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# Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory of a

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## I. INTRODUCTION

Federal courts regulate lawyers, including federal prosecutors, by enforcing various constitutional, statutory, and other legal constraints.[1] Federal courts also adopt and enforce their own disciplinary rules pursuant to rule-making authority delegated by Congress.[2] To what extent, however, do federal courts have independent power, in the absence of an explicit grant of authority, to regulate private lawyers and federal prosecutors? Although lower federal courts have long exercised power both to define and to sanction

1. *See, e.g.*, 18 U.S.C. § 3006A (2000) (codified in statutory notes) [Hyde Amendment] (authorizing federal courts to assess financial sanctions on federal prosecutors); 28 U.S.C. § 530B (2000) [McDade Amendment] (authorizing federal courts to apply state ethics rules to prosecutors in federal court); 28 U.S.C. § 1927 (2000) (authorizing the imposition of financial sanctions on any counsel who "multiplies the proceedings in any case unreasonably and vexatiously"); FED. R. CIV. P. 11 (authorizing federal courts to impose sanctions on lawyers who file pleadings for improper purposes).

2. 28 U.S.C. § 1654 (1989) (subjecting appearances by counsel to "rules of [federal] courts"); 28 U.S.C. § 2071(a) (1992) (authorizing federal courts to "prescribe rules for the conduct of their business"); FED. R. CIV. P. 83(a) (authorizing federal district courts to adopt rules governing practice); FED. R. APP. P. 46 (setting rules for admission to practice before federal appellate courts).

professional misconduct, the United States Supreme Court has never clarified the source and scope of this authority.

This issue is important for two reasons. First, most federal districts have adopted local rules of professional conduct, either by incorporating those of the states in which they sit[3] or by promulgating their own.[4] Unless these standards can be justified as exercises of procedural or evidentiary rule-making powers delegated by Congress, their validity depends on the existence of independent federal court authority. Second, and perhaps more importantly, federal courts have often imposed professional obligations on lawyers through judicial opinions. When federal courts eschew the rule-making process, their standards of conduct again can be justified, if at all, only by reference to some independent judicial authority to regulate lawyers.

The issues are especially significant in the context of the regulation of federal prosecutors, which has been among the most hotly debated areas of legal ethics over the past decade.[5] There is a good argument that the standards of conduct for federal prosecutors should be different—sometimes more restrictive, sometimes less so—than standards of conduct governing private attorneys and state prosecutors.[6] Who should impose the standards also is a complex issue.[7] Federal courts might prefer to consider these questions in the context of evaluating specific allegations of prosecutorial misconduct in litigation, which would lead to setting standards in judicial opinions rather than rules.[8] Whether the courts may follow this approach,

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3. *See* DANIEL R. COQUILLETTE, REPORT ON LOCAL RULES REGULATING ATTORNEY CONDUCT IN THE FEDERAL COURTS (1995), *reprinted in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, SPECIAL STUDIES OF FEDERAL RULES GOVERNING ATTORNEY CONDUCT 1, 4 (1997) [hereinafter SPECIAL STUDIES] (canvassing the local rules of the federal district courts).

4. *See id.* at 4.

5. *See* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 384-85 (2002) (noting debates over whether ethics rules may regulate prosecutors' communications with represented persons, issuance of grand jury subpoenas to criminal defense lawyers, and use of deceit in criminal investigations).

6. *See* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 225-43 (2000) (explaining why the standards of conduct for federal prosecutors might legitimately be different—in some cases more restrictive, in some cases less so—than those governing private lawyers or state prosecutors).

7. Alternative regulators include Congress, the federal courts, states, or the Department of Justice. *See* Green & Zacharias, *supra* note 5, at 391 (analyzing the issue of who should regulate federal prosecutors).

8. Courts might prefer to develop standards of conduct in common law fashion via case-by-case adjudication in areas where the propriety of attorney conduct requires fine-tuned judgments in light of factual complexities and nuances. *See* Green & Zacharias, *supra* note 5, at 472 ("[R]egulation that involves judicial supervision of prosecutorial activities on a case-by-case basis typically is more precise in identifying misbehavior."); *cf.* Bruce A. Green, Doe v. Federal Grievance Committee*: On the Interpretation of Ethical Rules,* 55 BROOK L. REV. 485, 530-42

however, depends on the nature and extent of their independent regulatory authority over lawyers.

To illustrate the significance and uncertainty of the issues, and to explore various ways in which they might be resolved, this Article takes as its point of departure the most significant recent case addressing the question of independent regulatory authority over lawyers, *United States v. Williams*.[9] Some observers believe that *Williams* has defined the nature and scope of federal judicial regulatory authority. Two federal courts of appeals have recently read *Williams* as foreclosing federal courts from using any authority, including rule-making and independent regulatory authority over lawyers, to adopt a rule of prosecutorial conduct that impinges upon core attributes of the grand jury.[10] A former Department of Justice official has characterized *Williams* more broadly as foreclosing federal district courts from imposing ethics standards governing *any* prosecutorial behavior occurring out-of-court.[11] A careful reading of the decision, however, suggests that *Williams* in fact resolved little, if anything, about federal courts' regulatory power.

This Article demonstrates that the outcome in *Williams* could have been reached in more than a dozen different ways. Many of the possible analytic approaches would have resolved important open questions about the scope and nature of judicial authority. Most of these approaches are consistent with the actual language of the *Williams* decision. Through its analysis of *Williams,* this Article identifies the different potential sources of regulatory authority,

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(1989) (arguing that, where disciplinary rules are ambiguous, it is preferable for courts to develop standards in common law fashion than for them to attempt to glean the intent of those who drafted the rules). On the other hand, rules may regulate more effectively by providing clearer notice to prosecutors and the public. *See* Green & Zacharias, *supra* note 5, at 472 ("The adoption of explicit general standards of conduct often promotes market regulation."). Moreover, rule making has procedural advantages over adjudication, including the ability to hear from a wider array of stakeholders and the involvement of more decision makers. *See* Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 497-99 (1996) [hereinafter Green, *Whose Rules*] (discussing limitations of adjudication as a means of determining professional standards).

9. 504 U.S. 36 (1992).

10. Stern v. United States Dist. Court for the Dist. of Mass., 214 F.3d 4, 16 (1st Cir. 2000); Baylson v. Disciplinary Bd. of the Supreme Court of Pa., 975 F.2d 102, 110 (3rd Cir. 1992).

11. Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, 410 (1996); *see also* John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 464 (1997) (reading *Williams* as holding that "the supervisory power of federal district courts should be limited to fashioning remedies for violations of existing federal law and prescribing rules of procedure for their own, in-house proceedings"). As discussed below, this probably is an over-reading of *Williams, see infra* text accompanying notes 104-109, but it shows how malleable the Supreme Court's decision was.

highlights the uncertainty of their reach, and notes the many difficult and important questions that remain to be resolved with respect to judicial regulation of federal lawyers (and especially federal prosecutors). This analysis calls into question a host of recent judicial and academic assumptions about the extent of federal judicial regulatory power.

## II. THE BACKGROUND PROBLEM

Most state supreme courts claim plenary law-making and rule-making authority to regulate the conduct of lawyers whom they have authorized to practice law.[12] Federal district courts, in contrast, are supposed to be courts of more limited jurisdiction.[13] They have never claimed authority to regulate all aspects of the professional conduct of federal lawyers. They have, however, exercised both congressionally delegated authority and independent non-delegated authority to regulate certain aspects of federal litigators' behavior.

The congressionally delegated authority takes two forms. First, federal courts have authority to enforce federal statutes and specific rules of procedure that establish standards of conduct governing lawyers generally or federal prosecutors specifically. These include

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12. *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 22-33 (1986) (discussing state and federal court inherent authority to regulate attorneys); Green and Zacharias, *supra* note 5, at 391 ("A state, however, may claim an independent substantive right to apply its ethics rules to the work of all lawyers"); Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 362 (1998) ("Quite beyond that, most state supreme courts also claim the exclusive power to regulate lawyers as the court sees fit—even if the state's legislature has enacted legislation that on its face is applicable to lawyers"); *see also* United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 226 n.2 (1967) (Harlan, J., dissenting) (referring to state supreme court's "exercise of its common law power of supervision over the Bar"); Cohen v. Hurley, 366 U.S. 117, 123-24 (1961) (describing courts' traditional power to discipline members of the bar, incident to a "broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied"). State rules of conduct extend not just to state-licensed lawyers' work in relation to state court litigation but to all aspects of professional work performed within a state; for example, negotiating business transactions, rendering legal advice, or drafting legal documents.

13. In most jurisdictions, state courts have taken on the role of regulating lawyers through their inherent powers. *See* Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1, 4-5 (1989) (discussing courts' inherent power to regulate lawyers). In the federal context, the courts typically have spoken of inherent authority as existing only in furtherance of the courts' need to govern their own litigation processes. *See infra* text accompanying notes 156-227. Because lower federal courts are creatures of congressional fiat, and subject to jurisdictional limitations imposed by Congress, federal courts traditionally have considered their authority to regulate lawyers subsidiary to Congress's authority. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) (quoting *Ex parte* Robinson, 19 Wall. 505, 511 (1874), for the proposition that "the exercise of the inherent power of lower federal courts can be limited by statute and rule, for 'these courts were created by act of Congress'").

Rule 11 of the Federal Rules of Civil Procedure[14] and, for federal prosecutors, the McDade[15] and Hyde Amendments.[16]

Second, Congress has delegated general rule-making authority to federal courts.[17] Although ostensibly limited to the power to make evidentiary and procedural rules,[18] federal district courts also have assumed the authority to adopt local practice rules that govern the conduct of federal litigation.[19] These rules have been used to incorporate standards of professional responsibility—some original and some following the standards of the states in which the federal courts sit.[20]

The power of federal courts to apply such rules to federal prosecutors is different, in some respects, from the courts' power over other attorneys trying cases in federal courts. Federal courts may have special authority to regulate participants in the criminal process, including prosecutors.[21] On the other hand, the same Congress that has delegated rule-making authority to the federal courts also has delegated authority to the Department of Justice to engage in particular law enforcement activities.[22] The two independent delegations may conflict with one another, giving rise to questions about which institution's judgments should control.[23] Moreover,

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14. Rule 11 authorizes the federal courts to impose monetary sanctions, *inter alia*, upon lawyers who file pleadings for an improper purpose. FED R. CIV. P. 11.

15. 28 U.S.C. § 530B (2000). The McDade Amendment requires federal prosecutors to comply with the ethics rules of the states in which they appear. *Id.*

16. 18 U.S.C. § 3006A (1997). The Hyde amendment authorizes federal courts to award attorneys' fees to criminal defendants who retained counsel to defend against frivolous or vexatious charges. *Id.*

17. *See, e.g.*, 28 U.S.C. § 2071 (2000) (setting forth the Rules Enabling Act); FED. R. CIV. P. 83 (authorizing local practice rules); FED. R. CRIM. P. 57 (authorizing local court rules for criminal proceedings).

18. *See* 28 U.S.C. § 2072(b) (2000) ("Such rules shall not abridge, enlarge or modify any substantive right.").

19. For a full discussion of federal court rule-making power, see generally JUDITH A. MCMORROW & DANIEL R. COQUILLETTE, THE FEDERAL LAW OF ATTORNEY CONDUCT § 802 (2001).

20. The status of professional rules in the various United States district courts is summarized in Coquillette, *supra* note 3, at 3-4, with specific references in Appendix II. *See also* MCMORROW & COQUILLETTE, *supra* note 19, §§ 802.01-.06; Green & Zacharias, *supra* note 5, at 400 (discussing the status of local district court rules).

21. *See infra* text accompanying notes 25-31.

22. *See, e.g.*, 28 U.S.C. § 515(a) (2000) (authorizing the Attorney General to "conduct any kind of legal proceeding . . . which United States attorneys are authorized by law to conduct"); 28 U.S.C. § 519 (2000) ("[T]he Attorney General shall supervise all litigation . . . and shall direct all United States attorneys [and] assistant United States Attorneys . . ."); 28 U.S.C. § 533 (2000) (directing Department of Justice "officials . . . to detect and prosecute crimes"); 28 U.S.C. § 547 (2000) ("[U.S. Attorneys] shall (1) prosecute for all offenses against the United States . . . .").

23. *See, e.g.*, Little, *supra* note 11, at 378-410 (arguing that the delegation of law enforcement powers to the Department of Justice preempts the power of states and federal

regardless of the desire of Congress or the federal courts to constrain federal prosecutorial conduct, the Department of Justice is an executive agency. As such, it may in some respects claim an immunity from judicial regulation, even from congressionally sanctioned judicial regulation.[24]

As a general matter, the judicial rule-making authority and other congressionally delegated powers have not proven controversial. This Article therefore focuses on the less-defined non-delegated authority to regulate federal lawyers, and especially federal prosecutors. Federal courts have four possible sources of independent authority: two well-recognized, two potentially controversial, and all uncertain in scope.

The first well-recognized source of federal judicial regulatory authority is the "supervisory power." Federal courts have most often employed the supervisory power in the criminal context to establish procedures governing the operation of the criminal justice system.[25] The courts have used the authority to regulate the practices of a variety of government agents, including federal prosecutors.[26]

The courts' supervisory authority over the criminal justice process has been the subject of substantial judicial and scholarly attention that questions its existence and its appropriate scope.[27] The

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courts to regulate federal prosecutorial ethics); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors; Or, Who Should Regulate the Regulators?*, 65 FORDHAM L. REV. 429, 439-45 (1996) (questioning Little's position).

24. *See* Edward C. Carter III, *Limits of the Judicial Power: Does the Constitution Bar the Application of Some Ethies Rules to Executive Branch Attorneys?*, 27 S. ILL. U. L.J. 295, 309-10 (2003) (arguing that rules like Model Rules 3.8(f), 4.2, and 8.4(c) violate separations of powers principles when applied to federal prosecutors); *see also* Green & Zacharias, *supra* note 5, at 446-47 (analyzing the separation of powers arguments); Zacharias & Green, *supra* note 6, at 250 (reviewing and analyzing the Department of Justice positions on separation of powers).

25. *See, e.g.*, United States v. Hale, 422 U.S. 171, 181 (1975) (exercising supervisory authority to grant new trial after government introduced evidence of defendant's post-arrest silence as probative of guilt); McNabb v. United States, 318 U.S. 332, 340 (1943) ("Judicial supervision of the administration of criminal justice in the federal courts implies tbe duty of establishing and maintaining civilized standards of procedure and evidence."); Burton v. United States, 483 F.2d 1182, 1187-88 (9th Cir. 1973) (cataloguing cases that have implemented the supervisory authority); *see also* Green and Zacharias, *supra* note 5, at 411 (distinguishing supervisory authority over the criminal justice system from a separate notion of general supervisory authority); Neals-Erik William Delker, Comment, *Ethics and the Federal Prosecutor: The Continuing Conflict over the Application of Model Rule 4.2 to Federal Prosecutors*, 44 AM. U. L. REV. 855, 885-88 (1995) (discussing supervisory authority of federal courts over prosecutors).

26. Many of the supervisory autbority cases involve federal investigators and other criminal law enforcement personnel.

27. *See, e.g.*, Carlisle v. United States, 517 U.S. 416, 424-25 (1996) (rejecting the use of supervisory authority to grant untimely motion for judgment of acquittal); United States v. Payner, 447 U.S. 727, 735 (1980) ("[T]he supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court."). *See generally* Sara Sun Beale, *Reeonsidering Supervisory Power in*

questions stem in part from doubts that Article III provides a basis for the exercise of supervisory authority in the absence of congressional approval[28] and in part from concerns that judicial interference with executive law enforcement prerogatives invades separation of powers.[29] By this point in our history, however, most observers (and certainly the Supreme Court and lower federal courts) accept the existence of *some* supervisory authority in the federal courts.[30] The question is simply how far it extends.[31]

The second well-recognized source of regulatory power is the inherent authority of federal courts to protect their own jurisdiction. Like the "supervisory" power, this authority has been characterized in many different ways. Least controversially, it includes authority to sanction lawyers for conduct in federal litigation that violates existing laws or rules, or that is otherwise wrongful and disruptive of the judicial process. The United States Supreme Court has long

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*Criminal Case: Constitutional and Statutory Limits on the Authority of Federal Courts*, 84 COLUM. L. REV. 1433 (1984) (analyzing the supervisory power and arguing for limitations on its scope); Gleeson, *supra* note 11, at 466 (discussing the supervisory power and concluding that "[a]lthough the temptation to supervise prosecutors is very strong, the power of federal courts to prescribe standards of conduct for them is limited"); Matthew E. Brady, Note, *A Separation of Powers Approach to the Supervisory Power of Federal Courts*, 34 STAN. L. REV. 427, 428 (1982) ("The Supreme Court has not clearly defined either the source or scope of this supervisory power. Moreover, its future is uncertain."); *cf.* Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1661-63 (1963) (tracing the advent of supervisory authority and finding difficulty in identifying the source of the Supreme Court's supervisory authority).

28. *See* Beale, *supra* note 27, at 1465 ("The Constitution contains neither an explicit grant of authority to formulate rules of judicial procedure nor a full definition of the judicial power conferred by article III.").

29. *See id.* at 1472-73 (citing United States v. Nixon, 418 U.S. 683, 705-08 (1974), for the proposition that "in exercising their procedural authority the courts must resolve the conflict between tbe competing concerns of the executive and the judiciary 'in a manner that preserves the essential functions of each branch'"); *see also* Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 203 (1969) ("[I]t may not be within tbe province of the judicial branch . . . to impede executive programs on the basis of [supervisory] judgments."); Brady, *supra* note 27, at 428 (arguing that "the Court should limit the supervisory power according to separation of powers principles and thereby exclude evidence whenever exclusion is the least restrictive means to balance properly the competing needs of the executive and judicial branches"); Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050 (1965); Comment, *Judicially Required Rulemaking as Fourth Amendment Policy: An Applied Analysis of the Supervisory Power of the Federal Courts*, 72 NW. U. L. REV. 595, 615 (1977) (discussing the "indefinite constitutional moorings" of the supervisory power).

30. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 216 (1960) (using supervisory power to overrule the silver platter doctrine); United States v. Mallory, 354 U.S. 449, 453 (1957) (using supervisory power to exclude a confession obtained after lengthy detention of the suspect).

31. *See, e.g.*, C. Douglas Ferguson, *Should the End Justify the Means? United States v. Matta-Ballesteros and the Demise of the Supervisory Powers*, 21 N.C. J. INT'L L. & COM. REG. 561, 571 (1996) (noting that "the recent trend has been toward restricting the use of the supervisory powers"); Comment, *supra* note 29, at 614 ("The supervisory power of federal courts is a concept widely recognized but of uncertain dimension").

maintained that, when necessary to enable the courts to operate efficiently,[32] federal courts have broad authority to hold lawyers in contempt,[33] require compliance with rules governing litigation,[34] and prevent interference with court processes.[35] At its core, this authority permits courts to regulate lawyer conduct that actually threatens the courts' ability to process litigation and to maintain respect for their decisions.[36]

A third, less certain source of regulatory authority is the authority of the federal courts to control the admission of lawyers to practice before them. Today, standards for federal court bar admission are set pursuant to the rule-making power,[37] but that has not always been the case. Individual federal district courts previously claimed the right to admit or exclude attorneys without an enabling statute.[38] Arguably, this admissions authority carries with it the power to set standards for suspension or disbarment. This might include the authority to identify unprofessional conduct—such as breaches of fiduciary duty, violation of criminal law, or dishonesty—that might fairly be said to demonstrate an individual's unfitness to practice law in federal court. Carried one logical step further, the authority to exclude or disbar lawyers might allow courts to define conduct that

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32. *See, e.g.*, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944) (recognizing inherent power to avoid "tampering with the administration of justice").

33. *Ex parte* Robinson, 86 U.S. 505, 510 (1873) ("The power to punish for contempts is inherent in all courts . . . ."); Michael Scott Cooper, Note, *Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 UCLA L. REV. 855, 856 (1979) (noting that "the circumstances in which courts may respond to attorney misconduct by invocation of the contempt power are subject to statutory, common law, and constitutional limitations" (citations omitted)). *See generally* RONALD GOLDFARB, THE CONTEMPT POWER (1963) (examining the history of contempt authority in state and federal courts).

34. *See, e.g.*, Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 796 (1987) ("The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches.").

35. *See, e.g.*, Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962) (referring to inherent powers "necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases").

36. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (noting that the inherent power must be exercised with restraint). *See generally* Chambers v. NASCO, Inc., 501 U.S. 32, 42-44 (1991) (discussing the contours of the inherent power and its limits).

37. *See* 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct cases therein."); MCMORROW & COQUILLETTE, *supra* note 19, at 801-55 (discussing local rules governing bar admission); Marie Leary, *Eligibility Requirements for, and Restrictions on, Practice Before the Federal District Courts*, *in* SPECIAL STUDIES, *supra* note 3, at 123, 135-82 (empirical appendix setting out district court bar admission standards).

38. *See, e.g.*, *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 530 (1824) (upholding the authority of federal courts to regulate admission to appear in federal litigation).

must be undertaken as an aspect of competent federal representation. In other words, lawyers who want to practice before a federal district court would need to abide by the court's ground rules.

Finally, some lower federal courts have asserted what one might call a "general ethics authority;" that is, an inherent authority to oversee lawyers[39] (including federal prosecutors)[40] that is broader than, and possibly distinct from, the supervisory power over the criminal justice system or the inherent power to protect court processes. In many cases in which lower federal courts have imposed obligations on lawyers, it is unclear precisely what authority is being invoked. But some decisions suggest that federal trial judges believe they have plenary authority to regulate the conduct of lawyers who appear in federal court, and perhaps even a power comparable to the power of state supreme courts to regulate lawyer behavior within their jurisdictions through rules of professional conduct.[41] Despite intimations in one of its decisions, the Supreme Court has never recognized this broad "general ethics" power.[42] The question of whether federal courts have general authority to prescribe standards of professional conduct for the federal bar, and how far that authority extends, are important questions that remain open to debate.

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39. *See, e.g.*, Comuso v. Nat'l R.R. Passenger Corp., 267 F.3d 331, 339 (3d Cir. 2001) (upholding order sanctioning attorney for threatening opposing counsel during a recess, and ordering payment of attorneys' fees, based on the "district court's inherent power to discipline attorneys appearing before it"); *In re* Bailey, 182 F.3d 860, 864, 873 (Fed. Cir. 1999) (recognizing "that regulation of attorney behavior is an inherent power of any court of law and falls within the discretion of such court" and upholding a public reprimand imposed by the disciplinary agency of the U.S. Court of Appeals for Veterans Claims based on a pro bono lawyer's failure to prosecute an appeal diligently); Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718, 724 (6th Cir. 1993) ("Federal courts have the inherent authority to discipline attorneys practicing before them.").

40. *See, e.g.*, Whitehouse v. United States Dist. Court for the Dist. of R.I., 53 F.3d 1349, 1357 (1st Cir. 1995) (approving district court regulation of federal prosecutors); *cf.* United States v. Hasting, 461 U.S. 499, 505 (1983) (referring to the district court's invocation of "supervisory powers to discipline the prosecutors of its jurisdiction"). *But see* Bank of Nova Scotia v. United States, 487 U.S. 250, 264 (1988) (Scalia, J., concurring) ("Even less do I see a basis for any court's 'supervisory powers to discipline prosecutors of its jurisdiction,' except insofar as concerns their performance before the court and their qualifications to be members of the court's bar" (citation omitted)).

41. *See, e.g.*, Weibrecht v. S. Ill. Transfer, Inc., 241 F.3d 875, 878 (7th Cir. 2001) (observing that "[t]he Southern District of Illinois has adopted Illinois's ethical rules as its own rules of professional conduct, relying on both its power to enact local rules under FED. R. CIV. P. 83 and its 'inherent power and responsibility to supervise the conduct of attorneys admitted to practice before it.'" (citation omitted)); *Whitehouse*, 53 F.3d at 1356 (holding that Local Rule 3.8(f), restricting prosecutors' issuance of grand jury subpoenas to defense lawyers, was a proper exercise of both the district court's statutory authority and its inherent power to control bar admissions and discipline lawyers, which includes the power to "erec[t] reasonable prophylactic rules to regulate perceived abuses by attorneys appearing before the court"); *see also* authorities cited *infra* note 309.

42. *See infra* Part V.D. (discussing Theard v. United States, 354 U.S. 278 (1957)).

In considering the application of any of the above powers to federal prosecutors, it is important to note that unique separation of powers considerations come into play. As instruments of the Department of Justice, federal prosecutors exercise executive discretion. When federal judges attempt to constrain, or set general or prophylactic standards for, the conduct of executive officers, they risk overextending their constitutional authority.[43]

The potential limits of the ability of federal courts to regulate the professional conduct of lawyers practicing before them and the potential conflict between judicial and prosecutorial authority are issues that, for the most part, have remained below the surface. Until *United States v. Williams*,[44] the Supreme Court largely avoided addressing any of the core questions noted above. In *Williams*, however, the Court confronted a challenge by federal prosecutors to a lower federal court requirement that federal prosecutors submit exculpatory evidence to grand juries.[45] Because the lower court had not relied on its rule-making authority,[46] the challenge directly called into question the extent of alternative sources of regulatory power that federal courts possess. Depending on how one interprets the Court's opinion, *Williams* may have significant implications for federal court oversight of federal prosecutors and of federal lawyers more generally.

## III. THE *WILLIAMS* DECISION

### *A. The* Williams *Court's Holdings*

A federal grand jury indicted John Williams on seven counts of making false statements in connection with attempts to obtain bank loans from federally insured financial institutions.[47] Williams moved

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43. *See* Carter, *supra* note 24, at 309 (arguing that separation of powers "is violated when the judiciary interferes with the exercise of discretionary executive branch powers by executive branch attorneys").

44. 504 U.S. 36 (1992).

45. *Id.* at 40.

