” with a responsibility, as public officials, “to seek to reform and improve the administration of criminal justice.”<sup>143</sup> In these examples, prosecutors’ institutions were addressing how prosecutors should best be regulated, and as public officials, their obligation was to promote the public interest, not personal self-interest. The position of the Tennessee and Wisconsin state prosecutors’ associations, because it was so obviously contrary to prosecutors’ personal interest in avoiding regulatory risk, comes across as an expression of the role of disinterested “administrator of justice.” Of course, there is room for honest disagreement about how best to serve the public interest, and prosecutors who oppose regulation are not necessarily acting self-interestedly. But the less plausible their anti-regulatory arguments seem, the more readily one views them as abdicating their public-interested law-reform function.

For reasons suggested, although admittedly not fully developed, in Part II, prosecutors’ anti-regulatory arguments seem implausible. Taken together, they seem to convey that prosecutors should be immune from all external professional conduct rules and their enforcement—that is to say, “we don’t need no regulation.” According to the prosecutors’ various submissions, professional conduct rules cannot legitimately add to prosecutors’ preexisting legal obligations or restrictions, and any new rule is simply an occasion for unwarranted complaints by disgruntled criminal defendants. Even if professional conduct rules might legitimately regulate them, prosecutors suggest, the existing process for developing professional conduct rules is illegitimate because of the influence of bar associations, which are subject to capture by criminal defense interests. Further, trial judges cannot undertake interpretation and enforcement of professional conduct rules, because they are biased and their adjudications are unfair, but disciplinary procedures also cannot be trusted to take adequate account of law enforcement interests.

The anti-regulatory rhetoric in the three examples described in Part II was largely inflammatory and superficial; it was not predicated on well-developed arguments, but bordered on sloganeering. For example, some of the rhetoric

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142. Consequently, just as the positions taken by the ABA are unlikely to reflect the unanimous views of its members, much less of all lawyers, the positions taken by prosecutors’ associations are unlikely to reflect the full range of prosecutors’ views.

143. Prosecution Standards, *supra* n. 67, Standard 3-1.2(b) & (c).

implied that professional conduct rules and interpretations of rules imposing new obligations on prosecutors are *invariably* inconsistent with policy judgments made by courts or legislatures, both when the courts and legislatures address an area of conduct and when they are essentially silent. But the prosecutors making those arguments did not explain why this was so in the particular cases, and there is, of course, no reason why this invariably should be so. In general, the central focus of professional conduct rules is different from that of substantive law, even if rules and law may overlap. The Constitution, for example, generally sets forth minimum obligations, and is not meant to preclude legislators from establishing stricter rules. The same may be true of legislation as relates to ethical rules: the former establish a floor, not a ceiling. Indeed, Congress's adoption of the McDade Amendment appears to presuppose that, at least as far as federal prosecutors are concerned, ethics rules can and will establish additional obligations. Thus, whether or not existing law reflects a policy judgment about where lines should be drawn in the ethics realm cannot be established simply by noting that law already exists on the subject.

Similarly, in its amicus brief in *Smith*, the NDAA never elaborated on its suggestion that the ABA's views on professional conduct are unworthy of respect simply because the ABA is a private association. Given the ABA's historic central role in developing professional rules, and courts' traditional reliance on the organization's suggestions, the NDAA's dismissal of the ABA requires at least some specific discussion of which of the ABA's processes or attributes makes it undeserving of continued influence. The mere fact that the ABA takes positions that some prosecutors dislike does not mean that the organization is imbalanced, much less that it is shilling for criminal defendants.

Besides being facile and inchoate, prosecutors' arguments against professional regulation were also indiscriminate and overbroad. For example, complaints that courts and disciplinary agencies lack an adequate appreciation of law enforcement interests, or that new ethics rules will result in floods of burdensome disciplinary complaints, can be invoked virtually whenever prosecutors would be subject to any regulation at all via professional conduct rules.<sup>144</sup> The logical conclusion of these arguments, then, is that prosecutors should be wholly exempt from professional conduct rules and from judicial oversight of their professional conduct. Such a claim is hard to take seriously. Certainly, prosecutors do not dispute that courts can adopt and enforce professional conduct rules restraining prosecutors' conduct in many respects, such as their arguments on summation and their communications with the media.<sup>145</sup> Thus, prosecutors should bear the

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144. See Zacharias & Green, *supra* note 7, at 39-40, 47-49 (discussing arguments that prosecutorial ethics rules result in burdensome litigation, "that disciplinary regulators may lack the institutional competence to evaluate and set standards for prosecutorial conduct" and that "disciplinary regulators [may lack] the authority to impose standards inconsistent with prevailing law").

