

Agent Narc Is Not Your Client: Reflections on the Proper Understanding of the Relationship Between Prosecutors and Investigating Agencies

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Introduction

When I was an Assistant Federal Defender, I worked regularly with an Assistant United States Attorney (“AUSA”) in the Criminal Division of the local United States Attorney’s Office (“USAO”) who, during plea negotiations and other discussions, would refer to his “client.” Puzzled, I would ask to whom he was referring, and he would respond with “the agent,” meaning the investigating case agent who had referred the case for prosecution—an agent of the Federal Bureau of Investigation (“FBI”), the Bureau of Alcohol, Tobacco, and Firearms (“ATF”), the Drug Enforcement Administration (“DEA”), the Bureau of Immigration and Customs Enforcement (“ICE”), etc. At the time, I chalked this up to his misunderstanding. This particular AUSA had a short attention span and was not terribly sharp. I assumed that he had attended some training that also involved civil AUSAs and had simply misunderstood its content while playing with his PDA.¹

Now, however, I am the faculty supervisor for criminal-justice externships at the law school where I teach. I often assign a reflection

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1. See, e.g., *Deseret Mgmt. Corp. v. United States*, 76 Fed. Cl. 88 (2007) (holding that, in the context of a civil suit by a taxpayer against the Internal Revenue Service (“IRS”) to recover illegally collected income taxes, communications between IRS employees and Department of Justice (“DOJ”) and IRS attorneys were protected by attorney-client privilege); see also *Galarza v. United States*, 179 F.R.D. 291, 295 n.4 (S.D. Cal. 1998) (defining an agency as a “client” of the Government in the context of administrative employment-law proceedings); cf. H. RICHARD UVILLER, *THE TILTED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR?* 70 (Yale Univ. Press 1999) (noting that the determination of the prosecutorial role is largely left “to the wisdom of the prosecuting attorney”).

paper to my students in prosecution placements, asking them to reflect upon who their clients are for the purposes of the rules of professional conduct, their fiduciary duties, and discretionary decision-making. I also ask them to interview one or more attorneys at their field placements and see if those attorneys' reflections on the question match their own. Increasingly, my students working in USAOs are reporting the same thing: that the "agency" or the case agent is their client.² Actually, my students tend to report something more along these lines: "My field supervisor says that the agent is our client. But I don't really understand." Neither do I.

I. The Implications of the Client Philosophy

Both descriptively and normatively, this cannot be right. To begin with, investigating agents are not parties in criminal proceedings, so how can the lawyer for one side be "representing" them? In various contexts, prosecutorial agencies, Congress, and the bench and bar all seem, at least implicitly, to reject the idea that AUSAs "represent" federal agencies or individual agents in criminal proceedings.

A. Official Interpretations

1. *The United States Department of Justice*

The structure of most federal law-enforcement agencies belies a claim that AUSAs "represent" the agencies or their agents. Post-2003, many of the federal law-enforcement agencies whose cases AUSAs prosecute are located in a different executive-branch department, the Department of Homeland Security ("DHS") rather than the Department of Justice ("DOJ"), including ICE and the Secret Service.³

In the context of fighting its pretrial discovery obligations, the DOJ has historically disavowed its affiliation with DHS and other non-DOJ agencies in order to argue that the files of other agencies are not in its possession or control such that it would be obligated to disclose them to the defense. For example, in *United States v. Jennings*,⁴ the Government successfully convinced the United States Court of Appeals for the Ninth Circuit that an AUSA did not personally have to inspect the personnel file of a testifying Government agent.⁵ Instead, the DOJ's policy is that "the

2. Cf. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992) (noting a trend in which prosecutors are becoming increasingly involved in law-enforcement investigations).

3. See Homeland Security Act, 6 U.S.C. §§ 101–1717 (2002).

4. *United States v. Jennings*, 960 F.2d 1488 (9th Cir. 1992).