46. The lower court in *Williams* relied on the following requirement announced in an earlier Tenth Circuit opinion, *United States v. Page*, 808 F.2d 723, 728-29 (10th Cir. 1987): "The Second and Seventh Circuits have suggested that, although a prosecutor need not present all conceivably exculpatory evidence to the grand jury, it must present evidence that clearly negates guilt. . . . This is the better, and more balanced, rule, which we adopt." *See* United States v. Williams, 899 F.2d 898, 900 (10th Cir. 1990), *aff'd*, 504 U.S. 36 (1992) ("We have previously held that a prosecutor has the duty to present substantial exculpatory evidence to the grand jury." (citing *Page*, 808 F.2d at 728)).

47. *Williams*, 504 U.S. at 38.

to dismiss the indictment based on a previous decision by the Tenth Circuit Court of Appeals that required federal prosecutors to present "substantial exculpatory evidence" to grand juries.[48] The district court ordered Williams's indictment dismissed without prejudice.[49] Although the government argued that the particular evidence it had failed to introduce was not "substantially" exculpatory—and that question was evidently a close one—the Court of Appeals affirmed on the basis that the district court's determination was not "clearly erroneous."[50]

The Supreme Court agreed to review the question of whether the district court had authority to dismiss an indictment as a remedy for the government's violation of its duty to disclose substantial exculpatory evidence to the grand jury.[51] In a 5-4 decision, the Court reversed. Justice Scalia's majority opinion, however, focused not on the remedial issue, but rather on the substantive power of the federal courts to require disclosure. The Court concluded that the Tenth Circuit had no authority to prescribe a duty on federal prosecutors to disclose exculpatory evidence to grand juries.[52]

The opinion discussed several aspects of the non-delegated[53] regulatory authority of the lower federal courts. First, it acknowledged that federal courts possess "inherent supervisory authority over their own proceedings,"[54] which permits federal courts "'within limits [to] formulate procedural rules not specifically required by the Constitution or the Congress.'"[55] The Court held, however, that this authority did not justify the duty to disclose exculpatory evidence

48. *Page*, 808 F.2d at 728. The Court of Appeals had based this holding on its belief that requiring prosecutors to produce exculpatory evidence "promote[s] judicial economy." *Williams*, 899 F.2d at 900 ("'[I]f a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution could have proved guilt beyond a reasonable doubt to a fully informed petit jury'" (quoting *Page*, 808 F.2d at 728)). Other circuits had adopted this position as well. *See* United States v. Flomenhoft, 714 F.2d 708, 712 (7th Cir. 1983) (recognizing disclosure obligation); United States v. Ciambrone, 601 F.2d 616, 622-23 (2d Cir. 1979) (same); *cf.* United States v. Vincent, 901 F.2d 97, 99 (8th Cir. 1990) (finding that there is ordinarily no disclosure obligation but implying there might be one in extreme cases); United States v. Rivera-Santiago, 872 F.2d 1073, 1087 (1st Cir. 1989) (same). *But see* United States v. Larrazolo, 869 F.2d 1354, 1359 (9tb Cir. 1989) (rejecting disclosure rule); United States v. Hawkins, 765 F.2d 1482, 1488 (11th Cir. 1985) (same); United States v. Adamo, 742 F.2d 927, 937 (6th Cir. 1984) (same)

49. *Williams*, 504 U.S. at 39.

50. *Williams*, 899 F.2d at 903.

51. *Williams*, 504 U.S. at 40.

52. *Id.* at 47.

53. Because neither the district court nor the court of appeals had adopted a formal practice rule requiring disclosure, congressionally delegated rule-making authority was not implicated.

54. *Williams*, 504 U.S. at 55.

55. *Id.* at 45 (quoting United States v. Hasting, 461 U.S. 499, 505 (1983)).

imposed in *Williams*, because grand jury proceedings are separate and apart from judicial proceedings.[56]

Second, Justice Scalia's opinion acknowledged the legitimate use of supervisory authority to enforce or vindicate legally compelled standards of conduct, including standards of prosecutorial conduct in grand jury proceedings, but found that this authority did not imply the further authority to prescribe new rules of grand jury procedure.[57] Because of the traditional independence of the grand jury, the opinion explained, "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings."[58] The opinion maintained that this limited supervisory power "certainly would not permit judicial reshaping of the grand jury institution,"[59] which Justice Scalia perceived the Tenth Circuit's rule to do.[60]

Subsequent parts of this Article will discuss alternative approaches to the issues faced by the *Williams* Court. But it is important first to identify what the decision did, and did not, expressly hold. Although the Supreme Court focused on "supervisory authority," it did not make clear whether it was considering the supervisory power over the criminal justice system or a more general supervisory ethics power. The Court also alluded to "courts' power to control their own procedures,"[61] which arguably may have been a reference to the inherent judicial authority. At the same time, the case did not involve congressionally delegated rule making, and the Court made no mention of the district court's independent authority to regulate bar admissions.

Despite the ambiguities concerning the precise power on which the Court was ruling, portions of the opinion clearly rest, at least in part, on the fact that the district court had attempted to control the operation of the grand jury. Justice Scalia emphasized the grand jury's character as an institution "independen[t] from the Judicial Branch."[62] Indeed, the bulk of the decision focused on cases involving judicial supervision of grand jury proceedings.[63] The Court therefore left open the degree to which its ruling was based on the district

56. *Id.* at 47.
57. *Id.* at 49-50.
58. *Id.* at 50.
59. *Id.*
60. *Id.*
61. *Id.* at 45.
62. *Id.* at 48.
63. *Id.* at 47-55.

court's excess in regulating the federal prosecutor's behavior (as opposed to its interference with the independent grand jury's functions).[64]

In dissent, Justice Stevens made this distinction clear: "The standard for judging the consequences of prosecutorial misconduct during grand jury proceedings is essentially the same as the standard applicable to trials."[65] Stevens faulted the majority for "seem[ing to] suggest that the court has no authority to supervise the conduct of the prosecutor in grand jury proceedings so long as he follows the dictates of the Constitution, applicable statutes, and Rule 6 of the Federal Rules of Criminal Procedure."[66] The rest of the dissent, however, also focused on the significance of grand jury independence for the appropriate judicial rule, without identifying the source and extent of judicial power to regulate prosecutorial conduct generally.[67]

### *B. The Ramifications of* Williams *for Non-delegated Judicial Regulatory Authority*

Before *Williams,* the scope of federal judicial authority to regulate at least prosecutorial ethics was very much an open question. Despite the dramatic resolution some commentators have attributed to the decision,[68] the *Williams* Court's actual holding is very limited. Justice Scalia's opinion seems to address only the recognized supervisory authority over the criminal justice system, not the other potential sources of judicial regulatory authority. Moreover, the

64. The latter clearly was the Court's primary concern. *Id.* at 50 ("[A]ny power federal courts have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings.").

65. *Id.* at 64 (Stevens, J., dissenting).

66. *Id.* at 65 (Stevens, J., dissenting).

67. *Id.* at 66-70 (Stevens, J., dissenting).

68. *See, e.g.,* R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence,* 13 GEO. J. LEGAL ETHICS 361, 361 (2000) (arguing that *Williams* in essence "transfer[s] to state courts and bar disciplinary authorities" the debate over prosecutors' disclosure obligations); Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations,* 51 S.C. L. REV. 1, 22 (1999); Ric Simmons, *Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?,* 82 B.U. L. REV. 1, 22 (2002) (ascribing to *Williams* a "complete withdrawal of judicial review of grand jury presentations"); Ali Lombardo, Note, *The Grand Jury and Exculpatory Evidence: Should the Prosecutor Be Required to Disclose Exculpatory Evidence to the Grand Jury?,* 48 CLEV. ST. L. REV. 829, 830 (2000) (arguing that *Williams* "is flawed because it diminishes crucial rights of defendants and because it prevents the grand jury from fulfilling its protective function"); Suzanne Roe Neely, Note, *Preserving Justice and Preventing Prejudice: Requiring Disclosure of Substantial Exculpatory Evidence to the Grand Jury,* 39 AM. CRIM. L. REV. 171, 171 (2002) ("*Williams* impinges on the grand jury's historical role of shielding criminal defendants by allowing indictment in a context strongly biased in favor of the prosecution."); *supra* notes 9-11 and accompanying text.

opinion confined itself to the special context of the grand jury, without making broader statements regarding the judicial regulation of prosecutors and lawyers more generally.

The way in which Justice Scalia drafted the *Williams* opinion leaves the Court's ultimate decision subject to a range of interpretations. The opinion does not offer a clear vision on the part of the Court concerning judicial authority to regulate lawyers and prosecutors. It is uncertain whether the Court believes non-delegated authority exists and, if it does, how the Court conceptualizes its scope or limitations.

Part IV of this Article sets forth a variety of possible rationales for, or interpretations of, the Court's approach in *Williams*, each of which is entirely consistent with the actual outcome. It remains open in future cases for parties on both sides of the issues to argue any of these positions concerning the general authority of federal courts to establish standards of professional conduct for lawyers in federal proceedings (including federal prosecutors). Part V then analyzes three possible sources of this authority and their potential scope. Part VI concludes by discussing ramifications of federal court reliance on these sources of authority.

## IV. ALTERNATIVE VISIONS OF FEDERAL JUDICIAL REGULATION

The *Williams* opinion is sufficiently imprecise to support a variety of arguments about what the Court in fact had in mind. This Part identifies four sets of possible interpretations of the Court's vision. These include explanations that: (1) say nothing about the existence and scope of federal courts' non-delegated authority; (2) do not foreclose non-delegated authority but reject the exercise of that authority in the *Williams* context for institutional reasons; (3) accept, *arguendo*, the existence of some non-delegated authority, but suggest limitations on the reach of that authority; and (4) reject the existence of non-delegated authority.

### *A. An Interpretation That Says Nothing About the Existence and Scope of Federal Courts' Non-delegated Authority*[69]

The Supreme Court might simply have believed that the Tenth Circuit's requirement that prosecutors produce exculpatory evidence in grand jury proceedings was unwise and that, therefore, the Tenth Circuit erred in adopting its rule even if it had the power to do so. That was the principal argument made by the government in its brief: the costs of the disclosure requirement outweighed any conceivable benefits.[70]

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69. There are two plausible ways the Supreme Court could have decided *Williams* without considering the extent of non-delegated federal court authority that seem inconsistent with the language of the decision. The Court could simply have ruled that the district court had misapplied the arguably legitimate rule of the Tenth Circuit—for example, because the evidence withheld from the grand jury was not in fact exculpatory. That was the argument made by the government in the Court of Appeals and, in Justice Stevens's dissenting view, was the only argument that the Court should legitimately have considered. *Williams*, 504 U.S. at 56-57 (Stevens, J., dissenting). Alternatively, the Court could have decided on remedial grounds; namely, that the district court had no power to dismiss the indictment, even if it had power to adopt the disclosure rule initially. *See, e.g.*, Allison E. Beach et al., *Procedural Issues*, 38 AM. CRIM. L. REV. 1151, 1157 (2001) (interpreting the thrust of *Williams* as "severely limiting the power of courts to dismiss an indictment in response to prosecutorial misconduct").

The argument that courts must limit their sanctions in order to avoid undermining the ability of federal executive agents (i.e., prosecutors) to carry out their functions is consistent with suggestions in earlier precedent. *See, e.g.*, Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988) (acknowledging some supervisory authority to formulate rules of conduct for prosecutors but holding that "as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants"); United States v. Hasting, 461 U.S. 499, 504, 505-07 (1983) (acknowledging federal court "supervisory powers to discipline . . . prosecutors" but holding that "reversals of convictions under the court's supervisory power must be approached 'with some caution.'" (citing United States v. Payner, 447 U.S. 727, 734 (1980))). A remedial approach also would have responded most directly to the question that the government raised when it asked the Supreme Court to review the case: "Whether an indictment may be dismissed because the government failed to present exculpatory evidence to the grand jury." *Williams*, 504 U.S. at 40. Under a strict reading of the holding, one could argue that this, in fact, was the question the Court answered. *See* United States v. Myers, 123 F.3d 350, 358 (6th Cir. 1997) (noting the argument that *Williams* merely foreclosed the remedy of dismissal, but declining to read *Williams* so narrowly); United States v. Sitton, 968 F.2d 947, 953 (9th Cir. 1992) (noting an open issue of whether "*Williams* has cut back on the power of this court to dismiss an indictment based on the presentation of perjured testimony to the grand jury"); United States v. Fenton, No. 98-OIJ, 1998 U.S. Dist. LEXIS 9763, at *11 (W.D. Pa. June 29, 1998) (interpreting *Williams* as foreclosing dismissals of indictments); United States v. Lopez, 854 F.Supp. 50, 56 (D.P.R. 1994) (holding that *Williams* limited the district court's power, in general, to dismiss indictments for misconduct before the grand jury). Yet the *Williams* Court's statement that "as a general matter at least" there is no supervisory authority to "prescribe . . . standards of prosecutorial conduct" in the grand jury suggests that the Court was focusing on the substantive scope of the lower courts' authority. 504 U.S. at 46-47.

70. The government's brief stated:

> Any marginal benefits from a rule requiring the presentation of exculpatory evidence before the grand jury would be vastly outweighed by the costs such a rule would impose. The task of identifying those cases in which the grand jury would not have

This interpretation of *Williams* would say nothing about the sources of judicial power, how far this power ordinarily extends, or the constraints that limit the power's otherwise lawful exercise.[71] It

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> indicted if certain evidence had been presented to it would be an exceedingly difficult one, in which the risk of error is high. Even assuming that courts could make that determination accurately, the value to the criminal justice system would be questionable. While the dismissals in a small number of cases might save the time and effort of a trial, courts would spend far more time and effort in processing the great number of pretrial motions to dismiss that the rule would generate, most of which would likely be found meritless. Experience and common sense dictate that there will be very few cases in which a grand jury that was otherwise prepared to indict will refuse to find probable cause upon being apprised of the theory of defense and the allegedly exculpatory evidence that is invoked to support it. Indeed, there is a built-in protection against indictments that are subject to ready rebuttal by defense evidence of which the prosecutor is aware: Prosecutors have every incentive not to seek an indictment where the case has little or no chance of resulting in a conviction when the full record is presented to the petit jury.

Brief for the United States at 5, United States v. Williams, 504 U.S. 36 (1992) (No. 90-1972), (LEXIS) 1990 U.S. Briefs 1972.

71. Although this approach would not significantly affect the law regarding the substance of judicial regulatory authority, it would be important for a different issue; namely, the standard of Supreme Court review when lower federal courts exercise independent authority to establish standards for lawyer conduct. The Supreme Court has exercised independent judicial authority (typically, "supervisory" authority) to tell lawyers, government agencies or courts how to act, but the Supreme Court has not often passed judgment on comparable rules set by lower federal courts. When it has done so, the question considered has ordinarily been substantive: did the lower court have authority to set the particular rule? The *Williams* Court, however, might have taken the view that the lower courts' inherent authority to make rules (regardless of the particular source of authority) is derivative of the Supreme Court's authority and therefore is subject to *de novo* review. *See, e.g.*, Miner v. Atlass, 363 U.S. 641, 647 (1960) (assuming district court authority *arguendo*, but reversing decision of district court to adopt local admiralty rule requiring depositions); *see also* Colgrove v. Battin, 413 U.S. 149, 163-64 n. 23 (1973) (explaining that in *Miner*, the Supreme Court's "advertent declination" to incorporate a discovery procedure into the Federal Rules of Civil Procedure foreclosed the admiralty court from using its local rule-making authority to establish the same procedure).

This is similar to the approach later taken in *Frazier v. Heebe*, 482 U.S. 641 (1987), striking down a local rule of the Eastern District of Louisiana requiring Louisiana bar members seeking admission to the district court bar to live in or maintain an office in Louisiana. The Court made plain that the district court had "discretion to adopt local rules that are necessary to carry out the conduct of its business," and that "[t]his authority includes the regulation of admissions to its bar," but found that the requirements in question were "unnecessary and irrational." *Id.* at 645-46. Nevertheless, both *Williams* and *Frazier* appear to assume that the Court may not strike down a rule established by the district court pursuant to its regulatory authority simply because the Supreme Court itself would not adopt the rule. The assumption seems to be that some deference is owed to the district court, and therefore the Court may not overturn it unless the Court can say the rule is "irrational" or that it was beyond the scope of the district court's authority. *See* Whitehouse v. United States Dist. Court for the Dist. of R.I., 53 F.3d 1349, 1361 (1st Cir. 1995) (deferring to the attorney-subpoena rule of a federal district court in Rhode Island because "the district court is in a much better position than this court to evaluate the need for an ethical rule regulating the practice of its officers at both the grand jury and trial stages"). This is consistent with the deference ordinarily accorded district court decisions concerning attorney discipline and sanctions. *See, e.g., In re* Jacobs, 44 F.3d 84, 87-88 (2d Cir. 1994) (noting that the "authority to discipline attorneys admitted to appear before" the district court is "a well-recognized inherent power," and therefore it is not obvious that a court of appeals may review a

merely suggests that the Supreme Court would have decided the case differently had it been in the Tenth Circuit's position, for one or more of the reasons that the government advanced.[72] Language in the *Williams* decision makes clear that the Supreme Court did *not,* in fact, like the Tenth Circuit's rule.[73]

### *B. Interpretations That Do Not Foreclose Non-delegated Authority, But Suggest That Institutional Considerations Foreclosed the Exercise of That Authority in the* Williams *Context*

Quite plausibly, the *Williams* Court was implementing a more nuanced vision of non-delegated authority—a vision expansive in some respects, but limiting in others. The Court might have been accepting the possibility that non-delegated authority exists and, in theory, encompasses the right to impose ethical obligations on private attorneys and prosecutors.[74] But at the same time, in striking down the lower court order, the Supreme Court may have believed that the exercise of that authority was constrained by the interests of other institutions, such as the executive or legislative branches of the federal government, the federal grand jury, or the state courts. Below, we discuss the institutional constraints that arguably precluded the district court from adopting a grand jury disclosure rule.

#### 1. The Primacy of Competing Executive or Legislative Authority

Separation of powers considerations arguably imposed an institutional impediment to the exercise of federal court regulatory authority in *Williams* for one of two reasons. First, the Supreme Court may have believed that federal court authority was superceded by executive authority,[75] at least in the grand jury context. This vision

district court's disciplinary decision, but nevertheless, opting to review the decision under an "abuse of discretion" standard).

72. If one adopts this interpretation of *Williams*, one can take the position that all language in the opinion about federal judicial authority and separation-of-powers limits was pure dicta.

73. Portions of the opinion suggest that the Court was, in essence, standing in the shoes of the lower court, asking whether it would have adopted the same requirement, and concluding that it would not: "Over the years, we have received many requests to exercise supervision over the grand jury's evidence-taking process, but we have refused them all, including some more appealing than the one presented today." *Williams*, 504 U.S. at 50.

74. The *Williams* opinion itself suggests the possibility of broader authority than that recognized in the case before it: "[A]ny power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, *not remotely comparable to the power they maintain over their own proceedings.*" *Id.* at 50 (emphasis added).

75. Even assuming that federal court supervisory authority over lawyers "extends to discipline of prosecutors," separation-of-powers concerns may constrain the exercise of that authority because "federal prosecutors are appointed by the executive branch of government."

conceptualizes federal prosecutors' activities in identifying and charging potential law violators as an independent executive function with which the judiciary has limited ability to interfere.[76]

Alternatively, the Court may have perceived a separation of powers issue involving a clash between congressional and judicial authority. The power of the grand jury and the power of federal prosecutors, in theory, both derive from a delegation of law enforcement authority by Congress.[77] To the extent judicial regulation of federal prosecutorial conduct interferes with or purports to oversee that delegation, the courts can be seen to be usurping legislative authority.[78]

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Ramos Colon v. United States Attorney for the Dist. of P.R., 576 F.2d 1, 6-7, 7 n.12 (1st Cir. 1978) (holding that a federal court could not appoint a private attorney to investigate alleged federal prosecutorial misconduct in bringing charges without sufficient proof).

76. Prosecutors are subject to limited constitutional restrictions governing their decisions about whom to prosecute. *See, e.g.*, Thigpen v. Roberts, 468 U.S. 27, 30 (1984); Blackledge v. Perry, 417 U.S. 21, 28-29 (1974). However, subject to those limitations, prosecutors have broad discretion to determine whom to investigate or prosecute, and those decisions are generally not subject to judicial review. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) ("[T]he decision to prosecute is ill-suited to judicial review."); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) (holding that a court may not compel a prosecutor to sign an indictment voted by the grand jury). *But see supra* note 1 (citing Hyde Amendment).

Depending on how one views the Tenth Circuit's disclosure rule, it may encroach on prosecutors' investigative and charging discretion. On one hand, the rule addresses only prosecutors' duty of disclosure to the grand jury. If one views withholding exculpatory evidence as deceitful—for example, by assuming that prosecutors impliedly represent to the grand jury that they possess no significant evidence contrary to the proposed criminal charges—then the disclosure requirement seems unremarkable. On the other hand, one might conceptualize the prosecutor's decision making about what evidence to present to the grand jury as an aspect of tbe discretionary decision concerning whom to investigate, how to conduct the investigation, whom to charge, and what charges to bring. Under that conception, courts might be limited in their authority to regulate prosecutorial conduct because of the executive branch's considerable autonomy to make these kinds of decisions.

77. This, essentially, is the argument Rory Little makes with respect to judicial regulation of prosecutorial activities. Little, *supra* note 11, at 378.

78. The question of whether a district court rule of professional conduct impermissibly interferes with legislative regulation of grand jury procedure bas been raised with regard to local rules requiring prosecutors to obtain authorization before issuing grand jury subpoenas to lawyers for evidence about their clients. *E.g.*, Baylson v. Disciplinary Bd. of the Supreme Court of Pa., 975 F.2d 102, 108 (3d Cir. 1992); United States v. Klubock, 832 F.2d 649 (1st Cir. 1986), *vacated and opinion withdrawn on reh'g en banc*, 832 F.2d 664 (1st Cir. 1987). Similarly, in *United States v. Lowery*, 166 F.3d 1119, 1125 (11th Cir. 1999), the court of appeals considered whether a district court's authority to suppress evidence obtained in violation of a rule of professional conduct was limited by federal legislation. The court concluded that the district court's authority had been superseded by Rule 402 of the Federal Rules of Evidence. *Id.*; *see* FED. R. EVID. 402 (providing that relevant evidence is admissible except where excluded on the basis of another evidentiary rule, the Constitution, federal legislation, or a rule lawfully prescribed by the Supreme Court).

### 2. The Primacy of Grand Jury Autonomy

A second potential institutional constraint on the exercise of non-delegated judicial regulatory authority relates to the notion of grand jury independence. The Supreme Court has always considered the grand jury to be a special institution which, while subject to judicial control in some respects,[79] largely functions according to its own rules and discretion.[80] The *Williams* Court might have been conceding the potential authority of courts to impose evidentiary disclosure obligations on federal prosecutors, but foreclosed the exercise of that authority in *Williams* because it interfered with grand jury independence.[81]

This approach is consistent with the Court's prior emphasis on grand jury independence[82] and certainly comports with the language in *Williams* that focuses on the grand jury. In practice, the approach would acknowledge federal authority to regulate lawyers in most

79. *See, e.g.*, United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring) (noting that grand juries are bound by carefully drafted rules approved by the Supreme Court and Congress that ensure the integrity of the grand jury's functions); Stirone v. United States, 361 U.S. 212, 217 (1960) (dismissing an indictment on the basis that the variation between the indictment and proof destroyed the defendant's right to be tried only on the charges presented to the grand jury); Hale v. Henkel, 201 U.S. 43, 76 (1906) (quashing a grand jury subpoena on the grounds that it was unreasonable in its breadth and therefore violated the Fourth Amendment).

80. *See, e.g.*, United States v. R. Enters., Inc., 498 U.S. 292, 298 (1991) (holding that "a grand jury 'may compel the production of evidence or the testimony of witnesses as it considers appropriate, and that its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials'" (quoting United States v. Calandra, 414 U.S. 338, 343 (1974))); United States v. Morton Salt, 338 U.S. 632, 642-43 (1950) (stating that the grand jury "can investigate merely on the suspicion that the law is being violated, or even because it wants assurance that it is not"); United States v. Johnson, 319 U.S. 503, 512 (1943) (holding that invalidating a grand jury indictment because it continued the investigation past the date that the grand jury was to expire would "make the grand jury a pawn in a technical game instead of respecting it as a great historic instrument of lay inquiry into criminal wrongdoing" and noting that the grand jury is invested with broad investigative powers that are not circumscribed by the technical requirements governing trials).

81. Numerous courts have interpreted *Williams* in this way. *E.g.*, United States v. Igro, 974 F.2d 1091, 1096 (9th Cir. 1992) (interpreting *Williams* as focusing on preserving grand jury independence); Lombardo v. Commissioner, 99 T.C. 342, 361 (1992) ("the *Williams* opinion reflects a recognition that the grand jury is an entity separate from the courts"); *cf.* Fred A. Bernstein, Note, *Behind the Gray Door,* Williams, *Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 590-91 (1994) (arguing that, in practice, *Williams* serves to reduce grand jury independence).

82. *See, e.g., R. Enters.*, 498 U.S. at 298 (noting that many of the rules and restrictions that apply at trial do not apply in grand jury proceedings); United States v. Calandra, 414 U.S. 338, 343 (1974) (noting the wide investigative latitude traditionally accorded to grand juries); Costello v. United States, 350 U.S. 359, 364 (1956) (holding that indictments based solely on hearsay are valid, and that ruling otherwise "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules"); Nixon v. Sirica, 587 F.2d 700, 712 n.54 (D.C. Cir. 1973) (noting the federal grand jury's independence from the executive branch).

contexts, but insulate prosecutors appearing before the grand jury except in limited circumstances.[83] The judicial authority would be confined to facilitating the grand jury's work or applying legal and constitutional requirements that constrain grand jury activities.[84]

### 3. The Primacy of State Ethics Rules

Arguably, the *Williams* Court concluded that, as a matter of comity, federal courts should not impose professional obligations on lawyers that differ from those imposed by the states, at least without a compelling reason to do so. Although Supreme Court decisions acknowledge that federal courts have some independent authority to regulate lawyers in federal proceedings, federal courts typically have relied on state courts and bar organizations in admitting and disciplining lawyers. For example, federal court admissions processes piggyback on those of the states, and no federal court independently administers a bar examination or admits an individual to practice before it unless he or she has first been admitted to practice by a state court. Similarly, although some federal courts conduct their own disciplinary proceedings when lawyers engage in alleged misconduct

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83. *See, e.g.*, United States v. Colo. Supreme Court, 988 F. Supp. 1368, 1370 (D. Colo. 1998) (applying *Williams* to foreclose application of a rule limiting ability of prosecutors to subpoena attorneys before the grand jury, but upholding the rule in settings other than the grand jury), *aff'd*, 189 F.3d 1281 (10th Cir. 1999).