145. See, e.g., MODEL RULES R. 3.4(e), 3.6 & 3.8(f).

burden of explaining why courts should not undertake the particular regulatory action at issue—*e.g.*, what is wrong with a court's adoption of a rule of conduct on disclosure of exculpatory information or a trial court's inquiry into arguably misleading interrogation practices. To discharge this burden, prosecutors might explain, for example, why a specific rule would intrude into an area where prosecutors' internal standards of conduct are particularly worthy of deference, where courts are particularly unqualified to set standards, or in which a regulatory inquiry would be particularly harmful. But the various submissions described in Part II did not attempt any of this heavier lifting.

Ultimately, much of the prosecutorial rhetoric described above is not convincing. For example, prosecutors have suggested that separation of powers principles exempt them from professional regulation of prosecutorial conduct, but courts reject this argument.<sup>146</sup> State courts adopt rules specifically targeted at prosecutors and (if only occasionally) they oversee disciplinary actions against prosecutors on the obvious assumption that prosecutors, as lawyers, are subject to regulation for professional misconduct. The U.S. Supreme Court made the same assumption in its prosecutorial immunity decisions.<sup>147</sup> In its extreme form, the separation-of-powers argument would imply that courts cannot forbid prosecutors from suborning perjury, making false and misleading statements to the court, or making improper jury arguments—a result that seems intuitively distasteful and that no prosecutor has yet advocated.

Further, prosecutors have maintained that prosecutorial ethics provisions will lead to burdensome disciplinary complaints but offered no empirical evidence to support that view.<sup>148</sup> Other arguments—casting prosecutors as potential victims of an unsympathetic or unreliable judicial process—seem disingenuous, given prosecutors' customary role. For example, the Queens County prosecutors sought extraordinary judicial relief from the perceived harm to their professional

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146. Of course, particular regulation may cross constitutional lines. *See, e.g.*, *Stern v. U.S. Dist. Court for Dist. of Mass.*, 214 F.3d 4 (1st Cir. 2000) (finding adoption of attorney-subpoena rule ineffective, in part, on separation of powers grounds); *cf. United States v. Williams*, 504 U.S. 36, 46 (1992) (noting limit on courts' supervisory authority to restrict prosecutor's investigative conduct in the grand jury, given grand jury's independence). For example, courts are deferential to prosecutors in the exercise of charging discretion and would probably look skeptically at rules that encroach on that discretion. In other contexts, although not exempting prosecutors from regulation, separation-of-powers concerns may be given weight in how prosecutors are regulated. *See, e.g.*, *United States v. Basciano*, 763 F. Supp. 2d 303, 314 n.7 (E.D.N.Y. 2011) (noting that separation of powers concerns favor disqualifying an individual prosecutor rather than the entire office); *United States v. Koubriti*, 305 F. Supp. 2d 723, 755-56 (E.D. Mich. 2003) (admonishing prosecutor but declining to initiate criminal contempt proceedings for ethically impermissible public statements).

147. *See supra* note 10.

148. The problem with the prosecutors' prediction that a particular standard of professional conduct will lead to a flood of disciplinary complaints is that, as state courts adopt the standard, the prediction is tested. If the prosecutors' prediction fails, their credibility suffers. *Cf. Bruce A. Green, Fear of the Unknown: Judicial Ethics After Caperton*, 60 SYRACUSE L. REV. 229 (2010) (arguing that the dissent's prediction about the Court's decision would unleash a flood of recusal motions has been unfulfilled, and that public respect for the Court's deliberative processes may be undermined as a result).

reputations from having to defend their professional conduct in a suppression hearing. Yet prosecutors often show little concern for the reputations of individuals whom they accuse of criminal conduct in public filings, press conferences, or elsewhere. Even when mistaken, they rarely take steps to repair the reputations of those who are acquitted or against whom charges are not filed. Likewise, prosecutors claim to worry that the risk of discipline will chill them in performing their professional tasks, but discredit complaints about the chilling effect of aggressive criminal prosecutions on others' legitimate professional activities.<sup>149</sup>