5. See *id.*; see generally *infra* note 6 & accompanying text.

files of law enforcement officers are to be examined *by the appropriate agency's attorney* or his staff.”⁶ The agency's attorneys will then notify the AUSA assigned to the case if any discoverable material is found.⁷ This policy clearly envisions the general counsel's office of the relevant agency to be that agency's (or individual agent's) attorney—not the USAO.

The DOJ describes the mission of USAOs as “conduct[ing] most of the trial work in which the United States is a party.”⁸ The individual law-enforcement agencies all have in-house general counsel that function as the agencies'—and in some cases agents', attorneys—including the General Counsel for DHS,⁹ the General Counsel for the FBI,¹⁰ the Chief Counsel for the ATF,¹¹ and the Chief Counsel for the Internal Revenue Service (“IRS”).¹² To the extent that federal agents/agencies are the legal clients of any attorneys, these entities are much closer to filing that role than AUSAs.

The DOJ also does not do all of the criminal trial work in the federal system. Like in some local misdemeanor courts,¹³ in the federal system, federal (nonattorney) agents sometimes conduct misdemeanor prosecutions. In these situations, the case agent cannot be the “client” because the prosecutor is not a lawyer.

The United States Attorneys Manual (“USAM”) does refer, at points, to “client agencies,”¹⁴ but not in Title 9, which governs criminal prosecutions.¹⁵ For example, the DOJ's “*Giglio* policy”¹⁶ refers to case

6. *Jennings*, 960 F.2d at 1492 n.3 (emphasis added).

7. *See id.*; *see infra* Part II(C)(1).

8. OFFICE OF THE U.S. ATTORNEYS, *Mission*, U.S. DEP'T JUSTICE, <https://www.justice.gov/usao/mission> (last updated Sept. 22, 2016).

9. *See* 6 U.S.C. § 113(a)(1)(J).

10. *See* THE FBI: A COMPREHENSIVE REFERENCE GUIDE 227 (Athán G. Theoharis, ed., Oryx Press 1999).

11. *See Organization Structure*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, <https://www.atf.gov/about/organization-structure> (last updated Sept. 22, 2016).

12. *See Office of Chief Counsel At-a-Glance*, INTERNAL REVENUE SERV., <https://www.irs.gov/uac/office-of-chief-counsel-at-a-glance> (last updated Oct. 3, 2016).

13. *See* Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1306 (1998) (noting that “the police prosecution of misdemeanor offenses before federal magistrates in various United States Magistrates Courts is a relatively common practice”); Andrew Horwitz & John R. Grasso, *Police Prosecution in Rhode Island: The Unauthorized Practice of Law*, 54 R.I.B.J. 5 (2006).

14. *See* OFFICE OF THE U.S. ATTORNEYS, *U.S. Attorneys Manual Title 1: Organization and Functions*, U.S. DEP'T JUSTICE, <http://www.justice.gov/usam/usam-1-10000-litigation-against-state-governments-relations-client-agencies> (last visited Oct. 28, 2016).

15. *See* OFFICE OF THE U.S. ATTORNEYS, *U.S. Attorneys Manual Title 9: Criminal*, U.S. DEP'T JUSTICE, <http://www.justice.gov/usam/title-9-criminal> (last visited Oct. 28, 2016).

agents as “law enforcement agency witnesses,”¹⁷ which is quite different than “clients.” The Criminal Resource Manual (“CRM”) describes the agencies for whom these “agency witnesses” work as “federal investigative agencies.”¹⁸ If the DOJ shared in the interpretation of agencies as clients, one would expect that to be made clear in these sections of the USAM.