84. There is a related way of interpreting the *Williams* Court's approach that highlights this institutional grounding for the decision. It may be that the Supreme Court perceived the regulation that the district court attempted to enforce to be a regulation not of lawyers or prosecutors, but a regulation of the grand jury itself. *Cf.* Stern v. United States Dist. Court for the Dist. of Mass., 214 F.3d 4, 16 n.4 (2000) (citing *Williams* for the proposition that "the Supreme Court has explicitly rejected the notion that an otherwise impermissible rule of grand jury procedure becomes permissible if it is enforced against the prosecutor instead of the grand jury itself"). The rule, in essence, told the grand jurors what evidence they needed to consider in reaching their decision of whether to indict, an instruction that seems inconsistent both with notions of grand jury independence and of grand jury secrecy. When viewed in this way, it is easy to conceive of the possibility that the *Williams* Court acknowledged the existence of judicial regulatory authority over lawyers but still relied on institutional considerations to foreclose the particular implementation of that authority attempted by the district court.

At least one district court seems to have interpreted *Williams* in this fashion. In *In re Indep. Counsel Kenneth W. Starr*, 986 F.Supp. 1144, 1151-52 (E.D. Ark. 1997), the independent counsel investigating President Clinton through a grand jury process attempted to use *Williams* to argue that conflict of interest rules could not be applied to his activities before the grand jury. The district court disagreed, holding that these rules regulated Starr as a lawyer rather than the procedures of the grand jury and that *Williams* therefore did not control. *Id. Cf. In re* Grand Jury Proceedings (John Doe), 790 F. Supp. 422, 427 (E.D.N.Y. 1992) (distinguishing *Williams* on the basis that a rule requiring a prosecutor to allow a grand jury to overrule his decision to subpoena a witness furthers the "traditional relationships between the prosecutor, the constituting court, and the grand jury" by "ensuring that the prosecutor not arrogate to himself a decision that is for the grand jury to make").

in federal litigation,[85] most rely on state disciplinary mechanisms.[86] Some lower federal court decisions have suggested that once federal courts choose to rely on the state regulatory processes, federal courts owe deference to the state decisions.[87]

Comity considerations suggest that deference may be owed not only to state admissions and disbarment decisions, but also to state disciplinary rules. There are good practical and policy reasons why federal courts might defer to these rules.[88] The prosecutors involved in *Williams* did not have any professional obligation under state rules to disclose exculpatory evidence to the grand jury. The Supreme Court's ruling in *Williams* thus is consistent with the view that a federal court should not contradict the professional standards of the state in which it sits unless there is a compelling reason to do so.[89]

### *C. Interpretations That Accept, Arguendo, the Existence of Non-delegated Authority*

There are several ways in which one might read *Williams* as accepting the possibility of non-delegated judicial authority, while still

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85. *See infra* note 232.

86. Federal courts usually accept state bar determinations that a particular lawyer is qualified to practice or should be suspended from practice. *See infra* text accompanying notes 230-235. Although not universally true, when federal courts have made independent disbarment determinations, they ordinarily have acted in situations where it was likely that the relevant state bar would have taken a similar step when, and if, it addressed the lawyer's alleged misbehavior. *But see In re* G.L.S., 745 F.2d 856, 859 (4th Cir. 1984) (upholding the denial of federal admission to practice even though state court admitted the lawyer in question).

87. *See, e.g., In re* Abrams, 521 F.2d 1094, 1103 (3d Cir. 1975).

88. Federal courts do not oversee formal disciplinary agencies and thus typically need to rely on state procedures to administer admissions and disciplinary matters. A few federal courts employ ad hoc mechanisms for imposing discipline, but they are in the minority. *Cf.* Grievance Comm. for the S. Dist. of N.Y. v. Simels, 48 F.3d 640, 645 (2d Cir. 1995) (noting district courts' use of ad hoc procedures to discipline attorneys); *In re* Grievance Comm. of the United States Dist. Court, 847 F.2d 57, 61-62 (2d Cir. 1988) (same). Fact-finding regarding a lawyer's general competence and qualifications to practice requires investment of more judicial resources than simple evaluation of individual acts of misconduct and it may require information that district courts are not privy to. *See generally* Green & Zacharias, *supra* note 5, at 418-32 (discussing in detail the policies for and against federal court deference to state ethics rules).

89. One might envision a scheme in which federal courts could only exercise their admissions authority in a way that piggyhacks on, or is consistent with, state decision making. Under this approach, deference would not be a matter of comity, but rather legally required because of federal courts' limited jurisdiction.

Previous Supreme Court cases, however, suggest that federal courts do have admissions authority independent of state requirements. At times, federal courts have exercised this authority in a way that is inconsistent with the desires of particular state courts or bar agencies. *See, e.g., In re* G.L.S., 745 F.2d at 859 (approving a district court decision to diverge from a state's decision to allow a lawyer to practice). *Williams* expresses no intention to overrule the prior cases.

disapproving the specific regulation imposed by the trial court. The Court may simply have been reaching a limited holding about the exercise of the supervisory power over the criminal justice system in the grand jury context. Alternatively, the Court may have believed in the existence of non-delegated authority, but envisioned procedural limitations on how federal courts may exercise that authority. Finally, the opinion can be read as implying substantive limitations on non-delegated regulatory power.

1. The Supervisory Power Invoked by the Tenth Circuit Could Not Support a Grand Jury Disclosure Obligation for Prosecutors

Perhaps the fairest reading of *Williams* is that the Court recognized a narrow limitation on one aspect of federal courts' non-delegated authority:[90] the supervisory authority to make rules regulating federal criminal proceedings. Under this interpretation, the opinion has some significance with respect to the supervisory authority over criminal proceedings, but none with respect to the existence and scope of other non-delegated judicial powers.[91]

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90. *See* Whitehouse v. United States Dist. Court for the Dist. of R.I., 53 F.3d 1349, 1359 (1st Cir. 1995) (concluding that *Williams* did not foreclose adoption of a local rule requiring prosecutors to obtain judicial approval for grand jury subpoenas issued to criminal defense lawyers, because "*Williams* involved the use of a federal court's 'supervisory power'" while the attorney-subpoena rule was adopted pursuant to the district court's power "to regulate the conduct of attorneys appearing before it").

91. The arguments before the Supreme Court support this interpretation. The government envisioned the Tenth Circuit's decision as an exercise of supervisory authority. United States v. Williams, 504 U.S. 36, 56-57 (1992). The respondent, in language quoted by the Court, defended the Tenth Circuit's opinion as being "supported by the courts' 'supervisory power.'" *Id.* at 45. Thus, neither the parties nor the Justices conceptualized the disclosure requirement as an exercise of an independent "ethics" authority.

Nor did the parties ever argue that the disclosure rule could have been imposed pursuant to some source of authority other tban the supervisory authority. *Cf. Whitehouse*, 53 F.3d at 1359 (distinguisbing *Williams* on the basis that its rule was justified only under the supervisory power, in contrast to the "district court's power merely to regulate the conduct of attorneys appearing before it" that was the justification for the attorney-suhpoena rule at issue in *Whitehouse*). There would have been a basis for them to raise this issue, because Rule 3.8(d) of the American Bar Association's Model Rules of Professional Conduct, then in effect in most states, required lawyers in *ex parte* proceedings to disclose evidence adverse to their positions. MODEL RULES OF PROF'L CONDUCT R. 3.8 (1983); *see also id.* R. 3.8 cmt. (applying the rule to grand jury proceedings).

The parties may have assumed that if the Tenth Circuit could not impose its disclosure rule under supervisory authority, it could not have imposed the same rule under other non-delegated powers to regulate lawyers. In fact, however, the Court's observation that "any power federal courts may have to fashion, on their own initiative, *rules of grand jury procedure* is a very limited one," *Williams*, 504 U.S. at 50 (emphasis added), was not accompanied by any statement ahout federal courts' general authority to fasbion rules of attorney conduct. Principles of judicial restraint might simply have prevented the Court from considering a question that was not raised by the parties.

Similarly, the *Williams* Court's oblique majority opinion easily can be read as imposing a limitation on federal courts' authority to exercise supervisory power in the grand jury context, but as saying nothing about the supervisory power in other contexts. The Court specifically observed the following: that the supervisory authority over the grand jury is "a very limited one"[92] that a court should be "reluctant" to invoke;[93] that this authority "would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself;"[94] and that such reshaping "would be the consequence of the [Tenth Circuit's] proposed rule."[95] These statements arguably reflect a recognition of the uniqueness of the grand jury context and thus of an intent to limit *Williams* to restricting supervisory authority in that unique context.

2. The Lower Courts May Have Exceeded Procedural Limitations

In striking down the grand jury disclosure requirement, the *Williams* Court may have envisioned procedural constraints on the exercise of non-delegated authority. First, the Court may have assumed that non-delegated regulatory authority can only be exercised through rule making, not through *ad hoc* judicial pronouncements in individual cases. We have discussed elsewhere the advantages of implementing restraints on prosecutorial conduct by rule,[96] either through legislatively authorized rule making or otherwise.[97] Although the common law legal system ordinarily prefers courts to decide issues on an *ad hoc* basis, when judges exercise a general supervisory authority that purports to govern the behavior of lawyers generally, their decisions become less fact-sensitive in nature and more like administrative regulation. Under these circumstances, the *Williams* Court might have envisioned that the promulgation of ethics rules should follow an administrative model.

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92. 504 U.S. at 50.

93. *Id.*

94. *Id.*

95. *Id.*

96. *See* Green & Zacharias, *supra* note 5, at 469-73. The benefits include the ability of Congress or the Supreme Court to oversee the development of the rules, the ability of courts to seek substantive input from knowledgeable institutions and persons who are less narrowly self-interested than the litigants in a particular case, and the ability of the rule-making courts to reach a decision when distanced from heated arguments in litigation. *See id.* at 474 (urging a rule-making process through which interested parties can participate).

97. Of course, when courts adopt rules without legislative authorization, questions may arise regarding their authority to promulgate such rules that are not equally applicable to exercises of delegated power.

Second, and conversely, the Court might have accepted the view that federal courts sometimes may define attorney misconduct, but also taken the view that federal courts must exercise that authority in common law fashion—by focusing on the facts of the case before them, not by making broad rule-like pronouncements. Under this approach, for example, the district court in *Williams* could properly have held that the particular prosecutor in question had engaged in misconduct by failing to disclose important evidence to the grand jury,[98] but was without authority to establish a forward-looking rule.[99]

3. The Lower Courts May Have Exceeded Substantive Limitations

Perhaps the most interesting, and potentially most significant, interpretation of *Williams* is that the Court implicitly recognized non-delegated authority, but anticipated subjecting that authority to particular *substantive* limitations. As discussed earlier, one substantive limitation clearly can be gleaned from the decision: *Williams* held directly that the power to supervise the criminal justice system did not justify the district court's grand jury disclosure requirement.[100] However, whether the *Williams* Court envisioned further limitations, either on supervisory authority or on the other possible non-delegated authorities, is less obvious.

It is plausible that the *Williams* Court implicitly concluded that federal courts may not invoke *any* authority to impose a grand jury disclosure obligation on prosecutors. Alternatively, it might have assumed that the alternative sources of non-delegated power—the supervisory authority invoked by the Tenth Circuit, the inherent authority,[101] the lawyer admissions authority,[102] and the general ethics authority[103]—all are aspects of a single judicial power and therefore subject to the same substantive limitations. Under either scenario, the *Williams* decision would have broad implications both for the existence of independent judicial regulatory authority over lawyers and for limitations on that authority. The following analysis

98. Such a decision might take into account the prosecution's theory, the extent to which the evidence contradicted it, how credible that evidence was, and the strength of the other evidence of guilt.

99. This approach anticipates that a federal court's action can serve as "regulation" only in the sense that it guides attorneys and influences future courts' decisions, subject to future case-by-case decision making.

100. *See supra* text accompanying notes 55-61.

101. *See supra* text accompanying notes 32-36.

102. *See supra* text accompanying notes 37-38.

103. *See supra* text accompanying notes 39-42.

identifies several possible limitations that the Court may have had in mind.

### *a. Federal Courts May Regulate Only In-Court Conduct*

At least one commentator has taken the position that *Williams* establishes a bright-line rule: federal district courts may regulate the conduct of federal prosecutors, and presumably other federal lawyers, that occurs before them, but not conduct that occurs outside the courtroom setting.[104] This interpretation is consistent with the outcome in *Williams* because the conduct that the district court tried to regulate occurred in the grand jury context. The Supreme Court's opinion, however, provides no language supporting such a broad in-court versus out-of-court distinction.

Proponents of this interpretation might find some support in a theory of "inherent" judicial authority that is confined to regulating conduct which specifically threatens the administration of the courts,[105] a theory of admissions regulation that is confined to ensuring that only qualified lawyers appear in federal court,[106] or an analogy to the judicial power to punish direct contempt.[107] Alternatively, proponents can rely upon separation of powers notions that delineate the boundaries of judicial and prosecutorial authority.[108] The bright-line distinction, however, fails as a practical matter to account for lawyer activity that occurs outside a judge's presence, but that threatens judicial administration or highlights lawyer incompetence to the same degree as in-court behavior.[109]

### *b. Federal Courts May Regulate Out-of-Court Conduct Only If It Affects the Integrity of Judicial Proceedings*

Some cases that have recognized an inherent judicial power to regulate lawyers have rested that authority on the core right of courts to protect themselves—to sanction conduct that abuses the sanctity of

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104. Little, *supra* note 11, at 410; *see also* United States v. Simpson, 927 F.2d 1088, 1091 (9th Cir. 1991) (overturning dismissal of indictment because of government's improper investigative tactics on the reasoning that "[t]he supervisory power comprehends authority for the courts to supervise their own affairs, not the affairs of other branches; rarely, if ever, will judicial integrity be threatened by conduct outside the courtroom that does not violate a federal statute, the constitution or a procedural rule").

105. This theory is discussed *infra* Part V.B.

106. This theory is discussed *infra* Part V.C.

107. *Ex parte* Robinson, 86 U.S. 505, 510 (1873) (noting the inherent contempt power).

108. *See supra* text accompanying notes 75-78.

109. For example, suborning perjury, bribing a witness, or failing to produce discovery material to the opposing party.

the judicial process and prevents the courts from operating in their intended fashion.[110] One can interpret *Williams* as accepting the existence of some such authority, but also as anticipating that its scope will be limited to misbehavior that actually threatens judicial administration.[111] Thus, courts could regulate conduct such as witness bribery or subornation of perjury that impacts on the integrity of the proceedings. But they could not impose rules such as those forbidding a lawyer from giving advice to an unrepresented party, from communicating with a represented party, or from misleading opposing counsel, which are designed primarily to protect third parties rather than to protect the integrity of the courts. This construction of *Williams*, like the one distinguishing in-court and out-of-court activity, seems unlikely, however, given how commonly federal courts regulate attorney conduct for the protection of third parties.

### *c. Federal Courts May Regulate Out-of-Court Conduct Only If It Bears On the Offending Lawyer's Qualification To Practice Law*

One theory of judicial authority rests on the power of the courts to regulate federal bar admission.[112] Federal courts always have assumed that they have some independent power to determine both whether individuals are qualified to practice before them[113] and whether lawyers should be disbarred from practicing before the

110. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 43-44 (1991) (cataloguing the federal courts' inherent powers).

111. This interpretation is consistent with the *Williams* Court's factual holding. The grand jury proceedings that the district court tried to control had little to do with the court's ultimate ability to try the case according to traditional processes after the indictment. Nor did the grand jury proceedings involve or affect the ability of the government's trial attorneys to abide by the court's rules once the case reached the court.

One might argue, as the Tenth Circuit suggested in *Williams*, that "judicial integrity" was implicated—as when frivolous civil complaints are filed—if the concept of judicial integrity is read broadly to encompass the interest in efficiency or the interest in seeing that defendants are treated fairly. *See* United States v. Williams, 899 F.2d 898, 900 (10th Cir. 1988) (quoting United States v. Page, 808 F.2d 723, 728 (10th Cir. 1987), and noting that the disclosure "requirement promotes judicial economy because 'if a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution could have proved guilt beyond a reasonable doubt to a fully informed petit jury'"). One might also argue that the requirement promotes the fairness of judicial proceedings by reducing the risk that a defendant will be put to the cost and anxiety of defending against unsustainable charges. Under a narrower view of the judicial integrity concept, however, the case could still proceed fully and fairly before the trial court, whatever happened before the grand jury.

112. This theory is discussed *infra* Part V.C.

113. *See infra* text accompanying notes 252-257.

federal courts.[114] When federal judges sanction federally admitted lawyers for misconduct, or prescribe standards of attorney conduct outside the rule-making process, they may be asserting the power to do so ancillary to their authority to admit and disbar lawyers.[115]

*Williams* can be read as acknowledging this authority, but limiting the scope of this authority to permitting federal courts to prescribe standards that bear directly on the competence of lawyers to appear in federal court. For example, a federal court might tell lawyers explicitly, "remain sober," "don't steal from clients," "be punctual," and "abide by pretrial orders and discovery rules." These standards are arguably valid because they bear on lawyers' ability to represent clients and help the court reach appropriate decisions. Conversely, it would be hard to construe a prosecutor's failure to disclose exculpatory evidence to the grand jury as suggesting anything about the lawyer's character or fitness to practice law. The *Williams* Court, therefore, may have concluded that the Tenth Circuit exceeded its authority to regulate particular aspects of incompetence or instances of misconduct.

### *d. Federal Courts Have Authority To Regulate Out-of-Court Conduct Only When the Regulation Bears Directly on Lawyer "Ethics"*

The Court in *Williams* may have assumed that federal courts have independent authority to set forth rules of ethics to govern lawyers in federal court proceedings, but may also have found that the Tenth Circuit exceeded this authority by treating its disclosure requirement as an "ethics" rule.[116] In recent years, the question of

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114. *See In re* Ruffalo, 390 U.S. 544, 547 (1968) ("[D]isbarment by the State does not result in automatic disbarment hy the federal court. Though that state action is entitled to respect, it is not conclusively binding on the federal courts."); *see also infra* text accompanying notes 234-235.

115. Typically, courts do not identify the basis for disciplinary decisions, because they assume that their authority to discipline exists. Thus, the cases ordinarily do not reveal any express reliance on the notion that the power to disbar includes the lesser power to sanction misconduct.

116. It stands to reason that the Court would contemplate limitations, because recognizing a general ethics authority opens the door to vast federal court power. One need only look to the Model Rules of Professional Conduct to see that ethics standards can be used to impose evidentiary and procedural requirements and to make significant substantive changes in the law. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983) (imposing confidentiality requirements that go beyond what the law of privilege requires); *id.* R. 3.8 (imposing a series of substantive obligations on prosecutors); *see also* Fred C. Zacharias, *Specificity in Professional Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 232 (1993) (identifying one goal of professional codes as being to influence the substantive law). If the *Williams* Court envisioned a scheme of limited non-delegated powers (as it clearly wished to limit the supervisory power), *see supra* Part IV.C.1, text accompanying notes 53-60, it would have been important for the court to define carefully what "ethics rules" could encompass.

what is an "ethics" rule (as distinguished from a rule of criminal procedure, for example) has arisen in connection with the McDade Amendment.[117] The McDade Amendment refers specifically to federal court authority to enforce state "ethics rules,"[118] and seemingly differentiates such rules from procedural or evidentiary obligations imposed on lawyers. Several lower federal courts have employed this reading of the statute to confine the scope of its requirements.[119] They have therefore made an effort to identify distinctive characteristics of "ethics" rules.[120]

One conceptualization is that "ethics" rules must be generally applicable to all lawyers, and not simply to prosecutors or some other small subclass of lawyers.[121] Rules uniquely applicable to a subclass of lawyers, such as prosecutors, are too likely to reflect substantive judgments about the criminal process that are within Congress's exclusive jurisdiction to make.[122] Ethics rules, in contrast, should

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117. 28 U.S.C. § 530B (2000). The McDade Amendment was adopted well after *Williams* was decided and is factually irrelevant to the *Williams* issues, but the *Williams* Court may have contemplated the same distinction about "ethics" rules that courts interpreting McDade are seeking to implement. In other words, the Court may have been willing to accept some judicial authority to regulate behavior that is quintessentially "ethical" or "unethical" in nature, but not been willing to recognize a broader non-delegated authority to supervise lawyer conduct more generally.

118. The caption of the statute identifies the statute as referring to "Ethical standards for attorneys for the Government." *Id.*

119. *E.g.*, Stern v. United States Dist. Court for the Dist. of Mass., 214 F.3d 4, 14 (1st Cir. 2000); United States v. Colo. Supreme Court, 189 F.3d 1281, 1284 (10th Cir. 1999). An alternative interpretation of the McDade Amendment would be that federal courts must apply to federal government attorneys all rules that states include in their rules of professional conduct.

120. For example, in *Colo. Supreme Court*, 189 F.3d at 1287, the Tenth Circuit Court of Appeals identified the following "factors to help us determine whether a rule really is one of professional conduct": (1) whether it "would bar conduct recognized by consensus within the profession as inappropriate," (2) whether it "comes in commandment form," (3) whether, unlike most procedural and substantive law, it is "vague" and "sweeping," and (4) whether it "is directed at the attorney herself."

121. For example, the rule restricting all lawyers' communications with represented parties might fairly be characterized as an ethics rule and applied, as it has been in limited fashion, to prosecutors. *See* Green, *Whose Rules, supra* note 8, at 470-72 (noting that "[a]lthough the no-communication rule undoubtedly originated with civil cases in mind, most prosecutors initially accepted that the rule applied in criminal cases" but were uncertain about the rule's scope). *But see* F. Dennis Saylor & J. Douglas Wilson, *Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. PITT. L. REV. 459, 477 (1992) (arguing that federal courts lack authority to adopt a rule such as Model Rule 4.2 to govern federal prosecutors in conducting investigations, because the courts may not "make or alter substantive law in the guise of a local rule"). On the other hand, the "ethics" authority arguably may not be employed to adopt a rule, like the one in *Williams*, applicable exclusively to prosecutors.

122. *See* Grievance Comm. for the S. Dist. of N.Y. v. Simels, 48 F.3d 640, 651 (2d Cir. 1995) (suggesting that a defense attorney's efforts to gather evidence directly from a represented witness or potential co-defendant "raises policy issues that should be resolved against the backdrop of federal law enforcement concerns," and that if a choice is made to restrict such

reflect more broadly applicable judgments about what constitutes professional practice.[123] The district court's rule under consideration in *Williams* arguably fails to qualify as an expression of a broadly applicable ethics judgment.

A second possible conceptualization is that legitimate "ethics" rules are limited to those having a primary impact on lawyers rather than on other individuals or institutions.[124] From the *Williams* majority's perspective, the Tenth Circuit's rule may not have qualified because the Justices believed that the brunt of the disclosure obligation fell on the grand jury, not the prosecutor.

### *e. Federal Courts May Proscribe Attorney Conduct That Is Wrongful or Harmful Per Se but May Not Establish Prophylactic Rules*

One of the core arguments within the debate over federal judicial authority to supervise the criminal justice system is whether, and to what extent, the courts may establish prophylactic rules to govern situations in which no government misconduct has been shown.[125] The arguments against prophylactic rule-making power include separation of powers concerns,[126] concerns about judicial competence,[127] and legal arguments concerning judicial power.[128]

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efforts to promote the represented person's interests over those of the defendant, "that choice should be made either by Congress or the Supreme Court, and not by district courts' expansive interpretations of disciplinary rules").

123. For example, judgments about the proper relationship of lawyers to clients, the courts or third parties characterize rules of lawyer ethics. *Cf.* Whitehouse v. United States Dist. Court for the Dist. of R.I., 53 F.3d 1349 (1st Cir. 1995) (upholding a rule requiring prosecutors to obtain judicial approval before subpoenaing lawyers for evidence about their clients; reasoning in part that the rule's purpose of protecting the attorney-client relationship outweighed its incidental effect on the grand jury).

124. *Cf.* Stern v. United States Dist. Court for the Dist. of Mass., 214 F.3d 4, 19-20 (1st Cir. 2000) (striking down an attorney-subpoena rule, on the ground that it "impermissibly interferes with federal grand jury practice" and finding that "though doubtless motivated by ethical concerns" it was "more than an ethical standard").

125. *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 691 (1993) (distinguishing among various Supreme Court decisions that establish rules which have been termed prophylactic); YALE KAMISAR ET AL., BASIC CRIMINAL PROCEDURE 488-89 (10th ed. 2002) (discussing the debate in the cases between rules that rely on actual coercion by the police in interrogation and rules that adopt an *"inherent* or *irrebuttably presumed* coercion"). *See generally* JOSEPH GRANO, CONFESSIONS, TRUTH, AND THE LAW 185-95 (1993) (discussing the author's objections to some of the prophylactic rules adopted by the U.S. Supreme Court, and in particular *Miranda*); Evan H. Caminker, *Miranda and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1 (2001) (discussing "the energetic debate over the legitimacy of the Court's creation of so-called prophylactic rules").

126. *See, e.g.*, Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 124 (1985) (discussing federalism and separation of powers concerns relating to federal judicial adoption of prophylactic rules); Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in*

The district court in *Williams* imposed a prophylactic rule when it required the disclosure of significant exculpatory evidence to all grand juries, even without a showing that the constitutional or statutory rights of the defendant had been negatively affected by the prosecutor's failure to disclose. The Supreme Court expressly found that this requirement was not a valid exercise of the lower court's supervisory authority.[129] In avoiding any discussion of alternative theories of non-delegated power the Court may have perceived that the disclosure rule could not have been justified even under these

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*Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1052 & n.98 (2001) ("The primary critique of prophylactic rules one sees in the literature, in addition to the Article III legitimacy critique, is that such rules implicate federalism and national separation of powers.").