One might easily conclude that prosecutors' employment of these arguments against professional regulation is purely instrumental. Prosecutors' customary role is that of advocate, and advocates are entitled to make any non-frivolous argument in support of their objectives. In the end, prosecutors' opposition in the three examples comes across as simply advocacy.<sup>150</sup> In a different context, if there were something to be gained by it, one can imagine prosecutors turning about face and extolling the efficacy of the regulatory process. Indeed, prosecutors recently did just that in *Connick v. Thompson*,<sup>151</sup> where the New Orleans district attorney's office argued successfully that a wrongfully convicted individual, who had been deprived of exculpatory evidence in violation of *Brady v. Maryland*, could not predicate his civil rights action on the office's systematic failure to train prosecutors as to their discovery obligations. The district attorney asserted that such training was in fact not necessary, because "[a] district attorney reasonably relies on prosecutors obeying the standards of their own profession."<sup>152</sup> An amicus brief filed by an association of New York state prosecutors, elaborating on this point, approvingly cited both the state's version of Model Rule 3.8(d) and the counterpart ABA Standard<sup>153</sup>—essentially the same provisions derogated by the NDAA's brief in *Smith v. Cain*—and acknowledged

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149. See, e.g., Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327, 385 n.294 (1998) (noting that prosecutors complain about the chilling effect of disciplinary prosecutions but do not accept at face value complaints that their prosecutions of lawyers will chill lawyers' legitimate activities); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. REV.* 757, 774 n.82 (1999) (noting that aggressive white collar prosecutions under such laws as "mail fraud, Hobbs Act, money laundering statutes, and RICO" pose a risk of "chill[ing] legitimate economic activity").

150. The apparent inconsistency of some of the arguments augments this appearance. For example, prosecutors argue, on one hand, that rules codifying post-conviction obligations are unnecessary because prosecutors already act consistently with the rules, but on the other hand, that such rules are unwarranted because they establish obligations beyond preexisting legal ones.

151. 131 S. Ct. 1350 (2011).

152. Brief for Petitioner, *Connick v. Thompson*, No. 09-571, 2009 U.S. Briefs 571, 2010 U.S. S. Ct. Briefs LEXIS 547, at \*30 (June 20, 2010); accord *id.* at \*38 ("Prosecutors are trained professionals, subject to a licensing and ethical regime designed to reinforce their duties as officers of the court. Absent powerful evidence to the contrary, a district attorney is entitled to rely on prosecutors' adherence to these standards.").

153. Brief of the District Attorneys Association of the State of New York as Amicus Curiae, *Connick v. Thompson*, No. 09-571, 2009 U.S. Briefs 571, \*10, 13, 2010 U.S. S. Ct. Briefs LEXIS 547, \*15, 19 (June 11, 2010).

that both “ethically and in practice,” a prosecutor should disclose “all evidence helpful to the defense,” not just material evidence.<sup>154</sup>

#### B. SOME CONCERNS WITH THE RHETORIC

There are many reasons to be concerned about the seemingly reflexive position that some prosecutors’ representatives take in opposition to professional regulation. A principal concern is the potential impact of prosecutors’ arguments on individual prosecutors’ attitudes and the culture of prosecutors’ offices.<sup>155</sup> Given the modest role of formal regulation, one cannot underestimate the importance of maintaining an office culture that promotes prosecutors’ respect for, and compliance with, legal and regulatory obligations and professional norms and expectations.<sup>156</sup> Even if anti-regulatory rhetoric is intended solely as an advocacy tool, it is nevertheless likely to have a negative effect on prosecutorial cultures in individual offices. To say that prosecutors employ anti-regulatory rhetoric instrumentally is not to say that such advocacy has no influence on their systems of belief. Prosecutors’ public rhetoric will necessarily enter their private discourse. What they tell the courts becomes what they tell themselves and each other, and they come to believe what they are saying. And, in this case, that can foster perverse incentives and create a culture that is counterproductive to the goal of being more ethical. For example, the Queens County DA’s attack on the trial judge and the suppression hearing as biased and unfair is likely to be given credence by assistant DAs in the office, with the result of eroding the office’s respect for the court and its regulatory role. The derogation of provisions of Model Rule 3.8 by the NDAA as the product of ABA partisanship both alienates prosecutors from their professional peers and signals that professional conduct rules are unworthy of respect. The suggestion that, as public officials, prosecutors should be exempt from professional conduct rules both reflects and breeds arrogance and indifference to prevailing professional norms as reflected in court decisions and professional writings.

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154. *Id.*, 2009 U.S. Briefs 571, \*13, 2010 U.S. S. Ct. Briefs LEXIS 547, \*19.