The DOJ’s conduct in actual cases is also inconsistent with a view of the investigating agent as a client. For example, in a recent case in New York, the Government convicted two former DEA agents of making false statements and conspiring to defraud the Government because they hid their financial connections to a strip club in order to maintain their DEA security clearance.¹⁹ In another recent case, the Government convicted a former DEA agent of extortion, money laundering, and obstruction of justice for stealing from and extorting the target of an investigation into online drug trafficking.²⁰ AUSAs have also refused to use evidence that they believe that federal agents obtained illegally.²¹ If these DEA agents had been the Government’s “clients” during their alleged misconduct, it would be a conflict of interest for the Government to charge them now with crimes that occurred during their investigations (i.e., their course of representation).²²

16. See *Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding that the requirement that prosecutors disclose favorable evidence in their possession to the defense, first recognized in *Brady v. Maryland*, 373 U.S. 83 (1963), extended to “impeachment” material).

17. See OFFICE OF THE U.S. ATTORNEYS, *U.S. Attorneys Manual Title 9 § 9-5.100: Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses*, U.S. DEP’T JUSTICE, <http://www.justice.gov/usam/usam-9-5000-issues-related-trials-and-other-court-proceedings#9-5.100> (last visited Oct. 28, 2016).

18. See OFFICE OF THE U.S. ATTORNEYS, *U.S. Attorneys Manual: Criminal Resource Manual § 107*, U.S. DEP’T JUSTICE, <http://www.justice.gov/usam/criminal-resource-manual-107-federal-investigative-agencies> (last visited Oct. 28, 2016).

19. See Colin Moynihan, *2 DEA Workers Convicted over Ownership of Strip Club in New Jersey*, LAS VEGAS SUN (June 10, 2016), <http://lasvegassun.com/news/2016/jun/10/2-dea-workers-convicted-over-ownership-of-strip-cl/>; Benjamin Weiser, *D.E.A. Workers’ Ownership of Strip Club Was an Open Secret, Lawyers Say*, N.Y. TIMES (Mar. 14, 2016), http://www.nytimes.com/2016/03/15/nyregion/dea-workers-ownership-of-strip-club-was-an-open-secret-lawyers-say.html?_r=0.

20. See Dan Levine, *Ex-U.S. Agent Gets Over Six Years for Bitcoin Theft in Silk Road Probe*, REUTERS, (Oct. 19, 2015, 6:30 PM), <http://www.reuters.com/article/us-usa-bitcoin-silkroad-idUSKCN0SD2IA20151019>.

21. See, e.g., Brad Heath & Brett Kelman, *Justice Officials Fear Nation’s Biggest Wiretap Operation May Not Be Legal*, USA TODAY, (Nov. 11, 2015, 5:40 PM), <http://www.usatoday.com/story/news/2015/11/11/dea-wiretap-operation-riverside-california/75484076/> (describing AUSAs’ refusal to use the results of DEA wiretaps in federal court because they have concluded that they were illegal).

22. See *Lane v. State*, 233 S.E.2d 375 (1977) (holding that the participation of a special prosecutor in Lane’s murder trial, who had previously represented Lane’s alleged coconspirator, denied him due process); *People v. Zimmer*, 414 N.E.2d 705 (1980) (reversing Zimmer’s

2. *The National District Attorneys' Association*

The National District Attorneys' Association ("NDAA"), in its National Prosecution Standards, describes the role of prosecutors as follows:

[T]he prosecutor has a client not shared with other members of the bar, *i.e.*, society as a whole The prosecutor must seek justice. In doing so, there is a need to balance the interests of *all* members of society, but when the balance cannot be struck in an individual case, the interest of society is *paramount* for the prosecutor.²³

While the NDAA is the organization that generally represents the interests of state and local (rather than federal) prosecutors, there is no reason to think that the relationship between a county district attorney and a local sheriff's deputy is any different than that of an AUSA and a federal case agent.

3. *The American Bar Association*

The American Bar Association ("ABA") has unequivocally declared: "The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client."²⁴ The drafters of the Model Rules of Professional Responsibility also do not seem to have envisioned investigating agents as the clients of prosecutors. For example, Rule 5.3 specifically governs the ethical obligations of attorneys with respect to non-lawyers with whom they are "associated" for "assistance," essentially extending attorneys' ethical obligations to cover these non-lawyer partners.²⁵ For attorneys in private practice, these non-lawyer assistants are usually individuals like paralegals and private investigators. The obvious analogue in the government context is the investigating case agents. The language of Rule 3.8(f), which describes prosecutors' duty to avoid unnecessary pretrial publicity, employs similar language, referring to "investigators" and "law enforcement personnel" as

conviction for grand larceny, forgery, and the issuance of a false financial statement because the district attorney who presented the case to the Grand Jury was also counsel to and a stockholder of the corporation in the course of whose management Zimmer was alleged to have committed the crimes with which he was charged); *see infra* Part II(C)(1).