127. *See, e.g.*, Smith v. Robbins, 528 U.S. 259, 260-61 (2000) (allowing a departure from the Supreme Court's prophylactic rule in Anders v. California, 386 U.S. 738 (1967), on the basis of a desire to leave to "the laboratory of the states" the "challenging task of crafting appropriate procedures"); *cf.* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1061 (1998) (attempting to demonstrate empirically that the partly prophylactic rule of Miranda v. Arizona, 384 U.S. 436 (1966), interfered unduly with the ability to police to obtain legitimate confessions); Klein, *supra* note 126, at 1060 (arguing that prophylactic rules allow the Supreme Court "to change the rules by accepting alternate rules provided by Congress, state legislators, federal and state law enforcement agencies and state judges, who may have better knowledge of the circumstances encountered or facts on the ground, and who may be better institutionally-suited to play factfinder").

128. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 444, 454 (2000) (Scalia, J., dissenting) (arguing that *Miranda* is a prophylactic rule and that, insofar as it is used to override a federal statute permitting certain interrogations, the Court "arrogates to itself prerogatives reserved to the representatives of the people"); *see also* Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failure in* Dickerson, 99 MICH. L. REV. 898, 915-16 (2001) (arguing that the Supreme Court in *Dickerson* acted lawlessly in preferring its prophylactic procedures to congressionally approved procedures); Joseph D. Grano, Miranda's *Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 178 (1988) (arguing that Article III does not give the courts authority to create a general body of federal common law binding on the states or a supervisory power over state courts); Grano, *supra* note 126, at 128-36, 141 (discussing the limits of federal judicial authority to impose nonconstitutional rules); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 21 n.112 (1975) ("But if the prophylactic rules announced in these cases are not viewed as an integral part of the underlying constitutional right, where is the authority of the Court to require that state courts adopt a rule, rather than proceed on a case-by-case basis, and a particular form of a rule among several arguably adequate ones?"); Thomas S. Schrock and Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1124 (1978) (arguing that prophylactic rules are "neither constitutional nor common law but pragmatism without either precedent or principle—judicial realism radicalized and rampant"); *cf.* Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 926 (1989) (arguing that some rationales for prophylactic decisions are illegitimate because they merely read rights into the constitution); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 194 (1988) (conceding a "legitimacy problem" when prophylactic rules reflect "only a judgment by the court that the world would be a better place if law enforcement officers were required to comply").

129. United States v. Williams, 504 U.S. 36, 55 (1992).

theories because they too would be subject to a limitation on adopting prophylactic rules.

Why might the Supreme Court have limited the scope of the non-delegated powers in this way? Because prophylactic rules are difficult to enforce.[130] Because they risk invading lawyer or prosecutorial prerogatives by including, within their prohibitions or prescriptions, some conduct that may legitimately serve the lawyer's or prosecutor's functions. Because they may replace lawyer discretion with judicial fiat in some circumstances in which lawyers actually may know better than the courts. The *Williams* Court simply may have believed that non-delegated regulatory authority exists, but that courts should be required to exercise their regulatory discretion particularly cautiously when relying upon a general supervisory power.

Under this approach, federal courts might be authorized to sanction specific conduct by lawyers that is *per se* wrongful, such as deceit,[131] or harmful, such as violating other persons' privileges,[132] but not be authorized to make general rules designed to lessen the possibility of the misconduct or harm[133] (such as a prohibition against communicating with represented persons).[134] District court rule making might still be possible, but would need to occur through

130. In other words, they at times so interfere with clearly legitimate law enforcement activities that law enforcement personnel and courts find it difficult to adhere to them. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 653 (1984) (adopting a public safety exception to *Miranda*); Michigan v. Tucker, 417 U.S. 433, 441 (1974) (admitting a statement obtained without *Miranda* warnings on the basis that *Miranda*'s requirements were prophylactic and that the police acted in good faith); *see also* Paul Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299, 303-13 (1996) (discussing the costs of the prophylactic requirements of the *Miranda* decision); *cf.* Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda*"*, 54 U. CHI. L. REV. 938, 948 (1987) (criticizing the prophylactic aspects of *Miranda* and concluding that "[t]he costs of the *Miranda* system to the public's interest in effective law enforcement are great, and no progress in alleviating these costs can be expected so long as the Miranda decision continues to hold sway").

131. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (1983) (requiring candor to tribunals); *id.* R. 4.1 (forbidding false statements by lawyers).

132. Such privileges might include the privilege against self-incrimination or attorney-client privilege. *See, e.g., id.* R. 3.8 (forbidding prosecutors from seeking a waiver of important pretrial rights from unrepresented persons).

133. Rules against communicating with represented persons are, in part, justified as preventive rules that assure the presence of counsel to help clients avoid being tricked or revealing confidences. *Cf.* Whitehouse v. United States Dist. Court for the Dist. of R.I., 53 F.3d 1349, 1357 (1st Cir. 1995) (upholding a local rule requiring judicial approval of grand jury subpoenas to lawyers as "a prophylactic rule [to protect confidences and attorney-client relationships] aimed at, and principally affecting, prosecutors, not the grand jury").

134. MODEL RULES OF PROF'L CONDUCT R. 4.2 (1983).

delegated rule-making power that is subject to statutory constraints and exercised under congressional and higher court supervision.

### *D. An Interpretation That Implicitly Rejects Any Significant Non-delegated Authority*

Some of the interpretations discussed above would accommodate the exercise of expansive non-delegated regulatory authority to establish standards of conduct for lawyers in federal court, but also would incorporate substantive limitations on lower federal court power. There is, of course, another substantive explanation for the outcome in *Williams*; namely, that any non-delegated authority is narrow. Arguably, the Court believed that the two non-delegated sources of authority that it previously had recognized—supervisory authority over the criminal justice system and inherent authority of federal courts to protect their own processes—should be strictly confined. The language of *Williams* did not expressly confine these recognized bases of judicial power, but neither did it suggest in any way that they extend beyond the narrowest reach identified in previous cases.

If *Williams* was indeed intended to imply a narrow reach to the supervisory authority and the inherent authority, the question remains whether, and to what extent, independent sources of authority for judicial ethics regulation exist other than these two. The Court did not foreclose regulation under the rubric of the admissions power, but the Court's holding may have incorporated an assumption that the admissions power did not independently justify judicial rules of conduct for lawyers. Probably, the absence of any comment about a broad "ethics authority" is most consistent with a decision to leave the issue to another day,[135] but it is at least plausible to read the Court's attitude towards the facts as signaling a negative impression of such powers.

135. *See, e.g.*, McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-35 ("[It is] the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below.").

## V. THEORIES OF FEDERAL COURT AUTHORITY TO ESTABLISH STANDARDS OF LAWYER CONDUCT

### *A. Preliminary Observations About Federal Court Authority To Establish Standards of Lawyer Conduct*

The most interesting and important of the questions left unresolved in *Williams* is whether and to what extent federal courts have independent authority to establish standards of conduct for lawyers in federal proceedings. Some interpretations of *Williams*, such as those limiting the reach of federal judicial regulatory power to in-court conduct[136] or to conduct that highlights a lawyer's unfitness to practice,[137] assume that the Court envisioned limitations on particular theories of judicial regulatory power.[138] The *Williams* Court's holding, however, treats the Tenth Circuit's disclosure requirement simply as an exercise of its supervisory authority over the criminal process. The parties did not raise, and the Court did not discuss, whether the requirement could have been imposed pursuant to other sources of authority.[139]

Suppose, therefore, that a federal district court, after *Williams*, decreed the following:

> Pursuant to the independent power of federal courts to regulate the ethics of lawyers in federal proceedings, we declare that all lawyers in ex parte proceedings in this federal district must inform the fact finder of all

136. *See supra* text accompanying notes 104-109.

137. *See supra* text accompanying notes 112-115.

138. For example, the Court may have envisioned limits on the inherent power or admissions authority.

139. Following *Williams*, the Department of Justice presented this question more squarely in a declaratory judgment action against the Colorado Supreme Court. United States v. Colo. Supreme Court, 87 F.3d 1161, 1164 (10th Cir. 1996). The action challenged the potential application of Rule 3.3(d) of the Colorado Rules of Professional Conduct, which required the disclosure of adverse facts in ex parte proceedings. *Id.* at 1164-65. Rule 3.3(d) would have applied to federal prosecutors in Colorado under a District of Colorado local rule providing that the Colorado state ethics rules apply to lawyers in Colorado federal court proceedings. *Id.* at 1163. A Comment to Rule 3.8 of the Colorado rules stated that the disclosure requirement should apply in grand jury proceedings. *Id.* The Tenth Circuit reversed the District Court's ruling that the Department of Justice lacked standing and remanded the case. *Id.* at 1167. If the merits of the government's challenge had been adjudicated, the court would likely have been forced to consider whether the district court could impose the disclosure requirement under either the rule-making authority delegated by Congress or under its independent authority to set ethics standards for lawyers in federal cases. The case, however, became moot when the Colorado Supreme Court amended its rules of conduct to delete the comment applying the disclosure provision in grand jury proceedings. United States v. Colo. Supreme Court, 988 F. Supp. 1368, 1369 (D. Colo. 1998), *aff'd*, 189 F.3rd 1281 (10th Cir. 1999).

> material facts known to be adverse to the lawyer's position. Furthermore, since grand jury proceedings are ex parte, this obligation requires prosecutors seeking an indictment in this district to disclose to the grand jury any evidence known to be substantially exculpatory.

Would the hypothetical court's reliance on a general ethics authority justify the court rule that the *Williams* Court rejected when it was adopted on a different basis?

The *Williams* Court was no doubt cognizant of the fact that lower federal courts have at least some independent power to regulate lawyers. Like state courts, they may admit and disbar lawyers and sanction lawyers for some types of misconduct. The question is whether federal courts also have non-delegated authority to set standards of conduct for lawyers and, if so, how the scope of that authority compares to that of a state supreme court to set standards of professional conduct for lawyers it admits to practice.

Whatever authority federal courts possess is likely to be narrower than that of state courts in at least one respect. Most state courts interpret their state constitutions as rendering judicial authority to regulate lawyers preemptive, if not exclusive.[140] In other words, state court regulation trumps efforts by a state legislature or executive to regulate the professional conduct of lawyers. The alternative regulators may be foreclosed even from attempting to regulate aspects of lawyer conduct interstitially.[141]

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140. *See generally* WOLFRAM, *supra* note 12, at 22-31 (discussing the inherent powers of state courts to regulate lawyers, and observing that most courts "assert a negative aspect" of the inherent powers doctrine, which "asserts that only the courts, and the legislative or executive branches of government, may regulate the practice of law").

141. The question of precisely how regulatory authority over lawyers is divided between state judiciaries and legislatures has been debated in the case law and commentary for years, but remains unsettled. *See, e.g.*, Leon Green, *The Courts' Power over Admission and Disbarment*, 4 TEX. L. REV. 1, 9-16 (1925) (noting that some courts contend that the power to regulate lawyers is "vested exclusively in the courts" while others recognize "a sort of dual jurisdiction, holding generally that while the power of admission and discipline is judicial, yet the legislature may prescribe reasonable regulations which the court will acquiesce in"); Leroy Jeffers, *Government of the Legal Profession: An Inherent Judicial Power Approach*, 9 ST. MARY'S L.J. 385, 397-99 (1978) ("The predominant line of cases holds that the supreme court of the state has inherent power to establish a unified bar and to govern the practice of law"); Blewett Lee, *The Constitutional Power of the Courts over Admission to the Bar*, 13 HARV. L. REV. 233, 249-50 (1899) (arguing that "the powers of admission and disbarment are necessarily inseparable and equally inherent in courts of justice"); Charles A. Degnan, Note, *Admission to the Bar and the Separation of Powers*, 7 UTAH L. REV. 82, 82 (1961) ("[F]ew jurisdictions totally deny legislative competence in [regulating lawyers], practically all agree that the primary regulator is the judiciary, and that it has the last word on the subject."); Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783, 784 (1976) ("[L]egislative regulation of the profession has existed concomitantly [with judicial regulation], and the boundary between the two prerogatives has remained remarkably ill defined.") (hereinafter Note, *Inherent Power*);

In contrast, federal courts likely have less autonomy than state courts. Their authority to establish rules of conduct is certainly not exclusive; Congress can pass laws that regulate lawyers in federal proceedings.[142] Nor is federal judicial authority preclusive; at least in some areas, Congress can restrict the exercise of non-delegated powers by federal courts.[143] The federal executive branch also may have some authority to curtail or supplant the exercise of judicial authority.[144]

The question left open by *Williams*, then, is whether and to what extent (and subject to separation of powers limitations) federal courts have independent power to establish standards of conduct for lawyers in federal proceedings. Various lower court decisions assume that federal courts *do* possess this authority. An example is the First Circuit's 1995 decision upholding a Rhode Island district court rule of professional conduct that required prosecutors to obtain judicial approval before subpoenaing an attorney to testify about a client.[145] The court found that the rule was authorized not only pursuant to legislatively granted rule-making power, but also pursuant to a judicial power "inherent in derivation . . . [to] erec[t] reasonable prophylactic rules to regulate perceived abuses by attorneys appearing before the court."[146]

Similarly, many of the federal decisions disqualifying lawyers for alleged conflicts of interest appear to assume that federal courts have some non-delegated authority to set standards of practice.[147]

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Note, *Legislative or Judicial Control of Attorneys*, 8 FORDHAM L. REV. 103, 106-10 (1939) (describing a difference of opinion regarding the scope of the New York Supreme Court of Appeals' authority to regulate lawyers).

142. *See* MCMORROW & COQUILLETTE, *supra* note 19, § 801.02[5] (discussing congressional power to regulate federal attorney conduct).

143. Because Article III of the U.S. Constitution subjects the jurisdiction of federal courts to congressional control, the courts typically have assumed that Congress has plenary power to supplant court-made rules. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991) (subordinating the exercise of inherent federal court power to congressional oversight); *Ex parte* Wall, 107 U.S. 265, 302 (1882) (recognizing that "[t]he power to punish for contempt—a power necessarily incident to all courts for the preservation of order and decorum in their presence—was formerly so often abused for the purpose of gratifying personal dislikes, as to cause general complaint, and lead to [federal] legislation defining the power and designating the cases in which it might be exercised"); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 337 (1994) (noting Congress's authority to establish national ethics rules).

144. *Cf. Ex parte* Garland, 71 U.S. 333, 381 (1866) (holding that the President's issuance of a pardon to an attorney who participated in the Rebellion foreclosed a federal court, relying on federal legislation, from disbarring him for that role).

145. Whitehouse v. United States Dist. Court for the Dist. of R.I., 53 F.3d 1349, 1351-52 (1st Cir. 1995).

146. *Id.* at 1356.

147. Federal courts have characterized their authority to disqualify counsel in various ways. *E.g.*, Jenkins v. Missouri, 931 F.2d 470, 484 (8th Cir. 1991) (noting that the district court's power to disqualify counsel arises out of its "responsibility for supervision of the members of its bar");

Most federal courts do not act as if they are limited to applying pre-existing legal standards, such as those established by state codes of ethics or agency law, in determining what constitutes an impermissible conflict of interest.[148] Instead, they have developed standards themselves in a "common law" fashion.[149] Cases in which federal courts have developed common law standards raise two questions. First, do the courts have authority to proceed in this way, or should they instead be required to rely on state or congressionally authorized rules governing conflicts of interest?[150] Second, if federal courts have the authority to establish independent conflict of interest standards for federal litigation, may Congress supercede those standards?

The case law suggests three possible theories to support federal judicial adoption of standards of lawyer conduct, even absent a congressional grant of authority. The first two derive from powers that federal courts unquestionably possess: the inherent authority to regulate federal judicial proceedings and sanction lawyers for misconduct in connection with federal proceedings[151] and the

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Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1574 (Fed. Cir. 1984) (stating that the "standard for attorney disqualification" relates "to a district court's power to supervise and to conduct local operating procedure"); Tingley Sys., Inc. v. CSC Consulting, Inc., No. 95-10284-RCL, 1997 U.S. Dist. LEXIS 13334, at *2 (D. Mass. July 25, 1997) (referring to the district court's duty "as a supervisor of attorney conduct . . . to ensure that the attorneys appearing before it adhere to appropriate standards of professional conduct" and also referring to the court's "inherent authority to disqualify attorneys"); United States v. Siegner, 498 F. Supp. 282, 287 (E.D. Pa. 1980) (referring to the "exercise of the court's supervisory powers to disqualify" an attorney with a conflict of interest).

148. *See, e.g.*, Resolution Trust Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993) (holding that a disqualification motion "must be determined by standards developed under federal law"); Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1316 (3d Cir. 1993) ("The ethical standards imposed upon attorneys in federal court are a matter of federal law.").

149. A good example is the line of cases, beginning with District Judge Weinfeld's famous opinion in *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953), developing the standard governing the disqualification of lawyers who appear against their former clients. *See, e.g.*, Allegaert v. Perot, 565 F.2d 246, 250 (2d Cir. 1977); NCK Org., Ltd. v. Bregman, 542 F.2d 128, 132-33 (2d Cir. 1976); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754-57 (2d Cir. 1975); Hull v. Celanese Corp., 513 F.2d 568, 571-72 (2d Cir. 1975); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 570-73 (2d Cir. 1973). Other examples include cases involving criminal defense lawyers' conflicts of interest and those involving conflicts of interest in class actions. *See* Bruce A. Green, *Conflicts of Interest In Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 77-78 (1996) ("[C]ourts rely on the conflict rules to varying degrees. . . . [I]n certain classes of cases, conflict rules are largely ignored by most courts.").

150. As discussed *infra* text accompanying notes 328-329, some federal courts have taken the position that federalism and preemption considerations prevent state rules from governing the practice of lawyers appearing in federal court.

151. For example, in *Dale M. v. Bd. of Educ.*, 282 F.3d 984, 985-86 (7th Cir. 2002), the court of appeals recently held that the district court had inherent authority to order counsel to return fees to the defendant after the court of appeals reversed the plaintiff's judgment and the award

authority to admit lawyers to practice, or to disbar lawyers from appearing, in federal court.[152] Insofar as federal authority to adopt professional standards rests on either of these theories, the scope of the courts' authority to regulate lawyer conduct may be significantly more limited than the parallel authority of state courts.[153]

The third, more sweeping theory is that the power to set standards of conduct is part and parcel of the general ethics authority discussed above[154]—a broad independent authority to regulate lawyers. This theory posits that federal court control over federal litigators has the same elements as state-court control of state-supervised lawyers. The theory, if accepted, would support federal courts not only in admitting and disciplining lawyers, but also in setting general standards for professional conduct in connection with federal proceedings.[155]

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of attorneys' fees in a lawsuit under the Individuals with Disabilities Education Act. Judge Posner's opinion referred to federal courts' "broad power, deemed 'inherent' in the sense that its existence does not depend on an explicit grant of power in a statute or other formal enactment, to regulate the conduct of the lawyers who practice before them." *Id.* (citing Chambers v. NASCO, Inc., 501 U.S. 32, 43-44 (1991)). This regulatory authority, he suggested, "extends to *any* unprofessional conduct." *Id.* at 986; *see also In re* Poole, 222 F.3d 618, 620-21 (9th Cir. 2000) ("In short, 'a federal court has the power to control admission to its bar and to discipline attorneys who appear before it.' . . . Pursuant to their exclusive authority over members of their bar, federal courts have promulgated local rules pertaining to admission and discipline." (quoting *Chambers*, 501 U.S. at 43)).

152. For example, the Supreme Court's decision in *Ex parte* Wall, 107 U.S. 265, 302 (1882), which upheld a federal court's disbarment of an attorney who had participated in a lynching, contained a lengthy discussion of "the relations between attorneys . . . and the courts" and the power of courts over attorneys. The discussion referred to the lawyer's obligation, upon admission to the bar, to take an oath expressing his duties, including a duty to "conform to the rules prescribed by [the courts] for his conduct in the management of causes." *Id.* at 304. It also acknowledged the court's power to ensure compliance with this obligation, among others. *Id.* at 303. The suggestion is that the federal court's power to admit individuals "as officers of the court" and to disbar them from practice before the federal court implies the power to establish the standards of their conduct before the court. *Id.* This argument was expressed more clearly by the First Circuit in *Whitehouse v. United States Dist. Court for the Dist. of R.I.*, 53 F.3d 1349, 1356 (1st Cir. 1995), as follows: "Whether considered statutory or inherent in derivation, we have little difficulty concluding that the greater power of disbarring attorneys for unethical behavior necessarily includes the lesser power of erecting reasonable prophylactic rules to regulate perceived abuses by attorneys appearing before the court." *See also Ex parte* Secombe, 60 U.S. (19 How.) 9, 13-14 (1857) (indicating that courts have authority to prescribe rules for the admission of attorneys and their removal, including the offenses for which an attorney may be removed, and that a Minnesota statute describing some offenses for which attorneys may be removed did not materially narrow the court's discretion).

153. *See infra* Parts V.B.2, V.C.2.

154. *See supra* notes 39-42 and accompanying text.

155. *See* Theard v. United States, 354 U.S. 278 (1957) (discussed *infra* Part V.C); *see also* Howell v. State Bar, 843 F.2d 205, 206 (5th Cir. 1988) ("Since the early days of English common law, it has been widely recognized that courts possess the inherent power to regulate the conduct of attorneys who practice before them and to discipline or disbar such of those attorneys as are guilty of unprofessional conduct."); Bruce A. Green, Doe v. Grievance Committee: *On the*

The viability of the three theories ultimately has significance not only for the scope of federal judicial authority to regulate lawyer conduct through ad hoc judicial decision making, as in the disqualification cases or situations such as *Williams*, but also for the scope of federal court rule making. Although many federal courts have adopted either an entire state code of ethics or the American Bar Association's model code, it is uncertain whether each provision in those codes could legitimately be adopted under congressionally delegated rule-making authority. If federal courts are not able to adopt such provisions under congressionally delegated authority, it is important to consider whether federal courts may adopt a full code of professional conduct through other means; specifically, by invoking a separate, independent regulatory authority. As we conclude below, even the broadest of the three theories we have identified probably would not justify the wholesale adoption of the existing ethics codes.

### *B. Inherent Authority To Regulate Federal Judicial Proceedings*

The federal courts clearly have embraced a narrow inherent authority that encompasses the power to implement some regulation of lawyers.[156] They have long claimed the inherent authority to manage their proceedings,[157] including "the authority to impose reasonable and appropriate sanctions upon errant lawyers."[158] This

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*Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 530-31 (1989) (maintaining that federal courts, like state courts, have developed standards of professional conduct pursuant to their inherent authority to regulate lawyers, which includes "the inherent authority of courts to admit, suspend and disbar attorneys who practice within the jurisdiction of the court"); Jeffers, *supra* note 141, at 400 (suggesting that courts' authority to establish standards of conduct is part of their general regulatory authority over lawyers); Note, *Inherent Power*, *supra* note 141, at 800 & n.82. Many opinions suggest that courts have broad regulatory authority over lawyers that derives from lawyers' role as "officers of the court." *See, e.g.*, Bates v. State Bar, 433 U.S. 350, 389 (1977) (Powell, J., dissenting) (referring to "[t]he supervisory power of the courts over members of the bar, as officers of the court"); Goldfarb v. Va. State Bar, 421 U.S. 773, 792-93 (1975).

156. *See supra* notes 32-36 and accompanying text. As we will discuss presently, there is an argument that federal courts have broad inherent authority to regulate and discipline lawyers—which we refer to as the "independent authority to regulate federal lawyers' professional conduct." *See infra* text accompanying note 316.

157. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (recognizing that federal courts inherently possess those powers which "are necessary to the exercise of all others").

158. Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 888 (5th Cir. 1968). Federal courts have similar authority, derived from the same source, to sanction litigants for litigation abuses. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975) (upholding the assessment of attorneys' fees for intentional violations of court orders or bad faith conduct); Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962) ("The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,'

authority extends beyond simply punishing lawyers for violating established law or rules of procedure. Subject to principles of proportionality and fair notice, federal courts may sanction wrongful litigation conduct that is not independently proscribed.[159] The recognized authority to regulate federal proceedings arguably implies some authority not only to identify and sanction individual lawyers' misconduct after the fact, but also to establish advance standards governing some aspects of lawyer behavior in federal proceedings.

### 1. The Case Law

The leading Supreme Court decisions recognizing the right of federal courts to use their inherent authority to manage their proceedings to sanction lawyers are *Chambers v. NASCO, Inc.*[160] and *Roadway Express, Inc. v. Piper.*[161] In *Chambers*, a federal district court shifted nearly $1 million in attorney's fees because a litigant had filed frivolous pleadings and delayed the proceedings.[162] Recognizing that some of the misconduct was not sanctionable under specific federal rules,[163] the court relied on its "inherent power" to sanction fraudulent and "bad faith" litigation tactics.[164]

In affirming, the Supreme Court noted that "the inherent powers of federal courts are those which 'are necessary to the exercise of all others,'" and that the inherent power has many "facets."[165] These include a federal court's right "to control admission to its bar," to "punish for contempts," to "vacate its own judgment upon proof that a fraud has been perpetrated upon the court," and to "bar from the courtroom a criminal defendant who disrupts a trial."[166] Likening the district court's sanctions to these other expressions of authority, the Supreme Court recognized inherent federal power to protect the

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governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.").

159. *See infra* text accompanying notes 170-174.

160. 501 U.S. 32, 45-46 (1991).

161. 447 U.S. 752, 765-67 (1980). There have been a few other Supreme Court decisions invoking the inherent authority, but these have largely quoted and reiterated *Chambers* or *Roadway Express*, without offering further guidance on the issues. *E.g.*, Clinton v. Jones, 520 U.S. 681, 709 n.42 (1997); Degen v. United States, 517 U.S. 820, 823-24 (1996); Carlisle v. United States, 517 U.S. 416, 426 (1996); *see also Link*, 370 U.S. at 630-31 (discussing power of courts to dismiss cases for lack of prosecution).

162. 501 U.S. at 40.