155. For a recent discussion of factors that have shaped a negative culture in the New Orleans prosecutor’s office and the difficulty of improving the culture to promote compliance with disclosure obligations, see Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson*, 25 GEO. J. LEGAL ETHICS (9-3 2012). See also Ronald Wright & Marc Miller, *The Screening/Bargaining Payoff*, 55 STAN. L. REV. 29, 103-16 (2002) (exploring relationship between prosecutor’s screening and plea bargaining policies, office culture, and election rhetoric).

156. See, e.g., Burke, *supra* note 13, at 2127 (recognizing the importance of “maintaining a system and culture that values a fair process”). For other discussions of prosecutors’ office culture, see, e.g., Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 132-50 (2004) (arguing that “the institutional culture of most prosecutors’ offices values conviction rates and, in this environment, prosecutors may become wedded to maintaining convictions and resist incoming post-conviction motions based on innocence”); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 388-89 (2001); Zacharias & Green, *supra* note 7, at 19.

Further, indiscriminate opposition to professional regulation is contrary to prosecutors' professional obligation to promote the positive development of the law. Lawyers in general, as members of a self-regulating profession, are expected to work to improve the law,<sup>157</sup> and, as noted earlier, prosecutors in particular are expected to do so as an aspect of their duty to seek justice.<sup>158</sup> As public officials, prosecutors should perceive a stake in promoting an effective professional regulatory process and in promoting public respect for the process. Prosecutors should therefore be circumspect about criticizing aspects of the process and should confine their criticism to situations where it is truly deserved.

Prosecutors' exaggerated opposition to professional regulation<sup>159</sup> also undermines professional and public confidence in prosecutors. In the past decade, there has been increasing public concern about the role of prosecutorial misconduct in contributing to wrongful convictions.<sup>160</sup> In this context, opposition to professional regulation seems tone deaf, and may prompt the public to brand prosecutors as indifferent to the legitimate role of professional regulation in promoting proper prosecutorial conduct and the importance of professionally proper conduct to achieving just outcomes in criminal cases.

Finally, the breadth and nature of prosecutors' arguments undermine their credibility and detract from their more plausible arguments. For example, the Queens County prosecutor's attack on the trial judge and the adjudicative process took away from his arguments that, at the end of the day, his office's investigative conduct was proper and not impermissibly misleading. Likewise, some prosecutors' wholesale attack on proposed provisions based on Model Rules 3.8(g) and (h) detracted from serious arguments that redrafting might be needed to accommodate particular legitimate law enforcement concerns.<sup>161</sup> If federal prosecutors cannot support in principle a rule calling for disclosure of new and credible evidence that creates a "reasonable likelihood" of a wrongful conviction, what prosecutorial conduct rule would they support? Some prosecutors' apparent opposition to absolutely any new professional regulation may eventually lead courts to discount even their legitimate reactions to proposed regulation.

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157. See MODEL RULES R. 6.1 cmt. 8 (pro bono rule "recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession"); Chambliss & Green, *supra* note 18, at 425-27.

158. See ABA Standards for Criminal Justice: Prosecution Function Standards, Std. 3-1.2(d) (3d ed. 1993). See generally Norman Lefstein, *Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate?*, 38 HASTINGS CONST. L.Q. 949, 977-78 (2011).

159. See, e.g., *supra* text accompanying notes 75-76 (noting NDAA's mischaracterization of ABA's argument).

160. See, e.g., KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009 (2010); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399; Editorial, *Justice and Prosecutorial Misconduct*, N.Y. TIMES, Dec. 29, 2011, at A26.

161. See Saltzburg, *supra* note 97.



## CONCLUSION

Twenty years ago, in the context of various battles over the application of professional conduct rules to their investigative work, prosecutors expressed reflexive mistrust of professional regulatory institutions. Many prosecutors did not identify with the organized bar, and saw themselves as victims of a pro-defendant regulatory regime in which the bar had significant influence. Whether their mistrust was justified at the time is questionable. Even twenty years ago, professional regulation posed little threat to prosecutors and imposed no meaningful impediment to their legitimate work. Nevertheless, this negative attitude toward professional regulation by the organized bar—which has little basis in reality—has persisted in shaping prosecutors’ rhetoric, although the careers of most active prosecutors began well after the dust settled over the regulatory battles of twenty years ago. During the careers of most active prosecutors, the bench and bar have been highly deferential and, in the bar’s case, inclusive. To the extent that prosecutors’ inflammatory anti-regulation rhetoric reflects genuine belief, it seems likely that the belief is atavistic, vestigial, unexamined, and shaped by the continued utility of exaggerated rhetoric as an advocacy tool.