23. NATIONAL DISTRICT ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS (1991), at stds. 1.1, 1.3.

24. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958).

25. MODEL RULES OF PROF'L CONDUCT r. 5.3 (AM. BAR ASS'N 1983).

examples of “persons assisting or associated with the prosecutor in a criminal case.” These rules, put together, clearly suggest that the ABA views law-enforcement agents as nonlawyer adjuncts of the prosecutorial team, not clients.

Rule 1.13 governs the ethical obligations of attorneys “employed or retained by” a client organization.²⁶ The “employed or retained by” language of the rule implies that an attorney cannot “represent” an organization (such as the FBI) that does not employ and has not retained him or her to do so. AUSAs are not employed or retained by investigating case agencies, let alone individual agents. Unless they are the best-kept secret in the federal government, an FBI agent does not execute a retainer agreement with an AUSA every time a criminal investigation is referred for prosecution. This interpretation is consistent with the fact, discussed *supra*, that all of the federal law-enforcement agencies have their own general counsel.²⁷

4. *Federal Statutes and Rules*

Congress also does not seem to envision USAOs as “representing” federal agencies, at least not in the context of criminal investigations and prosecutions. For example, federal statutes severely restrict communications between AUSAs and IRS personnel about tangible tax material, including IRS investigative reports.²⁸ Such a restriction would illegally infringe upon attorney-client communications if AUSAs were representing IRS agents as “clients.”

The Federal Rules of Evidence are also inconsistent with this conception of the case agent or agency as the “client.” Rule 615 governs sequestering witnesses during trial.²⁹ The rule makes an exception for the Government to designate a law-enforcement agent as its “representative,” which typically authorizes the investigating case agent to remain in the

26. MODEL RULES OF PROF'L CONDUCT r. 1.13.

27. *See supra* Part II(A)(1).

28. *See* I.R.C. § 6103 (2012).

29. FED. R. EVID. 615 provides:

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding: (a) a party who is a natural person; (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; (c) a person whose presence is shown by a party to be essential to the presenting the party's claim or defense; or (d) a person authorized by statute to be present.

courtroom throughout the proceedings, even if she or he is expected to testify.³⁰

The characterization of this representative agent is inconsistent with the agent being the Government's "client" for several reasons. First, the Advisory Committee's Notes on Rule 615 discuss the agent exception in the singular, referring to the Government's need for the presence of "a police officer" or "an investigative agent."³¹ Second, in order for the Government to invoke this exception, it must formally designate the case agent as its representative if and when the defendant moves to sequester witnesses.³² If the multiple-agent task force investigated the Government's case, then under the "client" view of agency, all of the task-force investigators would be clients. Nonetheless, Rule 615 authorizes the AUSA to "designate" only a single representative, a procedure that is consistent with the view that the agent is assisting the prosecutor rather than the plaintiff being represented.

Consistent with this interpretation of the rule, courts applying Rule 615 to case agents who remain in the courtroom describe them as "the prosecutor's information source"³³ (rather than a client who has an implied right of presence).

Similarly, courts routinely permit defense investigators to remain in the courtroom even if they will later testify under the Rule 615 exceptions.³⁴ The defense investigator is the most obvious defense-side analogue to the case agent for the prosecution, but, certainly, no one would conceive of the defendant's investigator as being the defense attorney's "client" in the criminal case.