163. For example, it was not sanctionable under FED. R. CIV. P. 11.

164. *Chambers*, 501 U.S. at 42, 45.

165. *Id.* at 43-44 (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

166. *Id.*

"integrity of the courts"[167] and "to fashion an appropriate sanction for conduct which abuses the judicial process."[168] The Court relied on its earlier *Roadway Express* decision, in which it had recognized an inherent power to assess attorney's fees against counsel for "improvidently enlarg[ing] and inadequately prosecut[ing]" a federal action.[169]

Significantly, the *Chambers* Court noted that "the inherent power extends to a full range of litigation abuses,"[170] including "bad-faith" conduct that is not specifically proscribed by an existing rule or law.[171] Much of the behavior sanctioned in *Chambers* occurred outside the federal court. Some of the sanctioned lawyer's tactics had no direct bearing on the conduct of federal proceedings,[172] and other tactics even occurred prior to the commencement of the federal litigation.[173] The Court's conclusion that the inherent authority encompassed the power to regulate these activities elicited two dissenting opinions.[174]

Even as the Supreme Court suggested the existence of relatively broad judicial authority to sanction tactics that threaten federal proceedings, it also recognized boundaries on this authority. First, *Chambers* noted that "the exercise of the inherent power of lower federal courts can be limited by statute and rule, for 'these courts were created by act of Congress.'"[175] Second, both *Chambers* and *Roadway Express* held that not all arguably wrongful conduct is sanctionable under the inherent authority. Both cautioned that "inherent powers must be exercised with restraint and discretion,"[176] and only "in narrowly defined circumstances."[177] *Chambers* identified a number of relevant factors, such as the "willful disobedience of a

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167. *Id.* at 44.

168. *Id.* at 44-45.

169. Roadway Express, Inc. v. Piper, 447 U.S. 752, 756 (1980); *see Chambers*, 501 U.S. at 44-45.

170. 501 U.S. at 46.

171. *Id.* at 42.

172. These included "tactics of delay, oppression, harassment and massive expense [in discovery and pleadings] to reduce plaintiff to exhausted compliance." *Id.* at 41.

173. The district court imposed sanctions, in part, for an "attempt[] to deprive this Court of jurisdiction by acts of fraud" by selling property involved in the litigation the weekend before the court was to hear a motion for specific performance. *Id.* at 36-37, 41.

174. Three dissenting Justices concluded that federal courts lacked "inherent authority to sanction a party's prelitigation conduct," *id.* at 61 (Kennedy, J., dissenting), while a fourth disagreed with the majority's conclusion that a federal court's inherent power allowed it to sanction lawyers for out-of-court misconduct that did not interfere with the conduct of a trial. *Id.* at 60 (Scalia, J., dissenting).

175. *Id.* at 47 (quoting *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 511 (1873)).

176. *Id.* at 44; Roadway Express, Inc v. Piper, 447 U.S. 752, 764 (1980).

177. *Chambers*, 501 U.S. at 45; *Roadway Express, Inc.*, 447 U.S. at 765.

court order"[178] and actions taken "in bad faith, vexatiously, wantonly, or for oppressive reasons,"[179] while *Roadway Express* referred to the sanctioned lawyer's "bad faith."[180] Finally, the Court in both cases recognized that sanctions for misconduct are subject to a principle of proportionality. *Roadway Express* warned that "attorney's fees certainly should not be assessed lightly."[181] *Chambers* upheld the fee-shifting sanction on the basis that it was "less severe [than] outright dismissal."[182]

Lower court decisions have acknowledged these limitations. Although district courts have relied on the inherent power to impose a range of sanctions, including gag orders,[183] fines,[184] and even dismissals,[185] they have not treated all wrongful conduct as sanctionable. Most cases approving sanctions have involved violations of practice rules or litigation orders requiring parties to comply with specific directives.[186] In part because of the need to provide fair notice, the courts have avoided sanctioning conduct not explicitly proscribed by a rule, statute or prior court order, except where the conduct was undertaken in bad faith or otherwise obviously improper.[187] The courts also have limited the exercise of inherent authority to conduct that has threatened the judicial process in some way—a consideration that may have played a role in *Williams*.[188] In exercising inherent

178. 501 U.S. at 45.

179. *Id.* at 45-46.

180. *Roadway Express, Inc.*, 447 U.S. at 766.

181. *Id.* at 767.

182. *Chambers*, 501 U.S. at 45.

183. *E.g.*, Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435, 439 (9th Cir. 1983).

184. *E.g.*, United States v. Seltzer, 227 F.3d 36, 42 (2d Cir. 2000); *cf.* Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 732-33 (3d Cir. 1962) (overruling a fine imposed by a district court).

185. *E.g.*, Schwarz v. United States, 384 F.2d 833, 836 (2d Cir. 1967).

186. *E.g.*, Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 886, 888 (5th Cir. 1968) (sanctions imposed for disobeying order regulating pretrial procedures); *Gamble*, 307 F.2d at 733 (overruling fine imposed under the inherent authority for lawyers' failure to follow pretrial order governing litigation procedures).

187. *E.g.*, Glatter v. Mroz, 65 F.3d 1567, 1575 (11th Cir. 1995); Zambrano v. City of Tustin, 885 F.2d 1473, 1478 (9th Cir. 1989). On the question of whether a sanction can be imposed absent bad faith or an improper purpose, compare *Harlan v. Lewis*, 982 F.2d 1255, 1260 (8th Cir. 1993) (concluding that *Roadway* does not extend "the 'bad faith' requirement to every possible disciplinary exercise of the court's inherent power, especially because such an extension would apply the requirement to even the most routine exercises of the inherent power," and upholding sanctions against a lawyer who suggested that a potential witness not testify for opposing party) with *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001) (concluding that a district court may not sanction an attorney for recklessly making a false statement of law or fact unless it is "coupled with an improper purpose, such as an attempt to influence or manipulate proceedings in one case in order to gain tactical advantage in another case").

188. *See supra* text accompanying notes 110-111.

authority, the courts have relied on such factors as the need to "manage [their] calendar[s] and the courtroom,"[189] to "impose order, respect, decorum, silence, and compliance with lawful mandates,"[190] and to maintain "order and preserve the dignity of the court."[191]

Likewise, lower federal courts have recognized that sanctions imposed under the inherent authority must be proportional to the misconduct in question. For example, in *Flaksa v. Little River Marine Construction Co.*, the Court of Appeals for the Fifth Circuit overruled a district court's dismissal of a litigant's claim because of an attorney's "failure to meet his responsibilities at every stage of this proceeding."[192] The Court of Appeals held that the sanction was excessive in light of the fact that the litigant's claim itself was not "vexatious or fictitious"[193] and that the litigant was not personally responsible for the lawyer's dilatory behavior.[194] The court recognized the availability of a range of sanctions to enable courts to "keep litigation on congested dockets moving,"[195] but reasoned that judges should first resort to the least severe sanctions necessary to implement the interest in judicial administration and "the orderly and expeditious disposition of cases."[196]

### 2. Inherent Authority as a Basis for Establishing Standards of Conduct

To what extent does the theory of limited inherent authority independently justify general rules of professional conduct?[197] It is reasonable to assume that there is an inherent power to protect federal proceedings through the issuance of rules that is coextensive, or the same in nature, as the power to protect federal proceedings by

189. Saldana v. Kmart Corp., 260 F.3d 228, 237-38 (3d Cir. 2001); *Seltzer*, 227 F.3d at 42; *see also* Titus v. Mercedes Benz, 695 F.2d 746, 749-50 (3d Cir. 1982) (discussing the inherent authority of the district court to impose sanctions for failure to prosecute); *Schwarz*, 384 F.2d at 835-36 (upholding a dismissal for failure to prosecute); West v. Gilbert, 361 F.2d 314, 316 (2d Cir. 1966) (same).

190. United States v. Shaffer Equip. Co., 11 F.3d 450, 461 (4th Cir. 1993).

191. *Zambrano*, 885 F.2d at 1478.

192. 389 F.2d 885, 886 (5th Cir. 1968).

193. *Id.* at 889.

194. *Id.*

195. *Id.* at 888.

196. *Id.* at 887-88 n.3 (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630 (1962)).

197. It begs the question to assume that federal court adoption of local state professional rules insulates the rules from attack. There must be a basis for the adoption. *See* MCMORROW & COQUILLETTE, *supra* note 19, §§ 801.02, 806.01 (noting limits on federal courts' rule-making power and statutory power to discipline attorneys). If congressionally delegated rule-making authority cannot support the adoption, it must be justified by resort to a separate theory of non-delegated federal authority.

punishing individuals who commit misconduct.[198] At the very least, federal courts should be able to identify in advance particular conduct that would be sanctionable under the inherent authority.[199] Arguably, they also should be able to adopt rules restricting conduct that harms judicial proceedings but for which notice would be necessary before a lawyer could be sanctioned.[200] In this context, regulation by rule merely serves to provide notice; it is not expanding the category of conduct encompassed by the recognized principles governing inherent authority.

As a substantive matter, we have seen from the inherent authority cases involving sanctions that any exercise of the recognized inherent power should focus on conduct that affects the courts' ability to operate or that threatens the sanctity of the judicial process. The limits on judicial authority have been based on the recognition that not every instance of disrespect for a judge or a court rule rises to the level of a true threat to the court's ability to operate.[201] The more attenuated from actual in-court litigation activities the misconduct is, the less it prevents courts from accomplishing their business.

How do these considerations bear upon the use of inherent authority to develop rules of lawyer conduct?[202] Initially, one can posit that the inherent power provides little basis for courts to implement regulation that is designed to further interests unrelated to judicial

198. Well prior to the promulgation of the Rules Enabling Act, the United States Supreme Court stated that federal courts "have authority to make and establish all necessary rules for the orderly conducting [of] business in the said courts." Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 128 (1864); *see also* David W. Pollak, Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 633-36 (1977) (asserting that the inherent authority includes the authority to set rules).

199. Examples might include willfully lying to the judge or knowingly offering false testimony.

200. Examples might include intentionally failing to disclose controlling adverse authority or intentionally misleading a court by failing to correct the court's false assumption encouraged by the lawyer.

201. *See, e.g.*, Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 888-89 (5th Cir. 1968) (overruling dismissal for, *inter alia*, lawyer's failure to appear at pretrial conference on the basis that the sanction was too drastic). In considering whether and what kind of sanctions may be imposed, courts have considered such factors as the significance of the misconduct, its willfulness, and the availability of alternative sanctions. *See, e.g., id.* (noting that dismissal is generally only permitted after a "clear record of delay or contumacious conduct by the plaintiff" and proposing alternative sanctions).

202. It does bear mention that the reasoning supporting the inherent power—that its exercise may be necessary to protect the legal system—applies equally to clients and attorneys. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 50-51 (1991) (applying sanctions imposed under the inherent authority to the litigants themselves). Courts therefore may be authorized to develop rules based on the inherent authority that would apply to participants in federal proceedings other than the lawyers.

administration—including the interests in protecting third persons,[203] preserving the image of the profession,[204] maintaining the bar,[205] and providing public service.[206] At their core,[207] such regulation has little to do with judicial administration.[208]

In contrast, judicial regulation can easily be justified under this theory when it is directed at conduct that threatens the fair and efficient resolution of judicial proceedings. For example, rules requiring lawyers to expedite litigation and requiring candor to the tribunal are geared to facilitating the functioning of the courts.[209] Other requirements governing advocacy,[210] such as rules governing trial publicity[211] and lawyers as witnesses,[212] promote the fairness of

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203. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.1 (1983) ("[A] lawyer shall not knowingly . . . make a false statement of material fact or law to a third person. . . ."); *id.* R. 4.3 ("When [a] lawyer knows or reasonably should know that [an] unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding);" *id.* R. 4.4 ("[A] lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person. . . .").

204. *E.g.*, *id.* R. 7.1 ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.").

205. *E.g.*, *id.* R. 5.5(a) ("A lawyer shall not . . . practice law in a jurisdiction [where doing so violates] the regulation of the legal profession in that jurisdiction . . . ."), *id.* R. 5.6(a) (forbidding a lawyer to "participate in offering or making . . . [an] agreement that restricts the right[s] of . . . lawyer[s]"); *id.* R. 8.1-8.5 (imposing various limitations and requirements on lawyers to uphold the dignity of the judiciary and legal profession).

206. *E.g.*, *id.* R. 6.1 ("A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.").

207. In particular circumstances, individual rules fitting within these categories might affect the court's operations. For example, a public service rule that requires lawyers to accept federal appointments when requested helps the federal courts resolve cases. *See, e.g.*, *id.* R. 6.2 ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause. . . ."). Similarly, a rule that requires admission to some bar may be designed, in part, to preserve the image of the bar or to maintain the guild, but it also serves to provide competent federal lawyers who will enable the federal courts to process cases efficiently. *Cf. id.* R. 5.5(a) (requiring lawyers to abide by the rules of the jurisdictions in which they practice).

208. Thus, for example, the inherent power provides little basis for courts to implement legal advertising rules which are designed primarily to protect the image of the bar. It is also irrelevant to regulation that simply seeks to protect the rights of consumers of legal services in ways that do not impact upon the actual conduct of litigation—such as prohibitions against solicitation.

209. *E.g.*, *id.* R. 3.2-3.3. Direct lies to the court, failures to appear or comply with calendar and discovery orders, and refusals to obey litigation directives both make it impossible for a court to control a particular case and, if visible, breed disrespect for court orders on the part of other litigants and attorneys.

210. *E.g.*, *id.* R. 3.1-3.4 (requiring lawyers to bring meritorious claims, expedite litigation, be candid to the tribunal, and act fairly to opposing counsel).

211. *E.g.*, *id.* R. 3.6 (imposing limits on extrajudicial statements by lawyers in the course of litigation)

212. *E.g.*, *id.* R. 3.7 (limiting the ability of lawyers to appear as witnesses in cases in which they participate as lawyers).

the process by which cases are decided. The adoption of such rules and punishment of violations directly serves the courts' operations.

The mere fact that a rule involves litigation, however, does not automatically mean that it is necessary to prevent conduct that actually threatens the operation of the court. Civility rules provide an interesting example. Some civility rules facilitate the conduct of litigation by ensuring reasonable, trustworthy discourse among opposing lawyers and judges.[213] But other civility rules may simply be designed to make life more pleasant for lawyers and judges[214]—a goal that, while perhaps laudable, need not be accomplished for the courts to conduct their business.[215]

For similar reasons, one might assume that the inherent power to protect judicial proceedings cannot support rules that address conduct outside the courtroom. In at least some of the sanction cases, courts of appeals have overruled district court attempts to punish conduct in discovery and pretrial tactics that occurred outside the trial judge's presence.[216] As we have noted, one interpretation of *Williams* is that it precluded judicial regulation of federal prosecutors in such circumstances.[217]

Nevertheless, some rules governing out-of-court behavior can be justified under the theory of inherent powers on the basis that the rules promote the efficient operation of the federal adversarial process.[218] Arguably, these rules promote the courts' ability to develop full factual records and obtain a complete set of legal arguments.[219] This reasoning helps explain federal court implementation of a number of advocacy-oriented professional rules, including those

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213. An example of such a rule would be one that requires lawyers to speak truthfully with one another and the courts.

214. An example of such a rule would he a prohibition against using personal epithets or ad hominem attacks against one's adversary.

215. One court recently overlooked this distinction, assuming broadly that sanctioning uncivil behavior is within a federal court's "inherent authority to police practitioners before it." *In re* First City Bancorporation of Tex., Inc., 282 F.3d 864, 867 (5th Cir. 2002).

216. *E.g.*, Saldana v. Kmart Corp, 260 F.3d 228, 238 (3rd Cir. 2001) (overruling sanctions for profanity and abusive out-of-court conduct on the basis that it did not affect "either the affairs of the Court or the 'orderly and expeditious disposition' of any cases before it" (citing Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991))); *see also* Mruz v. Caring, Inc., 166 F. Supp. 2d 61, 70 (D.N.J. 2001) (citing *Saldana*, 260 F.3d at 338, for the proposition that district courts may not use inherent powers to sanction behavior that did not occur in their presence).

217. *See supra* Part IV.C.3.a.

218. *Cf. Chambers*, 501 U.S. at 46 (upholding sanctions for filing frivolous pleadings and delaying the litigation).

219. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 54-57, 54 nn. 37-40 (1991) (describing how prosecutors and other lawyers help courts in the adversarial system).

governing conflicts of interests, communications with opposing clients,[220] and client confidentiality.

The extent to which these rules truly can be justified under the inherent power depends, in part, on how far the courts are willing to extend the underlying theory. The sanction cases employ terms such as "essential" and "necessary" to describe the required nexus between the punishment and the goal it is designed to serve.[221] What nexus should be required of prophylactic standards of behavior? Rules designed to preserve the adversary system, for example, will undoubtedly encompass conduct that might be harmful to judicial proceedings, but may also include some conduct that would not be harmful enough to justify the imposition of sanctions.[222] The difficult question for the legitimacy of judicial rules—and one the *Williams* Justices may have had in mind—is when federal courts may adopt prophylactic conduct requirements that in theory promote the integrity of federal court proceedings, but do more than forbid intrinsically wrongful or harmful conduct.[223]

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220. Most authorities interpret no-communications rules to forbid communications with represented persons, not simply represented parties. *See, e.g.*, Monceret v. Bd. of Prof'l Responsibility, 29 S.W.3d 455, 460 (holding that the rule forbids communications with a represented witness). Insofar as a district court no-communication rule applies to contacts with persons who have no relationship to proceedings under a particular federal court's supervision, it would be difficult for the federal court to justify the rule under the inherent authority; MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 2 (1983).

221. *See, e.g.*, Scaife v. Associated Air Ctr. Inc., 100 F.3d 406 (5th Cir. 1996); Natural Gas Pipeline Co. v. Energy Gathering, Inc., 86 F.3d 464, 467 (5th Cir. 1996) ("Because of the potency of inherent powers and the limited control of their exercise, however, they must be used with great restraint and caution. The threshold for the use of the inherent power sanction is high. Such powers may be exercised only if essential to preserve the authority of the court and the sanction chosen must employ 'the least possible power adequate to the end proposed.'").

222. For example, requirements that the lawyer obtain a writing to evidence a client's consent to joint representation, *e.g.*, CAL. RULES OF PROF'L CONDUCT R. 3-310(c) (1996), or to evidence a client's consent to a fee-sharing arrangement, *e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5(e)(2) (1983), are prophylactic requirements. In cases where clients' informed consent is given only verbally, a lawyer's violation of the writing requirement would arguably not be harmful enough to be sanctioned under the court's inherent power. However, a few lower courts have held that, in unusual cases, a court may invoke the inherent authority to direct a lawyer's future conduct simply in order to protect the integrity of the proceedings. *See, e.g.*, Dale M. v. Bd. of Educ., 282 F.3d 984, 986 (7th Cir. 2002) (requiring plaintiff's attorney to return attorneys' fees to defendant to prevent future manipulative pleadings and to "enforce ethical conduct in litigation").

223. Courts that have invoked the inherent authority in order to preserve decorum or the "sanctity" of the courts probably followed this reasoning: unless attorneys and litigants show respect for the persons of judges and the courtroom setting, they are unlikely to obey substantive rulings and procedures that are essential for judicial administration. Prophylactic professional rules, such as Model Rule 3.5, may implement the same goals. MODEL RULES OF PROF'L CONDUCT R. 3.5(a), (d) (1983) ("A lawyer shall not . . . seek to influence a judge, juror . . . , or other official by [unlawful] means" nor "engage in conduct intended to disrupt a tribunal."). Whether federal courts could adopt, or incorporate, such rules under the rubric of the inherent

Even under an extended rationale, the theoretical key is to distinguish rules that truly relate to the functioning of the courts and those that do not. Thus, rules governing confidentiality,[224] loyalty,[225] and diligence[226] might be justified based on the need to protect the adversarial process. On the other hand, it would be difficult for courts to uphold traditional rules of professional conduct that are designed simply to protect litigants, as clients, from harms unrelated to the litigation.[227]

### *C. Federal Judicial Authority over Bar Admissions*

A second independent federal judicial authority that the Supreme Court has long recognized is the authority to admit and disbar lawyers who seek to participate in federal litigation.[228] But this power, the Court has stated, "ought to be exercised with great caution."[229]

The power to admit and disbar lawyers might imply a subsidiary authority to dictate standards or codes of professional conduct on which admission to the federal bar will be conditioned. But if so, as we discuss below, both the rationale for this power and the federal courts' cautious regard for it suggest that the subsidiary standard-setting authority is limited at best.

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authority probably would depend on whether the conduct they regulate is likely to affect judicial administration.

224. *E.g., id.* R. 1.6.

225. *E.g., id.* R. 1.7-8 (conflict of interest rules).

226. *E.g., id.* R. 1.3.

227. For example, rules regulating the safekeeping of property and selling law practices. *E.g., id.* R. 1.15 ("A lawyer shall hold property of clients . . . separate from the lawyer's own property."); *id.* R. 1.17 (imposing rules on sales of law practices). Rules governing fee agreements also fit within this category, unless the rules are meant to insure the quality of federal representation by attracting better quality lawyers.

228. *See, e.g., Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 529-31 (1824) (upholding the suspension of a federal attorney, with the observation that "the respectability of the bar should be maintained, and . . . its harmony with the bench should be preserved. For these objects, some controlling power, some discretion ought to reside in the Court."); *see also Ex parte* Garland, 71 U.S. (4 Wall.) 333, 376, 381 (1866) (discussing court rule requiring an oath by lawyers that they have never fought against the United States).

229. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991); *accord Ex parte* Burr, 22 U.S. (9 Wheat.) at 530 ("This discretion ought to be exercised with great moderation and judgment. . . ."); *see also* Saldana v. Kmart Corp., 260 F.3d 228, 237-38 (3rd Cir. 2001) (citing *Ex parte* Burr, 22 U.S. at 531, and noting the existence of the power to discipline lawyers under the admissions authority but noting that the power "ought to be exercised with great caution").

### 1. The Case Law

In determining who may or may not appear in federal proceedings, federal courts tend to rely on the judgment of state courts. To avoid having to develop entirely separate admissions criteria and procedures, most federal districts require a lawyer to be admitted in a state court as a condition of federal admission.[230] In some cases, they require nothing more.[231] For post-admission misconduct, a few federal courts employ an *ad hoc* disciplinary system to investigate and adjudicate allegations of misbehavior in federal court proceedings,[232] but most federal courts simply refer allegations of misconduct to state disciplinary authorities.[233] When a state court suspends or disbars a lawyer who also is a member of a district or federal appellate court bar, the federal court ordinarily will piggyback on the state court's order and suspend or disbar the lawyer from

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230. The District of Columbia is an exception. The local courts—which are themselves federal courts—control admission to practice in the district.

231. *See* Zambrano v. City of Tustin, 885 F.2d 1473, 1483 (9th Cir. 1989) (citing *In re* Evans, 524 F.2d 1004, 1007 (5th Cir. 1975), and stating that "as a practical matter, the application process for admission before the federal district courts is generally perfunctory and pro forma. Admission to the state bar is the essential determinant of professional ethics and legal competence.").

232. This is true, for example, of the Southern District of New York and the District of Connecticut. *See, e.g.*, Grievance Comm. for the S. Dist. of N.Y. v. Simels, 48 F.3d 640, 645 (2d Cir. 1995) (reversing sanctions imposed pursuant to findings of a "Committee on Grievances for the Southern District of New York"); *In re* Grievance Comm. of the United States Dist. Court, 847 F.2d 57, 59 (2d Cir. 1988) (discussing discipline imposed after inquiry by a "Grievance Committee which was comprised of practitioners from the District of Connecticut"). In some cases, a district court before which misconduct occurs itself conducts the necessary hearing and imposes a sanction rather than referring the matter to a disciplinary body. *See, e.g.*, Harlan v. Lewis, 982 F.2d 1255, 1261 (8th Cir. 1993) (upholding the district court's authority to sanction a lawyer directly for violating a disciplinary rule); Thatcher v. United States, 212 F. 801 (6th Cir. 1914) (affirming an order of a district court, following a hearing, disbarring an attorney for various misconduct, including libeling state judge, causing illiterate client to sign baseless pleading, and obtaining improper default judgment and finding that state court's readmission of attorney had no bearing on the federal admission decision); *In re* Boone, 83 F. 944 (N.D. Cal. 1897) (disbarring an attorney, following a hearing, for seeking employment in lawsuit adverse to former client). *See generally* MCMORROW & COQUILLETTE, *supra* note 19, § 806.02[2]-[3] (providing examples of various district court approaches to implementing discipline).

233. *See, e.g., In re* Cook, 49 F.3d 263, 265, 268 (7th Cir. 1995) (noting that federal discipline was imposed only after the matter was referred to state disciplinary officials and they failed to take action); *In re* Jacobs, 44 F.3d 84, 88-90 (2d Cir. 1994) (discussing a district court rule according deference to state court disciplinary decision); Houston v. Partee, 978 F.2d 362, 369 (7th Cir. 1992) (referring a question of prosecutorial misconduct to the state disciplinary committee). *See generally* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 77-91 (1995) (describing mechanisms for disciplining federal prosecutors); Note, *Disbarment in the Federal Courts*, 85 YALE L.J. 975, 977 (1976) (describing "disciplinary rules" in the various federal districts).

federal practice as well.[234] The Supreme Court has made clear, however, that this deference to state admissions and disbarment decisions is a matter of choice. Federal courts need not, and possibly may not, defer automatically.[235]

In the seminal case of *Theard v. United States*,[236] attorney Theard was disbarred by the state of Louisiana based on criminal acts he had committed 20 years earlier.[237] At the time of that offense, Theard was eighteen years old and suffering from "a condition of mental irresponsibility so pronounced that for years he was in an insane asylum under judicial restraint."[238] After recovering, he practiced law for six years without incident.[239] The United States Supreme Court held that the state court's subsequent judgment of disbarment was "not conclusively binding on the federal courts,"[240] and that the federal district court had erred in automatically disbarring Theard based on the Louisiana judgment.[241] The Court's later decision in *In re Ruffalo* confirmed that "[t]hough admission to practice before a federal court is derivative from membership in a state bar, disbarment by the State does not result in automatic

234. This is true whether the state imposed sanctions for conduct in federal proceedings or for other misconduct. *See, e.g.*, Greer's Refuse Serv., Inc., v. Browning-Ferris Indus., 843 F.2d 443, 447-48 (11th Cir. 1988) (upholding a district court's reliance on state disbarment to impose federal disbarment); Mruz v. Caring, Inc., 166 F. Supp. 2d 61, 68-69 (D.N.J. 2001) (authorizing, in theory, the revocation of a lawyer's federal admission, but finding that the district court exceeded its authority in the case at issue); *see also* Thatcher v. United States, 212 F. 801, 807-13 (6th Cir. 1914) (upholding disbarment, following hearing in district court, for publishing false statements about a state judge, bringing a fraudulent state court lawsuit, misleading a judge, causing an illiterate client to sign a baseless pleading, and obtaining a default judgment for fees against an uncomprehending client).

235. *See* Selling v. Radford, 243 U.S. 46, 50-51 (1917) (holding that a federal court may rely on a state's finding that a lawyer should be disbarred *unless* some procedural infirmity in the state proceedings is evident); *accord In re* Sassower, 700 F. Supp. 100 (E.D.N.Y. 1988); *see also* Elliott E. Cheatham, *The Reach of Federal Action over the Profession of Law*, 18 STAN. L. REV. 1288, 1291 (1966) ("The authoritative source of the right to practice before federal courts is federal law . . . . [T]he fact that the federal courts ordinarily make membership in a state bar a prerequisite . . . and treat disbarment of a lawyer by a state court as reason for an order to show cause why he should not be disbarred by the federal court . . . means only that the federal court borrows and makes use of the state court action for its purposes, not that it must follow state action.").

236. 354 U.S. 278 (1957).

237. *Id.* at 279 (noting that Theard had "forged a promissory note and collected its proceeds").

238. *Id.* at 280.

239. *Id.*

240. *Id.* at 282.

241. *Id.* at 282-83.

disbarment by the federal court. Though that state action is entitled to respect, it is not conclusively binding on the federal courts."[242]

*Theard* has several implications for the exercise of admissions authority by the federal courts. First, *Theard* illustrates that the essence of the federal power is the independent ability to determine who is, is not, or is no longer qualified to practice before the federal judiciary. This determination logically requires consideration of two questions: whether the applicant is able to render competent representation to clients in federal proceedings and whether the applicant will do so subject to applicable legal and ethical restraints.

In resolving the latter question, the courts typically have focused on the applicant's "moral character,"[243] including whether the applicant is law abiding and honest. They have also relied on the applicant's past conduct as an expression of character and thus as a predictor of future behavior.[244] *Theard* suggests, however, that past wrongdoing is relevant only insofar as it suggests that a lawyer does not presently take his legal obligations seriously or is otherwise unfit.[245]

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242. 390 U.S. 544, 547 (1968); *see also* Zambrano v. City of Tustin, 885 F.2d 1473, 1483 (9th Cir. 1989) ("Federal courts may set reasonable standards for admission, independent of the requirements established by coequal [state] courts."); *In re* G.L.S., 745 F.2d 856, 859 (4th Cir. 1984) ("The action of the Maryland Court of Appeals in admitting G.L.S. to practice is entitled to respect in the United States District Court . . . but it does not obligate that court to reach the same conclusion."); *In re* Landerman, 7 F. Supp. 2d 1202, 1203 (D. Utah 1998) (holding that federal bar admission is "exclusively the authority of this [federal] court and is not controlled by or dependent on any action or decision of the Utah Supreme Court"), and authorities cited at 1203-04; *In re* Culpepper, 770 F. Supp. 366, 367-70 (E.D. Mich. 1991) (holding that a federal court is not "bound by the determination of the state grievance board").

243. *See, e.g., In re* Sarelas, 360 F. Supp. 794, 799 (N.D. Ill. 1973) ("The prime condition for continued membership in the bar is maintenance of the high moral character expected from all of its members."); *see also* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 496 (1985) (questioning the use state bars have made of their assessment of character).

244. Past professional misconduct usually has been deemed particularly relevant, on the theory that a lawyer who has engaged in professional misconduct in the past predictably may do so again. But the relevant conduct need not have occurred in the context of federal proceedings, or even in the context of law practice. For example, federal lawyers have been disbarred for the commission of criminal conduct or such other immoral conduct "as may show him unfit to be a member of the bar; that is, as not possessing that integrity and trustworthiness which will insure fidelity to the interests intrusted to him professionally." *Ex parte* Wall, 107 U.S. 265, 306 (1883) (Field, J., dissenting).

245. That is one of the lessons of *Theard*, 354 U.S. at 280-82. *In re G.L.S.*, 745 F.2d at 859-60, illustrates how federal courts might implement this principle. The district court denied admission to a convicted robber who became a lawyer in good standing in Maryland. *Id.* at 857. The district court relied on a "rebuttable presumption that an applicant to this bar, who is an unpardoned convicted felon, is not of good character." *Id.* at 858. Although the court of appeals upheld the denial of admission, it did so only after concluding that the district court had done more than rely on the fact of a state felony conviction. *Id.* at 860. An independent evaluation of the underlying crime and additional facts regarding the lawyer's conduct while in prison were

*Theard's* facts also suggest that federal courts should focus primarily on a lawyer's *present* ability to practice competently and ethically. Although past misconduct may give rise to a presumption that the lawyer is unfit, other considerations can overcome the presumption. The requirement that federal courts make individualized determinations regarding lawyer competence and fitness *ex post* has implications for the extent to which the courts can set standards of professional conduct *ex ante*. It raises the question of whether federal courts may proscribe conduct that does not *invariably* establish a lawyer's unfitness to practice.

*Theard* is ambiguous in some respects. On one hand, the Court's concern about Theard's present fitness to practice suggests that a federal court should not be able to withhold the right to practice in federal proceedings as a sanction for every type of professional or personal misconduct.[246] Instead, disqualifying misconduct should have to demonstrate the lawyer's lack of the requisite competence or character, which in turn establishes a real risk that in future cases the lawyer will not render adequate representation or will not abide by applicable laws and rules.[247]

On the other hand, the Court's recognition that Theard's situation was rare and that federal courts can presumptively rely on the state court's determination undercuts this insight.[248] *Theard* imposes no general requirement on federal courts to consider whether the conduct for which a lawyer was suspended is indicative of incompetence or unfitness.[249] As a matter of practice, federal courts ordinarily do not focus upon whether a state court's order of

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necessary to justify the district court's conclusion that the lawyer did not possess "good private and professional character." *Id.* at 859-60.

246. *See Theard*, 354 U.S. at 282. For example, in *Mruz v. Caring, Inc.*, 166 F. Supp. 2d 61, 63, 65, 71 (D.N.J. 2001), the district court rejected a magistrate's recommendation that a lawyer's *pro hac vice* admission be revoked for "abusive behavior" that violated the applicable rules of professional conduct, finding that alternative sanctions, such as Rule 11 sanctions, should have been employed to address the misbehavior.

247. *See, e.g.*, Schlumberger Techs., Inc., v. Wiley, 113 F.3d 1553, 1554 (11th Cir. 1997) (holding that a denial of admission *pro hac vice* "requires a showing of unethical conduct of such a nature as to justify disbarment of a lawyer admitted generally to the bar of the district court").

248. *See Theard*, 354 U.S. at 282.

249. Likewise, with respect to the admission of lawyers to practice in federal court, it is well accepted that federal courts may require an applicant first to be admitted in state court. The federal court is under no obligation to consider whether the particular applicant, although not licensed to practice law in a United States jurisdiction, is nevertheless qualified to do so. *See, e.g.*, Wheat v. United States, 486 U.S. 153, 159 & n.3 (1988) ("Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court."). *See generally* Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 445-54 (1993) (discussing a requirement that lawyers must satisfy admissions standards to represent defendants in criminal cases).

suspension or disbarment reflected a specific conclusion that the lawyer was unqualified to practice.[250]

Federal courts have invoked the admissions authority in a variety of ways. They have used the authority *ex ante* to establish general criteria for admission to practice in federal court, determine whom to admit to the district court bar, and decide whether lawyers who are not members of the district court bar may appear *pro hac vice* in particular federal proceedings. They have also used the authority *ex post* to suspend and disbar members of the district court bar, disqualify lawyers from appearing in particular cases, and revoke permission to appear *pro hac vice*.[251] Because federal decisions invoking the admissions authority are not uniform, however, there is room for debate on the question of whether, and to what extent, federal courts legitimately may use the admissions authority to set standards of conduct for federal lawyers.

One clear principle is that, in deciding whom to admit to practice or to disbar, a federal court may not act arbitrarily.[252] Federal courts may test the moral fitness of applicants for admission[253] and require them to demonstrate their legal knowledge by meeting the standards for admission to a state bar,[254] passing specialized tests,[255]

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250. A state's disbarment order may be designed to accomplish a variety of purposes, including punishing the particular lawyer, deterring misconduct hy other lawyers, or promoting public respect for the legal profession. *See generally* Fred C. Zacharias, *The Humanization of Lawyers*, 2002 PROF. LAW. 9 (2002) (discussing the various, sometimes conflicting, goals of professional disciplinary agencies).

251. *See supra* notes 37-38 and accompanying text.

252. In an early decision, *Ex parte* Secombe, 60 U.S. 9, 13 (1856), the Supreme Court stated:

> And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. The power, however, is not an arhitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be scrupulously guarded and maintained by the court, as the rights and dignity of the court itself.

Recent decisions are to similar effect. *See, e.g.,* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (stating that federal courts have "power to control admission to its bar" but that it "ought to be exercised with great caution"); *In re* Evans, 524 F.2d 1004, 1008 n.1 (5th Cir. 1975) (refusing to accord a district court discretion to deny admission *pro hac vice* simply for "unlawyerlike conduct" because that discretion would be "too broad and, consequently, susceptible to abuse").

253. *See supra* text accompanying notes 243-245.

254. *See* Zambrano v. City of Tustin, 885 F.2d 1473, 1483 (9th Cir. 1989) ("[E]thical doubts are best resolved through state bar proceedings. . . . Tbe basic determinants of legal and moral competence lie with the state, not the federal, bar."). Some district courts accept admission to any state bar as dispositive of competence, while others require membership in the bar of the state in which the federal court is located. *See, e.g.*, N.D. CAL. R. 11-1(a) (requiring candidates to be admitted to the California state bar); C.D. ILL. R. 83.5(a) (providing that lawyers admitted to practice law in any state or the District of Columbia are eligible); E.D.N.Y., S.D.N.Y. R. 1.3(a)

or gaining a particular level of experience in law practice.[256] Federal courts may not, however, impose artificial obstacles to admission.[257]

In *Frazier v. Heebe*,[258] for example, the Supreme Court struck down a district court admissions rule that required not only admission to the state bar in which the district court was located, but also residency in the state. The district court justified this requirement as assuring the availability of a pool of lawyers for federal court business.[259] The Supreme Court dismissed this rationale as makeweight, holding that the availability of lawyers could be assured through other means and that the residency requirement had no relevance to the main goal of admissions requirements—assuring competence.[260]

One can interpret *Heebe* as requiring that federal admissions criteria bear specifically on applicants' competence or fitness to practice before the federal court.[261] The practice of many district courts of freely allowing *pro hac vice* appearances, together with judicial decisions indicating that *pro hac vice* admission ordinarily may not be denied absent genuine concerns about an applicant's fitness,[262] confirms that the focus of admissions authority should be on an applicant's present ability to practice. Nevertheless, the contrary practices of other federal courts raise some uncertainty about whether the admissions authority is so limited.[263]

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(providing that members of the bars of New York, New Jersey, Connecticut, and Vermont are eligible). The more general approach is designed to assure general lawyering competence, while the more specific approach seeks also to ensure some familiarity with state law that may become relevant (particularly in diversity cases).

255. Thus, for example, courts and federal administrative agencies governing specialized subject matters, such as patent and bankruptcy law, could require persons practicing before them to satisfy the requirements of membership in a specialized bar. *Cf.* 35 U.S.C. § 31 (2000) (permitting the establishment of qualifications to prosecute patent cases).

256. For example, some federal courts of appeals require that lawyers have conducted a set number of appellate arguments or have had comparable experience. *See, e.g.*, 2D CIR. R. 46(a)(1) (requiring candidates to have argued three substantive appeals, or their equivalent).

257. *See* Frazier v. Heebe, 482 U.S. 641, 645-46 (1987) (upholding the authority of federal district courts to adopt admission rules that are "necessary to carry out [their] business," but promising to review unnecessary and discriminatory admission requirements and ultimately striking down the residency requirement at issue).

258. *Id.* at 641.

259. *Id.* at 644.

260. *Id.* at 646-47.

261. The alternative reading is that admissions criteria must simply bear a rational relationship to some legitimate judicial interest.

262. *E.g.*, Schlumberger Techs., Inc., v. Wiley, 113 F.3d 1553, 1554 (11th Cir. 1997); *In re* Evans, 524 F.2d 1004, 1007-08 (5tb Cir. 1975).

263. A number of federal district courts require, for example, that applicants be admitted to practice law not just in some state, but in the state in which the federal court is located. Two recent court of appeals decisions have held that this is not a *necessary* requirement to ensure the

Federal court decisions regarding disbarment of federal practitioners are similarly ambiguous. They raise at least two questions concerning the ability of federal courts to impose discipline. First, does the authority to disbar or suspend an attorney imply the power to impose less onerous sanctions? Second, to what extent may federal courts sanction lawyers for misconduct that does not call into question the lawyer's competence or fitness?

Although some courts have relied on their admissions authority to impose sanctions on lawyers other than suspending their federal licenses,[264] the cases reflect a sense that the federal admissions authority is more limited in scope than the parallel authority of state courts and disciplinary agencies.[265] States may "punish" lawyers for a broad array of professional misconduct[266] and may impose a variety of sanctions that are "lesser" or different than disbarment or suspension. Arguably, federal courts are confined to deciding the question of whether a particular lawyer is or is not competent and fit to practice. Under this view, the only decision they can make is whether or not to allow the lawyer to practice, or continue practicing, before the district

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competence and fitness of members of the particular federal court bar. Desilets v. Delta Home Improvement, Inc., 291 F.3d 925 (6th Cir. 2002); Poole v. Smith, 222 F.3d 618 (9th Cir. 2000); *see also* AM. BAR ASS'N, INTERIM REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 33 (2001) (noting the policy adopted by ABA in 1995, which provides "[t]hat the American Bar Association supports efforts to lower barriers to practice before U.S. District Courts based on state bar membership by eliminating the state bar membership requirements in cases in U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules").

264. *See, e.g., In re* Prudential Ins. Co. Am. Sales Practices Litig., 63 F. Supp. 2d 516, 524 (D.N.J. 1999) (holding that the power to control admissions includes the power to order sanctioned lawyers to reveal information regarding their sanctions in future requests for admission), *aff'd in part and rev'd in part*, 278 F.3d 175 (3d Cir. 2002); Mruz v. Caring, Inc., 166 F. Supp. 2d 61, 72 (D.N.J. 2001) (declining to revoke a lawyer's admission).

265. In *Mruz*, 166 F. Supp. 2d at 61, for example, a federal district court limited its own sanctions authority. Reversing a recommendation by a magistrate that a lawyer's *pro hac vice* admission be revoked for "abusive behavior" that violated the applicable rules of professional conduct, the district court ruled that it could not impose sanctions for behavior that did not occur in a trial judge's presence and that did not affect the "orderly and expeditious disposition of any cases before it." *Id.* at 64-65, 70. The court relied, in part, on the availability of alternative sanctions, such as Rule 11 sanctions, to counteract behavior of the type the magistrate wished to punish. *Id.* at 71.

266. States can rely on a broad set of rationales for sanctioning lawyers, including the desire to maintain the dignity of the profession generally and the general interest in preserving public trust in the bar. *See, e.g., In re* Olkon, 605 F. Supp. 784, 792 (D. Minn. 1985) (noting the different concerns of state courts in admitting and disbarring attorneys), *aff'd*, 795 F.2d 1379 (8th Cir. 1986); *In re* Mattox, 567 F. Supp. 415, 417 (D. Colo. 1983) (noting that "the Supreme Court of Colorado must concern itself as well with the rights of members of its bar to sustain a livelihood"), *rev'd on other grounds*, 758 F.2d 1362 (10th Cir. 1985); Charles W. Wolfram, *Lawyer Crimes: Beyond the Law?*, 36 VAL. U. L. REV. 73, 83-90 (2001) (discussing discipline of lawyers for crimes totally unrelated to their practice).

court. Thus, for example, some federal courts evidently do *not* believe they have authority to fine an offending attorney in lieu of revoking the lawyer's license to practice.[267] Other courts have been circumspect about publicly censuring lawyers.[268]

The decisions also are unclear about the types of offenses a federal court may sanction under the admissions authority. A number of appellate courts have overruled punishment imposed by district judges for misconduct that occurred outside the district court's presence,[269] such as incivility or contentiousness in the course of discovery.[270] It is doubtful, however, that these courts meant to

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267. The key cases in which district courts have considered imposing, or attempted to impose, fines without statutory authority refer botb to the admissions authority and the inherent authority to regulate federal court proceedings discussed earlier in this Article. *See supra* text accompanying note 184. Ultimately, the courts seem to bave relied primarily on the inherent authority. *See, e.g.*, Zambrano v. City of Tustin, 885 F.2d 1473, 1484-85 (9th Cir. 1989) (overruling the imposition of monetary sanctions); Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 732-33 (3d Cir. 1962) (reversing a fine imposed by the district court).

Limiting federal court fining autbority may well be consistent with limits on the remedial powers of most state disciplinary agencies. Even many state courts disclaim the authority to fine lawyers as a means of discipline. *See generally* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, R. 10(A) (identifying as potential disciplinary sanctions, among others, disbarment, suspension, probation, reprimand, admonition restitution, and assessment of costs, but not imposition of a monetary fine). The federal decisions may simply reflect a perception on the part of tbe federal courts that their sanctioning authority is no greater than that of the state courts.

268. *See, e.g.*, Walker v. City of Mesquite, 129 F.3d 831, 832-33 (5th Cir. 1997) (noting the district court's deletion of public findings of misconduct against several attorneys and reversing the district court's order censuring one remaining attorney); *cf. In re* Prudential Ins. Co. Am. Sales Practices Litig., 63 F. Supp. 2d at 524 (upholding a requirement that the sanctioned attorneys reveal the sanctions in future applications for *pro hac vice* admission). There are, however, numerous judicial decisions criticizing lawyers for misconduct that arguably is not serious enough to merit more serious discipline. *See* United States v. Modica, 663 F.2d 1173, 1183 (2d Cir. 1981) (1982) (noting hopefully that public criticism of prosecutorial misconduct will cause prosecutors to change their behavior in future cases before courts find the need to reverse convictions because of the misconduct); MCMORROW & COQUILLETTE, *supra* note 19, § 807.01[5][a] (stating that "many courts have used a written reprimand, chastisement, or criticism in a published opinion as the first level punishment for attorney misconduct").

269. *See, e.g.*, Schlumberger Tecbs., Inc., v. Wiley, 113 F.3d 1553, 1560 (11th Cir. 1997) (distinguishing cases in which sanctions were imposed for in-court misconduct). In at least some of these cases, the out-of-court misconduct was not subject to sanction under the federal court's inherent authority to manage its proceedings. *See id.*

270. *See, e.g.*, Saldana v. Kmart Corp., 260 F.3d 228, 237-38 (3d Cir. 2001) (rejecting a district court's sanction for profanity towards other lawyers and abusiveness towards an expert witness). Some of tbe restrictive cases emphasize the availability of alternative sanctions or methods of regulating the misconduct in question. *See id.* at 238 ("'[G]enerally, a court's inherent power should be reserved for those cases in which the conduct of a party or an attorney is egregious and no other basis for sanctions exists. . . .'" (citing Martin v. Brown, 63 F.3d 1252, 1265 (3d Cir. 1995))). Independent district court authority to fine for pleading abuses, for example, seems unnecessary to protect the sanctity of courts when Rule 11 already provides similar protection. If the admissions authority is borne of practical necessity, its exercise seems

suggest that all misconduct outside federal proceedings is irrelevant to admissions issues. This view would flatly contradict Supreme Court decisions allowing the disbarment of federal lawyers for committing criminal acts unrelated to their professional work.[271] It also would be inconsistent with the myriad district court decisions suspending or disbarring lawyers for conduct outside federal proceedings.[272] The restrictive cases therefore are better explained by other factors.

The decisions may reflect a practical concern. Arguably, efficient allocation of judicial resources militates in favor of district courts confining themselves to adjudicating questions of professional misconduct that can be resolved without resort to an independent fact-finding mechanism.[273] Alternatively, the decisions may reflect skepticism about whether federal courts have authority to sanction misconduct that does not interfere with their ability to process litigation with the help of competent lawyers.[274] Or the decisions may grow out of a sense that the particular district court's sanctions were disproportionately harsh. Finally, they may be based on the view that misconduct not serious enough to be sanctioned by disqualification, suspension, or disbarment simply may not be sanctioned in less onerous ways under the admissions authority.[275]

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misguided to the extent that Congress or other rules already identify mechanisms that adequately deter misconduct.

271. *E.g.*, Theard v. United States, 354 U.S. 278, 279-80 (1957); *Ex parte* Wall, 107 U.S. 265, 271 (1882).

272. *See, e.g.*, *In re* Attorney Discipline Matter, 98 F.3d 1082 (8th Cir. 1996) (upholding reciprocal discipline of attorney for suborning perjury in state criminal case).

273. Such a limitation can be justified both by resort to practicality—federal courts have no administrative fact-finding resources available—and by reference to comity—respect for the state disciplinary mechanisms. However, the rationale may simply be that disciplinary hearings in the course of a lawsuit are a distraction for court, the parties, and the lawyers; while the individual district judge should refrain from judging the lawyer's conduct, a disciplinary arm of the district court may do so.

274. *See, e.g.*, *In re* Finkelstein, 901 F.2d. 1560, 1565 (11th Cir. 1990) (reversing the denial of admission on the basis of "reprehensible" conduct because a district court may not disqualify an attorney on the basis of some "transcendental code of conduct . . . that . . . existed only in the subjective opinion of the court"); Zambrano v. City of Tustin, 885 F.2d 1473, 1479-80 (9th Cir. 1989) (requiring that sanctions be limited to "mild sanctions" necessary to "control the district bar" because of a fear that authorizing all sanctions as being lesser-included aspects of suspension might turn a limited inherent power into dramatically expansive disciplinary authority); Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 731, 733 (3d Cir. 1962) (discussing federal courts' power to discipline attorneys under the "inherent authority" and noting that "The effort to concentrate all that frightening power in the bench is too dangerous a potential to let slip by clothed in such disarming language as 'simply . . . an exercise in disciplinary authority.' . . . All that 'exercise' happens to be is the first giant step in stripping a lawyer of his independence and leaving him, his client and the latter's cause of action to the ukase of the court.").

275. *Zambrano*, 885 F.2d at 1473, illustrates the federal courts' cautious approach toward the admissions authority and their uncertainty about the precise limitations of the authority.

### 2. Admissions Authority as a Basis for Establishing Standards of Conduct

If federal courts may deny admission to, or disbar, attorneys in order to ensure competent representation in federal proceedings, it follows that federal courts may identify specific future behavior which, if engaged in, would demonstrate a lawyer's incompetence or lack of fitness.[276] Arguably, federal courts should also be able to adopt prophylactic rules of conduct designed to achieve the purposes for which the courts have admissions authority.[277] This authority, however, cannot justify federal courts in adopting the full panoply of rules contained in the existing state codes of professional conduct

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Lawyers in the trial court participated in federal litigation without first seeking admission in the specific California district in which the litigation was located. *Id.* at 1474-75. The lawyers were members of two other California district court bars and apparently forgot to seek the additional license. *Id.* at 1475. The trial judge concluded that the failure to seek the proper admission meant that these lawyers were not "'any more qualified than an auto mechanic' to conduct a trial," dismissed the case in the middle of the proceedings, and imposed monetary and other sanctions on the lawyers. *Id.* at 1475-76.

The Court of Appeals referred both to theoretical limits on federal admissions power and to the practical benefits inherent in federal judicial self-restraint. The Court first noted that "[t]he power of the federal courts to sanction parties and counsel has been a subject of intense debate." *Id.* at 1477. It determined that the trial court had acted under local practice rules authorized by the Congress, but that "Congress . . . did not intend to permit the federal courts to arrogate unto themselves substantial powers over . . . members of the bar," instead limiting the courts to those sanctions necessary to "preserv[e] authority and control over the district bar." *Id.* at 1479. Although the Court recognized the authority of the district court to "set reasonable standards for admission, independent of the requirements established by coequal [state] courts," the Court reasoned that "as a practical matter, the application process for admission before the federal district courts is generally perfunctory and pro forma. Admission to the state bar is the essential determinant of professional ethics and legal competence. . . . [E]thical doubts are best resolved through state bar proceedings." *Id.* at 1483. Because there had been no showing that the lawyers had acted in bad faith, the Court of Appeals reversed the punishment imposed by the district court as exceeding both the court's statutory and inherent admissions authority. *Id.* at 1484-85.

276. *See* Note, *supra* note 233, at 977 & n.20 (noting "district courts which have promulgated substantive criteria for disbarment or suspension from practice").

277. *See In re* Abrams, 521 F.2d 1094, 1099 (3d Cir. 1975) (asserting the "unquestioned principle" that federal courts have "the power both to prescribe requirements for admission . . . before that court and to discipline attorneys who have been admitted to practice"). In other words, just as federal courts may adopt admissions criteria that indicate the lawyer's competence and fitness, they may condition ongoing membership in the federal bar on conformity with standards of conduct that promote competent, lawful representation. *See* Whitehouse v. United States Dist. Court for the Dist. of R. I., 53 F.3d 1349, 1356 (1st Cir. 1995) (holding that "the greater power of disbarring attorneys for unethical behavior necessarily includes the lesser power of erecting reasonable prophylactic rules to regulate perceived abuses by attorneys appearing before the court"). But, as noted earlier, one can make an argument based on *Theard* that the power to disbar for misconduct after-the-fact on an individualized basis does not imply the power to proscribe particular conduct categorically before-the-fact. *See supra* text accompanying notes 245-247.

because many of those rules serve values unrelated to the reasons for which admissions authority exists.