30. See *United States v. Parodi*, 703 F.2d 768, 773 (4th Cir.1983) (affirming Parodi's drug-conspiracy conviction over his challenge to the district court's failure to sequester the DEA case agent during trial and allowing the agent to testify in rebuttal); *but see United States v. Farnham*, 791 F.2d 331 (4th Cir. 1986) (holding that the district court's failure to sequester a second case agent during the testimony of the first case agent during Farnham's trial for lying to the agents was reversible error).

31. See *United States v. Pulley*, 922 F.2d 1283, 1286 (6th Cir. 1991) ("A representative, like 'a' natural person, 'a' police officer, and 'an' officer or employee, is singular.") (citation omitted).

32. See *United States v. Cueto*, 611 F.2d 1056, 1061 (5th Cir. 1980); *United States v. Avalos*, 506 F.3d 972, 978 n.3 (10th Cir. 2007).

33. *United States v. Martin*, 920 F.2d 393, 397 (6th Cir. 1990).

34. See, e.g., *United States v. Ortiz*, 10 F. Supp. 2d 1058 (N.D. Iowa 1998); *cf. United States v. Rhynes*, 218 F.3d 310 (4th Cir. 2000) (reversing Rhynes' drug-conspiracy conviction after the district court had excluded the testimony of a sequestered defense witness who had discussed the Government's case with a defense investigator who was permitted to remain in the courtroom under Rule 615 as a necessary defense agent); *United States v. Seschillie*, 310 F.3d 1208 (9th Cir. 2002) (holding that the district court's exclusion of Seschillie's expert from the court room was an abuse of discretion).

5. Courts

The descriptions of the role of prosecutors that courts employ conceive of them not as representatives of private parties or individual actors in the system, but rather as representing the interests of society more globally. The Supreme Court's quintessential description of the role of AUSAs was that of *Berger v. United States*,³⁵ which described them as "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."³⁶ In *Town of Newton v. Rumery*,³⁷ the Supreme Court specifically held that prosecutors represented the public and not the police.³⁸ While *Rumery* dealt with local prosecutors and police officers, its reasoning applies with equal force to federal prosecutors and case agents.

The federal courts of appeal espouse a consistent view of the role of AUSAs.³⁹ Judge Kozinski, writing for the Ninth Circuit, stated, "Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers. While lawyers representing private parties may—indeed, must—do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first."⁴⁰ The parallel structure of Judge Kozinski's second sentence: that *other* lawyers "represent[] private parties," while "lawyers representing the government in criminal cases serve truth and justice first" implies that the court does not conceive of AUSA's having "clients" in the same sense that other attorneys do, let alone that they somehow narrowly represent law-enforcement agents and agencies.⁴¹

State courts conceive of their prosecutors' roles in the same way, admonishing that prosecutors owe their allegiance to a broad set of societal

35. *Berger v. United States*, 295 U.S. 78 (1935).

36. *Id.* at 88; *cf.* *Burns v. Reed*, 500 U.S. 478, 486–87 (1991) (denying a prosecutor absolute immunity for advice given to police because the police were not the prosecutor's "client"); *but see* *Town of Newton v. Rumery*, 480 U.S. 386, 413 (1987) (O'Connor, J., concurring) (pointing out the conflict of interest that arises when prosecutors attempt to represent both the public and the police).

37. *Rumery*, 480 U.S. at 386.

38. *Id.* at 395 & n.5.

39. *See, e.g.*, *Blair v. Armontrout*, 916 F.2d 1310, 1352 (8th Cir. 1990) (cautioning that AUSAs should not place partisan success ahead of observance of the law).

40. *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993).

41. *Id.*

values and should avoid being “partisans.”⁴² For example, the Louisiana Supreme Court has written, “The district attorney is a quasi judicial officer. He represents the State, and the State demands no victims. It seeks justice only, equal and impartial justice”⁴³

6. *The Restatement of the Law Governing Lawyers*

The most recent RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS includes a description of the law governing attorneys’ contact with represented third parties.⁴⁴ It specifically discusses the general prohibition against attorney contact with represented third parties with regard to employees of “a represented government agency.”⁴⁵ It indicates that the anti-contact rule should apply to contact with such Government employees only when “the government is represented in a dispute involving a specific claim.”⁴⁶ The specific example that the RESTATEMENT gives of this limited situation in which the rule would apply is if an attorney were “prosecuting a tort claim against a governmental agency based on the activities of an agency employee in operating a motor vehicle.”⁴⁷ In this situation, in a tort suit against a Government agency for the conduct of one of its employees, it makes perfect sense that the Civil Division AUSA representing the agency would have an attorney-client relationship with the named employee (or supervisor). However, this is not analogous to a Criminal Division AUSA’s relationship with an investigating law-enforcement agent, and the RESTATEMENT’s silence on that subject, in a section that would otherwise logically address it, seems to be a clear indication of the American Law Institute’s belief of its inapplicability.

B. Other Commentators

The consensus of academic commentators likewise does not conceive of prosecutors as the agents of law-enforcement “clients.”⁴⁸ As Alan M.

42. *State v. Moss*, 376 S.E.2d 569, 574 (1988). *See People v. Kelly*, 75 Cal. App. 3d 672, 689 (1978) (“[I]n practical effect, the public prosecutor functions in a dual capacity as both agent and principal, as both attorney and client.”); *State v. Crume*, 22 P.3d 1057, 1068 (Kan. 2001).

43. *State v. Tate*, 171 So. 108, 112 (La. 1936) (upholding the trial court’s order recusing a prosecutor who had a personal interest in the case).

44. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (AM. LAW INST. 2000) [hereinafter “RESTATEMENT”].

45. *Id.* at § 101.

46. *See id.* at § 101 cmt. c.

47. *Id.*

48. *See, e.g.,* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 393 (3d ed. 1992); Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes*

Dershowitz in Joseph Lawless, Jr.'s PROSECUTORIAL MISCONDUCT has admonished, "It is important for the courts, scholars, bar associations and the press to keep reminding prosecutors that they must comply with an entirely different set of standards than those applicable to the defense bar."⁴⁹ Even academic commentators who would like to see a stronger attorney-client or work-product privilege for Government attorneys in criminal cases acknowledge that they do not exist currently.⁵⁰

The Attorney General of Hawaii reached a similar conclusion when asked for a formal opinion regarding whether the communications of the Chair of the Hawaii Department of Land and Natural Resources ("DLNR") with the Maui prosecutor's office regarding possible violations of the law by a non-government entity were privileged: "No."⁵¹ In reaching that opinion, the Hawaii Attorney General noted:

[T]he Maui Prosecutor's Office was the attorney for the State of Hawaii in criminal matters. As such, it acted in an impartial and unbiased manner. Witnesses were always told that the Maui Prosecutor was not that person's attorney. The same holds true for government agencies bringing cases to the Maui Prosecutor.⁵²

Taken together, these commentaries suggest that a broad consensus of academics, the bench, and bar view prosecutors as not having "clients" in the traditional sense of that word and view case agents as being

to Include the Non-Adversarial Roles of Federal Prosecutors, 37 B.C. L. REV. 923, 930-31 (1996); Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 703, 722-25 (1998) (noting that prosecutors are supposed to act "not only as an advocate, but also as a minister of justice"); Fuller & Randall, *supra* note 24, at 1218 ("The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged."); Bruce Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 615 (1998) (describes the role of prosecutors as "somewhere between judges, on the one hand, and lawyers advocating on behalf of private clients, on the other"); Melanie D. Wilson, *Anti-Justice*, 81 TENN. L. REV. 699, 718 (2014). *But see* James R. Harvey III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1570 (1996) (recognizing agencies and their officials as potential clients of the DOJ).

49. Alan M. Dershowitz, *Foreword to the First Edition: Why Do Honest Prosecutors Engage in Misconduct?*, in PROSECUTORIAL MISCONDUCT xv (2008).