What kinds of district court rules of professional conduct does the admissions authority support? At most, the admissions authority can justify rules that focus on excluding from practice lawyers who are (1) incompetent, (2) unwilling or unable to follow the rules and procedures that are part and parcel of the federal adversarial legal system, or (3) of a character (e.g., dishonest or lawless) that would lead the lawyer to disregard professional obligations to the legal system, clients, or others.

Thus, for example, federal courts should be able to maintain regulation that forbids incompetent behavior. Such regulation might include rules requiring lawyers to meet filing deadlines, render legal services effectively[278] and diligently,[279] and carry out their clients' lawful objectives.[280]

The admissions theory probably also justifies rules directed at conduct that reflects a lack of the requisite "character" to practice law; for example, rules proscribing dishonest or unlawful behavior[281] and conduct that is otherwise unworthy of public or client trust.[282] Two different rationales support this type of regulation.[283] First, lawyers who lack moral character are less likely to abide by court requirements or to serve their clients' interests well and, in these failings, are likely to prove incompetent.[284] Second, a federal court's agreement to admit a lawyer implies a corresponding ability and willingness of the lawyer to respect the court and bring a sense of dignity to the court's proceedings.[285] By definition, lawyers who are lawless, dishonest, or untrustworthy will fail in this regard.[286]

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278. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.4 (1983).

279. *E.g.*, *id.* R. 1.3.

280. *E.g.*, *id.* R. 1.2.

281. *E.g.*, *id.* R. 8.4.

282. *Cf.* FED. R. APP. P. 46(b)(1)(B) (2002) (providing for suspension or disbarment from a federal court of appeals bar for "conduct unbecoming a member of the court's bar").

283. A third plausible rationale is a contractual theory. In others words, by accepting federal admission, lawyers agree to abide by court rules and accept the possibility of sanctions for violating the rules. Because this theory essentially is a tautology that would justify any regulation of lawyers however inappropriate, courts have disfavored it. *See* Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 607-09 (1990) (discussing the argument that lawyers give up their constitutional rights by agreeing to become members of the bar).

284. *See In re* Thalheim, 853 F.2d 383, 389 (5th Cir. 1988) (citing approvingly and enforcing a local district court rule providing that "[d]iscipline by way of suspension or disbarment shall not be imposed unless any such violation be of sufficient gravity as to evidence a lack of moral fitness for the practice of law").

285. *See* Whitehouse v. United States Dist. Court for the Dist. of R. I., 53 F.3d 1349, 1361 (1st Cir. 1995) (citing Theard v. United States, 354 U.S. 278, 281 (1957), for the proposition that

Many traditional ethics rules fit within the category of character rules. Some proscribe deceitful conduct.[287] Others proscribe knowing violations of court rules, rules of procedure, criminal law or other existing legal standards.[288] Still others forbid conduct toward clients that breaches the lawyer's fiduciary duties to clients and thus betrays the client's trust.[289]

Somewhat more difficult to justify under the admissions authority is the category of rules that *promote* effective representation generally, but which do not necessarily identify conduct that inherently disproves an offending lawyer's competence or fitness. For example, conflict of interest rules typically prohibit lawyers from taking on clients not only when a lawyer will invariably render inadequate representation, but also when the risk of incompetence or disloyalty is high.[290] Federal courts might be able to justify such rules under the admissions authority on the basis that they protect client interests and help maintain the aggressive advocacy necessary for the

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admission is a "privilege burdened with conditions"). There are several links between deceit and incompetent representation in the federal adversarial system. First, clients deceived by their lawyers are unlikely to cooperate with the lawyers further, rendering the lawyers less effective. Second, the clients are likely to demand new counsel when the deceit is discovered, which in turn will delay or otherwise affect the federal litigation in a negative way. Finally, lawyers who engage in deceit towards other lawyers or third parties involved in litigation may undermine the process of fact finding, discovery, negotiations, and settlement upon which the federal court depends.

286. One related justification might be that clients and observers of the legal system who learn that the lawyer is dishonest or a law breaker will (1) lose respect for the lawyer and therefore disregard his advice or instructions that they comply with the federal court's mandates, or (2) will lose respect for a federal legal system that employs lawyers of bad character, particularly as appointed counsel. While the lawyer's character itself might not prevent the lawyer from providing aggressive advocacy, its impact on other participants in the litigation system might undermine the federal adversarial process. Whether this rationale justifies regulation resting on the admissions authority probably depends on several, semi-empirical factors: whether clients and observers are likely to learn of the lawyer's transgressions, how likely they are to be affected in a way that affects the adversarial process, and how significant those effects will be.

287. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (1983) (prohibiting false statements and certain failures to disclose); *id.* R. 3.4(b) (prohibiting the falsifying of evidence); *id.* R. 4.1 (requiring "truthfulness in statements to others"); *id.* R. 8.4(c) (prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation").

288. *E.g.*, *id.* R. 3.4(a) (regulating interference with access to evidence); *id.* R. 3.4(c) (prohibiting knowing disobedience to "obligation[s] under the rules"); *id.* R. 3.4(d) (prohibiting delay and frivolous discovery requests); *id.* R. 3.5(a) (prohibiting attempts to influence decision makers unlawfully); *id.* R. 8.4(b) (forbidding "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness").

289. *E.g.*, *id.* R. 1.1 (requiring competent representation); *id.* R. 1.3 (requiring diligence); *id.* R. 1.6 (requiring the maintenance of client confidences).

290. *See* Green, *supra* note 149, at 104 ("Conflict rules avert these harms by forbidding the representation under circumstances giving rise to an unreasonably high risk that such harms will occur.").

operation of the federal system. But one could also argue that their nexus to assuring competence is too attenuated to be justified on this rationale.[291]

Would the admissions authority justify a district court's blanket adoption of federal rules forbidding *any* arguably wrongful conduct—for example, by incorporating a comprehensive ethics code based on the Model Rules of Professional Conduct or on a state code?[292] Perhaps the best justification for such regulation is the argument that the admissions authority implies an authority to discipline,[293] which in turn implies the authority to establish disciplinary rules. Both halves of the syllogism are questionable, however.

If one views disbarment as punishment,[294] there is some logic to the claim that the power to disbar implies the power to impose lesser punishments for misconduct in federal proceedings.[295] Arguably, however, disbarment is not punishment, but simply a regulator's ruling expressing doubts about a particular lawyer's qualifications for a license. Moreover, even if one accepts that federal courts possess disciplinary authority and that the applicable standards of conduct in federal proceedings are a matter of federal law, it does not logically follow that the courts, rather than Congress alone, have the power to establish the underlying rules of conduct.

There might be a different way to rationalize federal district court power to establish broad rules of professional conduct. We have already noted that a federal court may refuse admission to or disbar an attorney who has previously been suspended from practice in his

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291. Of course, the rules might be justifiable under one of the other authorities discussed elsewhere in this Article.

292. As noted earlier, many federal courts have adopted comprehensive ethics codes in this manner without specifying wbether they have invoked rule-making authority or some non-delegated autbority. *See supra* text accompanying notes 3-4.

293. Some federal courts seem to have acted on the belief tbat they possess disciplinary authority. *See, e.g., In re* Jacobs, 44 F.3d 84, 87 (2d Cir. 1994) ("A district court's authority to discipline attorneys admitted to appear before it is a well-recognized inherent power of the court."). This belief may underlie the occasional implementation of disciplinary mechanisms to resolve allegations of misconduct in federal litigation. *See* authorities cited *supra* note 232.

294. *See, e.g., In re* Ruffalo, 390 U.S. 544, 550 (1968) (stating, in dicta, that "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer").

295. Even if one accepts the notion that the power to suspend implies the power to impose lesser sanctions, the issue of what sanctions are lesser can be complex. For some lawyers, for example, a fine might be more onerous than suspension or disbarment—as in the situation in wbich a lawyer wbo is appearing *pro hac vice* has no intention of appearing in future cases before the particular court and has little invested in the case. Other lawyers, in contrast, would regard suspension or disbarment as far more onerous, both because it implies that the lawyer's misconduct was serious and because other jurisdictions might rely on the suspension or disbarment as the basis for imposing a similar sanction.

home state, regardless of whether the lawyer's predicate misconduct reflected a lack of competence.[296] Arguably, this highlights a power of federal courts to rely on non-competence-based rules, and therefore authorizes them to craft such rules themselves.

The problem with the argument is that it is circular. It would justify any district court rule that a state could also adopt, simply because of a federal court practice of deference that is based largely on convenience.[297] Moreover, it seems contrary to the *Theard* premise that federal and state authority is separate in nature.[298]

In sum, it seems doubtful that the admissions authority allows federal courts to adopt comprehensive ethics codes. At best, the admissions authority can be invoked either to forbid conduct that casts doubt on a lawyer's competence or fitness to practice or to establish standards of conduct designed to promote competent representation within the federal adversarial scheme of litigation.

Various traditional ethics rules governing lawyer advocacy fall close to the line separating proper exercises of the admissions authority from improper attempts. For example, some federal courts have adopted rules that forbid federal lawyers from communicating with represented persons concerning the subject of the representation.[299] Several rationales have been offered for no-communication rules.[300] One of these—that the forbidden conduct interferes with the represented person's interest in receiving the benefit of his lawyer's competent representation[301]—does relate to the court's interest in maintaining competent representation in federal

296. *See supra* text accompanying notes 248-250. Some rules that state disciplinary agencies enforce are designed to assure competence, but others focus more on such goals as maintaining the image of the bar. *See generally* Zacharias, *supra* note 116, at 225-39 (discussing the various functions of professional rules).

297. *See supra* text accompanying note 88.

298. A final, equally circular argument is that federal courts may discipline lawyers for violating rules of professional conduct that the courts set because the violations demonstrate an unwillingness of the lawyers to follow judicial mandates, and thus shows them to be unfit to practice. Again, it stands to reason that lawyers should only need to abide by the rules that are lawfully adopted. They should be able to challenge the application of those rules that are *ultra vires*.

299. *See, e.g.*, United States v. Lopez, 4 F.3d 1455, 1458 (9th Cir. 1993) (noting that local district court rule adopted California's no-communication rule); United States v. Hammad, 858 F.2d 834, 841 (2d Cir. 1988) (suppressing conversation obtained by prosecutor from represented person); *cf.* United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir. 1981) (upholding a no-communication rule, but finding it was not violated).

300. These rationales are all described in STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEM OF LAW AND ETHICS 110 (6th ed. 2002).

301. *See, e.g.*, Papanicolaou v. Chase Manhattan Bank, N.A., 720 F. Supp. 1080, 1084 (S.D.N.Y. 1989) (stating that the no-communication rule "preserves the integrity of the attorney-client relationship.").

litigation and, concomitantly, the ability of clients to trust and use their attorneys.[302] If adopted with this purpose in mind, a no-communication rule can be justified by resort to the admissions authority. Other rationales for no-communication rules, however, have less to do with assuring competent lawyers or the integrity of federal litigation.[303]

It also is important to note that some ethics rules that could not be adopted under the admissions authority might legitimately be adopted under the federal courts' separate inherent authority to manage federal litigation.[304] For example, a rule restricting trial publicity is difficult to justify on the admissions theory that it promotes competent representation or ensures trustworthy or law-abiding counsel. Indeed, the rule furthers the courts' interests even at the possible expense of the client's interest in optimal representation.[305] Nevertheless, trial publicity regulation can be justified under the inherent authority as being necessary to protect the integrity of judicial proceedings.

Many traditional state ethics rules, however, are unsupportable under either theory of federal judicial authority. Legal advertising rules, for example, traditionally have sought to preserve

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302. One aspect of this theory is that the lawyer may, through derogatory comments, undermine the represented party's faith in his own lawyer. Another is simply that the client may give up certain rights or positions that his lawyer could use to his benefit.

303. In part, the no-communication rules prevent represented persons from making unwise decisions to provide information to opposing counsel or to surrender legal rights—decisions that their lawyers would discourage if they were present. *See, e.g.*, *Papanicolaou*, 720 F. Supp. at 1084 & n.7 (noting that the no-communication rule protects clients from being disadvantaged by opposing lawyer in contexts where a client would benefit from his or her lawyer's advice or assistance). From a federal court's perspective, it may actually benefit the federal truth-seeking process to have represented witnesses (or even defendants) provide information that their lawyers could help hide. The federal court that uses the admissions authority for the purpose of protecting clients from making such unwise decisions thus would need to establish separately that direct communications with the represented person say something about the offending lawyer's character that truly is relevant to the reasons why a lawyer should not be allowed to practice in federal court. *See* Grievance Comm. for the S. Dist. of N.Y. v. Simels, 48 F.3d 640, 651 (2d Cir. 1995) (noting that a no-communication rule "raises policy issues that should be resolved against the backdrop of federal law enforcement concerns," and Congress or the Supreme Court, rather than a district court, should evaluate the balance between the represented person's interests and those of the defendant).

304. *See supra* Part V.B. The reverse, of course, may also be true.

305. In other words, effective representation may entail making statements to the media that influence public opinion favorably to the defendant but that risk tainting the jury pool and thereby undermine the judicial interest in maintaining the integrity of the proceedings. *See, e.g.*, *In re* Grand Jury Subpoenas dated March 24, 2003, 265 F. Supp. 2d 321, 326-28 (S.D.N.Y. 2003) (recognizing the importance of influencing public opinion as an aspect of a criminal defense).

the dignity of the legal profession,[306] a goal which has little to do with competence or the integrity of judicial proceedings. Similarly, although some rules governing attorney's fees are directed at dishonest or illegal conduct,[307] many attorney fee regulations are based on a desire to maintain the profession's image and to enable the guild as a whole to maintain a stable, relatively high fee structure free from public oversight.[308] These rules might conceivably be adopted under some other rationale, but not under the admissions or inherent authorities.[309]

When federal courts adopt such rules by incorporating state standards or the ABA model code in its entirety, the courts may be implementing policy decisions that have little to do with the authorities upon which they rely. Federal court rules that track state ethics rules, for example, certainly reinforce state authority to control professional misconduct. Nevertheless, for our purposes, it is fair to conclude that federal court power to adopt comprehensive ethics codes simply because states have done so is not a natural or inevitable corollary to the courts' basic ability to regulate who may appear before them.

### *D. Federal Court Authority To Regulate Federal Lawyers' Professional Conduct*

The previous sections identified two possible sources of federal judicial authority to set standards of lawyer conduct: inherent

306. For a history of advertising regulations, see the authorities cited in Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 974-75 nn.8-13 (2002).

307. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5(d) (1983) (prohibiting the use of contingency fees in particular cases because of the risk of too great a conflict between the lawyer's interest and the client's); *id.* R. 1.15(a)-(b) (requiring client funds to be held in separate accounts and regulating how lawyers may take their fees).

308. *E.g.*, *id.* R. 1.5(a) (requiring fees to be "reasonable," not simply what the market will bear); R. 1.5 cmt. (requiring lawyers "to offer the client alternative bases for the fee").

309. For example, federal courts overseeing contingent fee arrangements appear to do so based on a broad regulatory authority like that described in Part V.D, *infra*. *See, e.g.*, Mitzel v. Westinghouse Elec. Co., 72 F.3d 414, 417 (3d Cir. 1995) (upholding federal district court's incorporation and application of state court contingency fee rule, and noting that "'contingency fee agreements are of special concern to the courts,' . . . and fall within a court's 'supervisory powers over the members of its bar'" (citations omitted)); Schlesinger v. Teitelbaum, 475 F.2d 137, 141-42 (3d Cir. 1973) (upholding district court local rule authorizing district court to establish a contingent fee schedule for use in personal injury actions involving seamen, pursuant to district court rule-making authority "and the inherent power of such courts to take appropriate action to secure the just and prompt disposition of cases," and noting that "in its supervisory power over the members of the bar, a court has jurisdiction of certain activities of such members, including the charges of contingent fees").

authority to regulate federal proceedings and the authority to admit and disbar lawyers. A third possible theory is simply that federal courts have the same independent authority to regulate lawyers that state courts possess.[310] In other words, they have an intrinsic power not only to admit, disbar, and sanction lawyers, but also to set standards governing professional conduct in general.

When discussing federal court regulatory authority generally, the courts have been less than careful in identifying which sources of authority they have relied upon. The courts sometimes have discussed the inherent and admissions authorities in the same case.[311] When they seem to have implemented a broader authority, they at times have used the term "inherent authority" to refer to more than the limited power that the Supreme Court has clearly recognized.[312] Similarly, the term "supervisory power" alternately has meant supervisory power over the criminal justice system,[313] supervisory power over federal litigation,[314] and supervisory authority over

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310. *See* MCMORROW & COQUILLETTE, *supra* note 19, § 806.01[2] (citing Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991), for the proposition that federal courts "have the inherent power to discipline attorneys. Court authority is rooted in the policy that attorneys are officers of the courts, and as such, the courts necessarily are vested with the authority to control attorney conduct in order to ensure the proper administration of justice."); *id.* § 807.01 (asserting that "this inherent power to control the conduct of hoth litigants and attorneys is quite flexible and 'staggeringly broad'").

311. *See supra* note 267.

312. *See, e.g., In re* First City Bancorporation of Texas, Inc., 282 F.3d 864, 867 (5th Cir. 2002) (upholding as a proper exercise of a bankruptcy court's "inherent power to impose sanctions" the imposition of a $25,000 fine for a lawyer's "obnoxious" and "uncivil" behavior); Comuso v. Nat'l R.R. Passenger Corp., 267 F.3d 331, 333, 339-40 (3d Cir. 2001) (upholding a district court's award of fees and costs, pursuant to its "inherent power to discipline attorneys appearing before it," as sanction for lawyer's "outrageous conduct" in litigation, including profane behavior during court recess and other out-of-court misbehavior); *In re* Bailey, 182 F.3d 860, 864 (Fed. Cir. 1999) ("[R]egulation of attorney behavior is an inherent power of any court of law and falls within the discretion of such court."); Mroz v. Mroz, 65 F.3d 1567, 1575 (11th Cir. 1995) (citing *Chambers,* 501 U.S. at 46, for the proposition that "the inherent power extends to a full range of litigation abuses"); Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 888 (5th Cir. 1968) (stating that the "inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it"); *cf.* Stern v. United States Dist. Court for the Dist. of Mass., 214 F.3d 4, 13 (1st Cir. 2000) ("[D]istrict courts have inherent power arising from the nature of the judicial process, and this power extends to certain types of rulemaking."); Zambrano v. City of Tustin, 885 F.2d 1473, 1479-80 (9th Cir. 1989) (rejecting the district court's view that the admissions and inherent authority permit district courts to impose a broad range of sanctions for a broad range of attorney misconduct).

313. *See, e.g.*, United States v. Gatto, 763 F.2d 1040, 1045 (9th Cir. 1985) (referring to "supervisory authority" to describe court's "authority to formulate procedural rules in its administration of criminal justice").

314. *See, e.g.*, United States v. Rhynes, 206 F.3d 349, 369 (4th Cir. 1999) ("[A] district court's supervisory authority over the conduct of a trial" permits it to take "measures to prevent the tailoring and fahrication of witness testimony, such as prohibiting witnesses from discussing the

lawyers generally.[315] The following section will employ the universal term "federal court authority to regulate lawyers' professional conduct" to refer to the type of broad general ethics authority that federal courts seem occasionally to have implemented under different labels.[316]

Once again, language in *Theard v. United States*[317] provides the starting point for the argument in favor of broad regulatory power. *Theard* equates the federal courts' authority with that of the state courts: "The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom . . . lawyers are included."[318] The First Circuit Court of Appeals has cited *Theard* as confirmation of federal courts' general authority to establish standards governing federal litigators' conduct.[319] Other courts, however, have assumed that

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case with one another, from discussing the case with any attorney, and from reading transcripts of the trial testimony of other witnesses.").

315. *See, e.g., In re* Kramer, 193 F.3d 1131, 1132 (9th Cir. 1999) ("There is little question but that district courts have the authority to supervise and discipline the conduct of attorneys who appear before them."); United States v. Ming He, 1996 U.S. App. LEXIS 28744, at *29 (2d Cir. 1996) (forbidding prosecutors from debriefing cooperating defendants without their lawyers present, and explaining: "we are enforcing our general supervisory authority over members of the bar of this Court, lawyers who are at the same time United States attorneys"); Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1383 (10th Cir. 1994) ("It is well-established that ordinarily 'the control of attorneys' conduct in trial litigation is within the supervisory powers of the trial judge,' and is thus a matter of judicial discretion."); O'Connor v. Jones, 946 F.2d 1395, 1399 (8th Cir. 1991) ("We note and confirm that a federal district court has the authority to supervise attorneys practicing before it."); Kevlik v. Goldstein, 724 F.2d 844, 847 (1st Cir. 1984) (reviewing disqualification order and starting "with the generally accepted rule that the district court has the duty and responsibility of supervising the conduct of attorneys who appear before it"); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385 (3d Cir. 1972) ("Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar.").

316. *Cf.* Kelly J. Applegate, G. Heilemen Brewing v. Joseph Oat Corp.: *The Use of Inherent Judicial Power Within the Limitations of the Federal Rules of Civil Procedure*, 17 J. CONTEMP. L. 159, 165-69 (1991) (analyzing whether inherent authority supports requirements that parties to federal litigation submit to alternative dispute resolution); Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805 (1995) (arguing in favor of a broad inherent authority to manage federal cases).

317. 354 U.S. 278 (1957).

318. *Id.* at 281.

319. *See, e.g.*, Whitehouse v. United States Dist. Court for the Dist. of R.I., 53 F.3d 1349, 1359-60 (1st Cir. 1995) ("In contrast [to the supervisory power], the power of a court to regulate the conduct of attorneys appearing before it derives not from a need to remedy or deter violations of defendants' rights, but from the professional relationship between the court and attorneys appearing before it."); *id.* at 1364 (citing *Theard* for the proposition that federal district courts have "inherent power . . . to promulgate and enforce" rules of professional conduct); *see also* United States v. Springer, 460 F.2d 1344, 1354 (7th Cir. 1972); Woodson v. Am. Cystoscope Co. of Pelham, 335 F.2d 551, 557 (5th Cir. 1964) (stating that federal courts "may resort to disciplinary action against [an] erring attorney"); *In re* Olkon, 605 F.Supp. 784, 789 (D.Minn. 1985)

*Theard*'s language applies only to the admissions power and have suggested that the federal and state judiciaries do not have the same interests in regulating lawyers more generally.[320]

Even under the *Theard* rationale, jurisdictional considerations would probably limit the broad regulatory authority. The differences between federal and state interests[321] and differences in the nature and volume of matters that the two court systems oversee[322] imply logical restrictions on the type of conduct that federal courts can regulate. A state license to practice law, for example, authorizes a lawyer to render all legal services in the state. Because most states, through their constitutions or otherwise, have delegated the role of supervising lawyers to the judiciary, state courts must regulate the full range of lawyers' professional conduct—including relations with clients and prospective clients, work in business transactions, and the rendering of advice outside the litigation context.

In contrast, when federal courts admit lawyers, the lawyers are admitted for the sole purpose of appearing in federal litigation. Even assuming that the federal courts' authority is analogous to that of state courts, the setting suggests a substantive limitation: federal judicial standards of conduct apply only to lawyers' work in or relating to federal court proceedings and, therefore, should relate in some way to the work of federal trial lawyers.[323]

Accordingly, federal courts should not be able to adopt rules of professional conduct unrelated to federal court interests. Beyond that

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(justifying the application of the ABA Model Code of Professional Responsibility to federal court proceedings on the basis of "our general supervisory authority to regulate attorneys appearing before this court"), *rev'd on other grounds*, 758 F.2d 1362 (10th Cir. 1985); *cf. In re* Sarelas, 360 F. Supp. 794, 801 (N.D. Ill. 1973) (asserting authority to suspend an attorney who "demonstrate[s] a gross failure of professional judgment and character").

320. *See, e.g., In re* Olkon, 605 F. Supp. at 792 ("[C]ourts of limited jurisdiction have a slightly different concern in maintaining discipline than a state bar authorizing the general practice of law. . . ."); *In re* Mattox, 567 F. Supp. 415, 417 (D. Colo. 1983) (noting the state courts' interest in protecting "the rights of members of its bar to sustain its livelihood"), *rev'd on other grounds*, 758 F.2d 1362 (10th Cir. 1985).

321. State courts, in addition to assuring competence, may be interested in safeguarding the image and reputation of the bar and the ability of lawyers to earn a living, in preventing competition by nonlawyers, and in safeguarding other interests that have nothing to do with maintaining competent lawyering in litigation before them.

322. *See In re* Mattox, 567 F. Supp. at 417 (arguing that the "demands of the federal practice, the volume of documents and case files confronting each judge and the vicissitudes and complexity of federal litigation" specially justify federal regulation to ensure "the trustworthiness and honor of the [federal] bar").

323. This suggests that, under any theory, federal courts may not establish rules of ethics that have no bearing on lawyers' federal litigation activities, such as a rule restricting the sale of a law practice. *Cf.* Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1131 (9th Cir. 1995) (holding that a federal court may regulate misconduct by a lawyer who has not appeared in federal litigation, but who nevertheless has affected federal proceedings).

limitation, however, the *Theard* theory is expansive.[324] It would allow federal courts to adopt standards that promote any of the purposes that traditionally justify ethics rules, including the protection of clients, court processes, and third parties. In all likelihood, it would permit federal courts to adopt most of the existing state ethics provisions that have relevance to federal litigation.[325]

Do federal courts actually have this broad regulatory authority? The best argument in favor of it is historical. Common law courts have always set standards of professional conduct for lawyers in proceedings before them. As a consequence, federal courts never have doubted their authority to regulate federal litigators, including the power to define misconduct in federal proceedings. They have set standards implicitly by sanctioning, disqualifying, or disbarring lawyers and have set standards explicitly by adopting local rules of professional conduct and by making pronouncements about how lawyers before them must behave in the future. These courts, in most cases, have not needed to identify the basis for their actions.[326]

A second argument supporting broad regulatory authority is one of necessity.[327] If federal courts cannot regulate federal litigators' professional conduct, aspects of that conduct that traditionally have been subject to professional regulation may become immune from supervision by any body. Federalism concerns arguably prevent state

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324. For constitutional reasons, the broad regulatory authority would have one limit shared by all forms of non-delegated authority: it may not be exercised arbitrarily. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998) ("We have emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government,' whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." (citations omitted)). Due process has been held to foreclose arbitrary decision making by courts as well as administrative agencies. Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994) (noting that when "absent common-law procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process").

325. Standards of prosecutorial conduct, like the one at issue in *Williams*, might be among the hardest to justify under this theory, because they are not applicable to all lawyers. They seem less like rules of ethics designed to regulate the conduct of the bar than like rules of procedure designed to regulate the government in criminal cases.

326. For example, in *Wheat v. United States*, 486 U.S. 153 (1988), the Court held that trial courts have power in criminal cases to disqualify criminal defense lawyers who have conflicts of interest and identified various judicial interests that justified their exercise of this power, but did not explicitly identify the source of the trial courts' power. For commentary on the decision, see Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201 (1989). Often, obvious justifications exist. In the rule-making situations, for example, many local rules could be defended by resort to congressionally delegated rule-making authority.

327. *Cf.* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) (noting that federal courts possess those inherent powers which "are necessary to the exercise of all others").

rules of professional conduct from applying to federal litigation unless the rules are incorporated by federal action.[328] Government attorneys, including federal prosecutors, may claim that their federal status preempts state regulation of them.[329] Even if state regulation were deemed to apply in federal court, not all federal litigators are subject to the same state's rules, which would potentially lead to an uneven playing field for opposing litigators.[330]

Congress, of course, could adopt federal rules of professional conduct.[331] Arguably, however, federal courts are in a better position to regulate lawyers, since they have the expertise borne from experience overseeing federal litigation.[332] Moreover, the judges before whom the conduct in question occurs are in the best position to judge the impact of that conduct on the court's proceedings.[333]

On the other hand, the source of this broad authority to establish standards governing all professional conduct in federal proceedings is unclear. Federal courts traditionally have been

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328. Grievance Comm. for the S. Dist. of N.Y. v. Simels, 48 F.3d 640, 645 (2d Cir. 1995) (noting that even when the federal court chooses to apply state standards of professional conduct to the work of lawyers in federal court, "well-established principles of federalism require that federal courts not be bound by . . . the interpretations of state courts"); *see also* Rand v. Monsanto Co., 926 F.2d 596, 600 (7th Cir. 1991) (refusing to apply state ethics rule on champerty). Application of state rules to federal proceedings was a consequence of the McDade Amendment. *See supra* note 15. However, serious efforts to repeal the McDade Amendment have been attempted since its adoption. *See, e.g.*, S. 250, 106th Cong. (1999); H.R. 2296, 105th Cong. (1998); *see also* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 832 n.331 (2003) (noting unsuccessful efforts of Justice Department to repeal the McDade Amendment as part of proposed anti-terrorist legislation); *cf.* Paula J. Casey, *Regulating Federal Prosecutors: Why McDade Should Be Repealed*, 19 GA. ST. U. L. REV. 395, 423 (2002) (arguing that the McDade amendment should be repealed because it "leaves the federal government unable to respond to the needs of law enforcement and to national emergencies").

329. *See* Little, *supra* note 11, at 392 (discussing the Thornburgh Memorandum and the potential inapplicability of state rules of professional conduct in federal proceedings, particularly with respect to federal prosecutors).

330. Green & Zacharias, *supra* note 5, at 392. Indeed, in theory, federal litigators do not have to be licensed by any state. Nor does a state court have to apply its ethics rules to a lawyer's conduct in federal proceedings. Under the choice of law principles in Model Rule 8.5, disciplinary proceedings involving alleged misconduct by a lawyer in federal court would therefore be resolved using the disciplinary rules applicable in the federal court. MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(1) (1983) ("[T]he rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise.").

331. Zacharias, *supra* note 143, at 337.

332. *See* Whitehouse v. United States Dist. Court for the Dist. of R.I., 53 F.3d 1349, 1361 (1st Cir. 1995) (justifying a federal court rule governing attorney subpoenas on the basis that "[t]he judges of the federal district court in Rhode Island are in a position to observe the subpoena practices of attorneys appearing before them"); *see also* Green & Zacharias, *supra* note 5, at 425-34 (discussing the expertise of federal courts).

333. *See* Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964) ("When an attorney appears before a federal court, he is acting as an officer of that court, and it is that court which must judge his conduct.").

characterized as courts of limited jurisdiction, which may act only in cases and on subject matters authorized by the Constitution and Congress.[334] Federal courts can justify the limited inherent and admissions powers discussed earlier on the basis that their exercise is necessary to enable the courts to operate in the matters prescribed by the Constitution and Congress. No similar justification exists for exercising undifferentiated ethics authority. Similarly, judicial adoption of professional standards that go beyond protecting court processes is a form of lawmaking.[335] Article III may require legislative authorization before federal courts can engage in that type of activity.[336] Arguably, judicial lawmaking is *ultra vires* even with congressional approval.[337]

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334. *See, e.g.*, Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 739 (2001) (questioning "judicial invocation of [broad] inherent power" as "clash[ing] with three principles of constitutional structure that the Court has long endorsed"); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1004-05 (1965) (discussing the Article III grant of power to Congress to set the jurisdiction of the federal courts).

335. *Cf.* Prentis v. Atl. Coast Line Co., 211 U.S. 210, 226 (1908) (Holmes, J.) ("A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.").

336. *See, e.g.*, Pushaw, *supra* note 334, at 739 ("The Court has never explained how the Constitution simultaneously limits federal courts (especially as compared to Congress), yet authorizes them to exercise broad and virtually unreviewable inherent authority."); *see also* Grievance Comm. for the S. Dist. of N.Y. v. Simels, 48 F.3d 640, 651 (2d Cir. 1995) (noting that some policy choices "should be made either hy Congress or the Supreme Court, and not by district courts' expansive interpretations of disciplinary rules"); *cf.* Marek v. Chesny, 473 U.S. 1, 15 (1985) (Brennan, J., dissenting) (arguing that court's attorneys fee rule "violates the most basic limitations on our rulemaking authority as set forth in the Rules Enabling Act"); United States v. Williams, 691 F. Supp. 36, 51 (M.D. Tenn. 1988) (noting that the Federal Rules of Civil Procedure "have been upheld on the ground that they are procedural, not substantive, in nature." (quoting Rules Enabling Act of 1934, 28 U.S.C. § 2072)).

337. Generally, federal courts are constitutionally foreclosed from making decisions in contexts other than deciding cases and controversies—a proposition that casts doubt on their power to set standards by rule. *See* U.S. CONST. art. III, § 2 (estahlishing the case and controversy requirement); Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 584 (1947) (explaining the advisory opinion doctrine on the basis of the dangers in judicial decision making in the absence of a concrete case). On the one hand, this limitation has been set to the side in the context of federal rules adopted pursuant to the Rules Enabling Act. The justifications for judicial adoption of those rules may apply to rules of professional conduct as well. *See* MCMORROW & COQUILLETTE, *supra* note 19, §§ 801.01, 801.03 (discussing the use of delegated rule-making power to justify federal judicial rules of professional conduct). Two important caveats bear mention, however. First, there may be a meaningful distinction between allowing courts to adopt rules of procedure and evidence and adopting substantive law standards. Second, in adopting rules pursuant to the Rules Enabling Act, federal courts arguably are exercising Congress's functions by delegation, rather than their own, limited Article III authority. The exercise of delegated authority may not provide support for deeming rule-making activities legitimate under the courts' independent Article III powers.

In discussing the recognized federal judicial regulatory powers, a number of courts have also expressed practical concerns about the prospect of broad federal court ethics authority. At one level, they have worried about creating a system in which federal judges assume traditional state functions in regulating and disciplining lawyers. This concern is borne out of a sense of tradition and comity.[338]

At a second level, the courts' qualms illustrate a fear that federal judges exercising broad regulatory authority would be assuming functions which they have neither expertise, information, nor the resources to fulfill,[339] and which may entrench unduly on the independence and aggressiveness of federal advocates.[340] As we have noted, a few federal districts have taken it upon themselves to implement procedures for enforcing ethics standards[341] but, for the most part, federal courts rely on state disciplinary mechanisms.[342] To the extent federal courts assume the function of establishing

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338. *See* Schlumberger Techs., Inc., v. Wiley, 113 F.3d 1553, 1554 (11th Cir. 1997) (limiting district court discretion to sanction "unlawyerlike conduct" as "too broad and, consequently, susceptible to abuse"); *In re* Evans, 524 F.2d 1004, 1007 (5th Cir. 1975) ("Admission to a state bar creates a presumption of good moral character that cannot be overcome merely by the whims of the District Court."). Thus, numerous courts have noted the benefits of "symmetry" in federal and state decisions regarding lawyer conduct. *E.g., In re* Braverman, 549 F.2d 913, 914 (4th Cir. 1976); *In re* Olkon, 605 F. Supp. 784, 792 (D. Minn. 1985); *see also In re* Abrams, 521 F.2d 1094, 1099 (3d Cir. 1975) (reversing a district court disciplinary decision that imposed a penalty greater than that imposed in state proceedings); *id.* at 1106 (Rosenn, J., concurring) ("Unless an exceptional reason . . . justifies . . . disparate treatment, its effect will . . . render a grave disservice to the public."). As a practical matter, federal courts have achieved this symmetry by deferring to state agencies on matters of admission and discipline.

339. *See, e.g.,* Zambrano v. City of Tustin, 885 F.2d 1473, 1483 (9th Cir. 1989) (emphasizing the primacy of state admission and disciplinary mechanisms); *In re* Abrams, 385 F. Supp. 1210, 1212-15 (D.N.J. 1974) (Cohen, J., dissenting) (focusing on both "comity" and practical constraints to justify a rule of deference to state disciplinary decisions in the absence of exceptional circumstances), *rev'd,* 521 F.2d 1094 (3d Cir. 1975). In other words, states maintain entire agencies through which they develop files on lawyers, investigate misconduct, and process allegations of misconduct.

340. *See, e.g.,* Gamble v. Pope, 307 F.2d 729, 733 (3rd Cir. 1962) (arguing that the exercise of disciplinary authority "is the first giant step in stripping a lawyer of his independence and leaving him, his client, and the latter's cause of action to the ukase of the court"); Petition of Merry Queen Transfer Co., 269 F. Supp. 812, 813 (E.D.N.Y. 1967) (stating that the federal court "should normally not depart from state practice respecting professional proprieties" because that "would create unnecessary tension for lawyers").

341. *See supra* note 232 and accompanying text; *see also In re* Landerman, 7 F. Supp. 2d 1202, 1204 (D. Utah 1998) (referring a disciplinary matter "to the Committee of Conduct for attorneys of this court for further proceeding under the rules of this court").

342. *See, e.g., In re* Isserman, 345 U.S. 286, 287 (1959) (noting that the federal courts do "not conduct independent examinations for admission to the bar. To do so would be to duplicate needlessly the machinery established by the states whose function it has traditionally been to determine who shall stand to the bar."); *see also* MCMORROW & COQUILLETTE, *supra* note 19, § 806.01 (asserting that federal courts "have both statutory and inherent power to discipline attorneys").

standards, pressure may develop for them to enforce those standards as well.[343]

*Theard* alone does not resolve the issue of whether broad federal court power to regulate federal lawyers' professional conduct exists. *Williams* provided the Supreme Court with its best opportunity to date to put the question to rest, but the Court failed to seize the opportunity. The tendency of lower federal courts to speak of the various types and levels of federal judicial authority as if they were the same has only served to confuse the issue further.

## VI. CONCLUSION: *WILLIAMS*, INDEPENDENT REGULATORY AUTHORITY, AND THEIR RAMIFICATIONS

Earlier, this Article raised the question of whether the district court in *Williams* could have justified its grand jury disclosure requirement on some basis other than the supervisory authority over the criminal justice system that the Tenth Circuit relied upon. The Article also posited that the resolution of that question might vary, depending on whether the district court implemented the disclosure requirement through case-by-case decision making or by a rule resting on authority not delegated by Congress. Part V has set forth three possible sources of non-delegated federal judicial regulatory authority, along with their potential limitations.

The *Williams* Court did not address these sources of authority directly. But if one interprets the decision either as being confined to its facts[344] or as implementing a narrow holding concerning the supervisory power over the criminal justice system,[345] *Williams* leaves open the possibility of alternative district court approaches, including rule making not specifically authorized by Congress. While several of the other interpretations of *Williams* suggest limitations on judicial regulatory power that may refer to specific alternative sources of authority, the reality is that we cannot know what the Supreme Court had in mind—if, indeed, the Justices agreed on any approach. If *Williams* demonstrates nothing else, it is that the issues remain very much open to debate.

The outcome in *Williams* is subject to the many interpretations that this Article has identified precisely because the scope of federal

343. *See* Green & Zacharias, *supra* note 5, at 434 (discussing the pressures towards federal enforcement of federal ethics standards); Fred C. Zacharias, *Reform or Professional Responsibility as Usual: Whither the Institutions of Regulation and Discipline?*, 2003 U. ILL. L. REV. (forthcoming Dec. 2003) (discussing the future of professional discipline).

344. *See supra* notes 69-73 and accompanying text.

345. *See supra* text accompanying notes 90-95.

judicial authority to regulate federal lawyers *is* so uncertain. In recent years, much of the legal wrangling has involved the regulation of prosecutorial ethics, not only in the grand jury context as in *Williams*, but in many other contexts as well.[346] Nevertheless, the potential impact of the alternative sources of regulatory authority reaches well beyond the prosecutorial ethics realm. The core issue of whether federal courts may adopt comprehensive ethics codes, for example, has never been resolved. If federal judicial regulatory authority over lawyers is rooted in the inherent authority to regulate court processes or in the admissions power, comprehensive local ethics codes probably go too far. They can only be justified—and then only partly—if federal courts have the broad, undefined "independent power to regulate federal lawyers" that this Article has discussed.[347]

Likewise, if the various alternative sources of authority justify some kinds of ethics rules but not others, that too has significant ramifications. On the one hand, it supports federal court attention to those specific subject matters. On the other hand, it may militate in favor of congressional action, in one of two ways. First, if the legitimate focus of the courts is limited, perhaps Congress should turn its own attention to those aspects of lawyers' conduct that federal courts have no business regulating and adopt its own preemptive rules. Second, and conversely, to the extent that broader federal judicial attention to professional conduct is appropriate, the existing limitations on federal judicial authority suggest the need for congressional authorization of judicial standards. The current congressional mandate that federal courts apply state ethics codes to federal prosecutors has limitations[348] that might well be avoided through well-crafted, congressionally guided judicial rule making.[349]

Whether federal courts attempt to set professional standards through local rules or through pronouncements regarding appropriate conduct in individual decisions, the scope of their authority remains uncertain. The nub of the uncertainty is that federal courts typically have adopted rules of professional conduct (either incorporating state codes or formulating their own) on the assumption that their rule-making authority authorizes them to do so. In individual cases like *Williams,* courts similarly have announced standards of conduct on the assumption that their discretion is unfettered.

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346. *See generally* Green & Zacharias, *supra* note 5, at 384.

347. *See supra* Part V.D.

348. *See* Zacharias & Green, *supra* note 6, at 215-24 (criticizing the McDade Amendment).

349. *See* Green & Zacharias, *supra* note 5, at 473-74 (encouraging congressional authorization of judicial rule making on legal ethics matters).

Why have there been so few challenges to these exercises of authority? One explanation may be that the rules are not enforced, except perhaps in those limited situations in which the judicial power is at its height.[350] Another explanation may be a sense by affected practitioners that any legal challenge would be handicapped by the reality that the deciding court will be the same as the initial rule maker, and that this court will also be the decision maker in the underlying case in which the standard of conduct is applied. This explanation finds support in the fact that most recent challenges to judicial regulatory authority have been brought by the government, which is less likely to fear individual courts than private litigants. Even in those cases, the government has sometimes surrendered rather than appealing to the highest levels.[351]

Whatever the reasons, challenges may yet be brought, with dramatic ramifications if they succeed. Surprisingly, the strongest proponents of broad federal judicial rule making seem to take the position that if federal courts may not adopt particular rules of conduct under the general rule-making authority, they may not do so using alternative means.[352] This Article's analysis calls that conclusion into question.

And what is the precedential value of *Williams*? By being unclear about the basis for the *Williams* decision, the Justices in the majority accomplished several things. At the simplest level, the Court avoided serious analysis of the hard issues we have discussed. The Justices may have sought this result because the parties and lower courts failed to raise the issues adequately or to eliminate the district

350. Thus, for example, we find no cases involving federal judicial enforcement of legal advertising rules, but do find cases involving the application of no-communications rules against prosecutors in situations in which courts can claim their regulatory authority derives from the recognized supervisory power over the criminal justice system. *See, e.g.*, United States v. Hammad, 858 F.2d 834, 841 (2d Cir. 1988).

351. An interesting recent example is *United States v. Sanchez*, 2003 U.S. Dist. LEXIS 7636 (S.D.N.Y. May 6, 2003), *withdrawn as moot by* 2003 U.S. Dist. LEXIS 9726 (S.D.N.Y. May 9, 2003). In that case, the prosecutor received and opened a letter sent to him by a represented defendant awaiting trial on narcotics charges. *Id.* at *2. The defense objected to the government's proposed introduction of the letter in evidence, arguing that tbe prosecutor had violated the no-communication rule by opening and reading the letter. *Id.* at *3. The government initially litigated the question, but then thought better of doing so. *Id.* at *4. Unaware of the government's decision not to offer the letter, the district court ruled that the prosecutor's opening of the letter comprised a "communication" within the meaning of the rule, and suppressed the letter as a remedy. *Id.* at *8, 11. Rather than challenging the decision on appeal, the government called the district court's attention to correspondence withdrawing its intent to offer the letter and asked the court to withdraw its decision as moot, wbich the court then did.

352. *See* MCMORROW & COQUILLETTE, *supra* note 19, at § 807 ("The inherent power, however, does not provide an independent authority for local rules of attorney conduct that exceed the scope of the rulemaking power of the federal courts").

court's disclosure requirement without making new law. More likely, however, the decision masks at least some disagreement within the Court concerning the appropriate rationale for the outcome. Through various concurring and dissenting opinions, Justice Scalia has made clear his opposition to the type of broad inherent[353] or supervisory judicial powers that some other Justices have recognized in the past.[354]

The consequence is a decision that is simultaneously nondispositive and far-reaching. It provides a basis for future claims all along the spectrum—that the Court limited judicial regulatory authority, that it recognized such authority, or that it said nothing about it. Virtually every one of the alternative interpretations of *Williams* that this Article has identified fits, tracks, or relates to one of the alternative theories of judicial regulatory authority.[355] Accordingly, the Article has attempted to parse out the key questions regarding the federal judicial regulatory authority—questions to which courts and commentators have tended to assume the answers.

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353. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 60 (1991) (Scalia, J., dissenting) ("I disagree, however, with the Court's statement that a court's inherent power reaches conduct 'beyond the court's confines' that does not 'interfer[e] with the conduct of trial.'"); United States v. Providence Journal Co., 485 U.S. 693, 708 (1988) (Scalia, J., concurring) ("I continue to believe, however, that district courts possess no power, inherent or otherwise, to prosecute contemners for disobedience of court judgments and no derivative power to appoint an attorney to conduct contempt prosecutions."). *Compare* Carlisle v. United States, 517 U.S. 416, 426 (1996) (Scalia, J.) (holding that the inherent authority of district courts to regulate their proceedings does not extend to granting untimely motion for judgment of acquittal), *with id.* at 437 (Stevens, J., dissenting) (arguing that there is a "power 'inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.'" (quoting Arkadelphia Co. v. St. Louis Southwestern Ry. Co., 249 U.S. 134, 146 (1918))).

354. *Compare* Bank of Nova Scotia v. United States, 487 U.S. 250, 264 (1988) (Scalia, J., concurring) ("Even less do I see a basis for any court's 'supervisory powers to discipline the prosecutors of its jurisdiction,' except insofar as concerns their performance before the court and their qualifications to be members of the court's bar." (citations omitted)), *with* United States v. Williams, 504 U.S. 36, 67-69 (1992) (Stevens, J., concurring) (disagreeing with Justice Scalia regarding the scope of the courts' supervisory authority).

355. Thus, for example, the interpretation that the Court was distinguishing the district court's ability to regulate in-court conduct from its ability to affect out-of-court conduct suggests that the Court may have been thinking of cases involving the inherent authority (which sometimes have made this distinction), but not the admissions authority. Similarly, the interpretation focusing on tbe remedy of dismissal of an indictment might refer, alternatively, to inherent authority cases limiting judicial sanctions or the notion that the admissions authority should rarely be used to penalize the litigants. Separation of powers concerns—a basis for yet another set of interpretations—are most germane to the supervisory power over the criminal justice system, but could in particular cases pertain to all the sources of autbority. In contrast, the notion of deference to state regulation has been featured most prominently in cases involving the exercise of the admissions authority. And the distinctions between *ad hoc* standards and rule making are relevant, but perhaps apply differently to eacb of the alternative sources of power.

Similarly, with respect to the specific issue of whether a federal court has the authority to adopt the *Williams* disclosure requirement through alternative means, this Article again has suggested that the issue remains open. But the Article's analysis suggests that a framework for resolving it is possible.

A judicial requirement of disclosure in the grand jury cannot be justified by resort to the inherent authority, for what occurs in the grand jury room has little to do with what will occur in court. Similarly, regulating the inner workings of the grand jury is not "necessary" for judicial administration or the maintenance of the federal adversary system—as a post-indictment disclosure requirement might be. Only the argument that failure to disclose exculpatory evidence produces frivolous indictments that eventually will burden the court suggests any significant connection to regulable federal proceedings, and this connection seems attenuated.

The admissions rationale provides no better justification for a general *Williams* type of disclosure rule. Failure to disclose exculpatory evidence says nothing about federal prosecutors' character, competence, or fitness to practice, unless the nondisclosure is used to mask actual deceit.[356]

Thus, if the authority to adopt a *Williams* standard for prosecutorial conduct exists on some independent basis, it can only be justified by resort to the final, expansive theory of regulatory authority. Prosecutorial activities before federal grand juries do have a sufficient tie to federal litigation to fall within the broad rubric that that theory contemplates. Even if the federal courts have this authority, however, it is important to note that its exercise may still be "trumped" by separation of powers or other institutional concerns.[357]

Finally, what about local district court rules that incorporate comprehensive standards of conduct? If the congressionally delegated rule-making process ultimately is judged to authorize generalized ethics provisions, then obviously the district courts need not invoke independent non-delegated powers. But the argument that at least some traditional rules of professional conduct are more than rules of

356. In a particular case, the failure to disclose exculpatory evidence may be an aspect of a course of prosecutorial conduct intended to mislead the grand jury to indict an individual in the absence of probable cause. In that event, the conduct would be sanctionable under various sources of authority, including the Hyde Amendment and ethics rules based on Model Rule 3.8(a). But it cannot always be assumed that a prosecutor who withheld exculpatory evidence knew that probable cause was lacking, or that in actuality there would have been an insufficient basis for an indictment if all the facts were considered.

357. *See supra* text accompanying notes 75-78.

evidence, practice, or procedure is strong.[358] To the extent that the congressionally delegated rule-making authority does not provide sufficient support for comprehensive local ethics rules, such rules must rest on the non-delegated powers. As this Article has discussed, all of the alternatives encompass limitations on the types of standards that federal courts may adopt.[359] Even under the broadest of the theories, federal judicial regulation must focus fairly specifically on the competence or fitness of federal attorneys or on some specific aspect of federal litigation.

We have seen that courts and commentators have attributed far more to the *Williams* decision than a close reading of the case allows. They have also tended to analyze federal judicial power to regulate federal lawyers superficially, by resort to broad statements about the majesty or limitations of the federal courts.[360] In leaving the issues unresolved in *Williams,* the Court missed perhaps its best opportunity to provide guidance regarding federal judicial regulation of professional ethics and federal judicial supervision of federal litigation more generally. This Article has highlighted some of the most significant questions and their ramifications, in the hope that the courts, commentators, and even Congress will come to better understand the complexity of the issues.

358. *See, e.g.,* Note, *supra* note 233, at 988 (questioning an appellate disbarment rule on the basis that it exceeds the authority to make rules governing "practice and procedure").

359. *See supra* text accompanying notes 202-208, 224-227 (inherent authority); 299, 306-309 (admissions authority); 321-325 (intrinsic power of state courts).

360. *See, e.g.,* Pushaw, *supra* note 334, at 799 (criticizing scholars for their inadequate analyses of the judicial approaches to the exercise of broad inherent authority).

# Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame

*Donald A. Dripps* 56 Vand. L. Rev. 1383 (2003)

*The concept of blameworthiness plays a central role in criminal law. Deontologists and utilitarians alike agree that the criminal sanction should rarely, if ever, apply to an actor who caused harm without some subjective awareness of wrongdoing. Research in social psychology, however, suggests that human beings are predisposed to overstate the role of personal, versus situational, factors in explaining negative outcomes.*

*It would seem to follow that officials (legislators, judges, and jurors) are likely to overstate the personal responsibility of individuals. This tendency has both positive and normative significance. Descriptively, it may help to explain why in many contexts, such as the felony-murder doctrine and prevailing (narrow) understandings of defenses based on insanity, intoxication, and necessity, present doctrine punishes absent culpability. It may also help to explain converse doctrinal anomalies, such as provocation, duress, and the "abuse excuse," which exculpate blameworthy actors. In these instances the defense invites the law to blame another human being, rather than impersonal situational factors.*

*Normatively, the tendency to attribute outcomes to persons rather than situations suggests a systemic tendency to overblame. This risk poses a significant challenge to most popular theories of punishment, but it is an especially strong point against mandatory forms of retributivism. As applied by observers predisposed to overblame, mandatory retributivism is likey to inflict punishment the theory itself forbids.*

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