50. See Todd A. Ellinwood, "In Light of Reason and Experience": *The Case for a Strong Government Attorney-Client Privilege*, 2001 WIS. L. REV. 1291 (2001).

51. State of Haw. Dep't of Att'y Gen., Opinion Letter on Attorney-Client Privilege Protection (Dec. 31, 2002), at *1.

52. *Id.*

complaining witnesses, prosecutorial adjuncts, or members of the prosecutorial team but not as being represented by the prosecutor.

C. Doctrinal Confusion

If prosecutors “represented” investigating agencies and agents as “clients,” it would create a host of unwanted conflicts and doctrinal complications in criminal adjudications.

1. Conflicts of Interest

a. *Brady v. Maryland*

One of the areas of “special obligation” for prosecutors involves their duty to disclose favorable evidence to the defense.⁵³ This obligation can only logically be fulfilled if investigating agents are not the clients of the prosecutors with whom they work.

The ABA Criminal Justice Standards for the Prosecution Function declare that “a prosecutor should avoid a conflict of interest with respect to her or his official duties.”⁵⁴ Prosecutors’ obligations include a duty to avoid partisanship and partiality in the performance of their duties.⁵⁵ Lawyers representing traditional clients, on the other hand, have a duty of zealous and partisan advocacy on their behalf.⁵⁶

If law-enforcement agents (or their agencies)⁵⁷ were truly the “clients” of prosecutors, that attorney/client relationship would create irrevocable ethical conflicts.⁵⁸ In addition to the ordinary requirement that all attorneys have to avoid engaging in misconduct,⁵⁹ under Rule 3.8 (as well as *Brady v. Maryland*⁶⁰ and its progeny), prosecutors have special obligations to

53. See *supra* note 16 & accompanying text.

54. See STANDARDS FOR CRIM. JUSTICE, std. 3-1.3(a) (AM. BAR ASS’N 1993).

55. See *Wheeler v. District Court*, 504 P.2d 1094, 1095 (1973).

56. See MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. 1 (“A lawyer must . . . act with commitment and dedication to the interests of the client . . . with zeal in advocacy upon the client’s behalf.”).

57. See generally MODEL RULES PROF’L CONDUCT r. 1.3 (governing the representation of organizations as clients).

58. See MODEL RULES OF PROF’L CONDUCT r. 1.7 (requiring attorneys to avoid conflicts of interest); see generally *People v. Conner*, 666 P.2d. 5, 8 (Cal. 1983) (defining a disqualifying conflict of interest as existing “whenever the circumstances of a case evidence a reasonable possibility that the DA’s office may not exercise its discretionary function in an even-handed manner”).

59. See MODEL RULES OF PROF’L CONDUCT r. 8.4.

60. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”).

disclose to defendants all information that tends to negate their guilt or mitigate the offense or sentencing.⁶¹ The commentary to the rule explains:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.⁶²

The constitutional requirements for disclosure pose similar obligations. The Supreme Court has expressly held that an “individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”⁶³ As a corollary to this general rule, courts specifically require AUSAs to examine the personnel files of any law-enforcement officers that they intend to call as witnesses for *Giglio* material (which, of course, must be disclosed).⁶⁴

Under Rule 1.6, however, lawyers are generally forbidden from revealing “information relating to the representation of a client” unless the client has consented to the disclosure or the disclosure is “impliedly authorized in order to carry out the representation.”⁶⁵ The commentary to the rule explains, “A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.”⁶⁶

If a law-enforcement agent were the client of the prosecutor prosecuting a case that she or he investigated and referred, these

61. See MODEL RULES OF PROF’L CONDUCT r. 3.8(d).

62. *Id.* at cmt. 1; cf. STANDARDS FOR CRIM. JUSTICE, std. 3-3.11(a) (“A prosecutor shall not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.”).

63. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). See *United States v. Bagley*, 473 U.S. 667, 684 (1985); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972).

64. See *United States v. Henthorn*, 931 F.2d 29 (9th Cir.1991) (holding that the Government had a duty to examine the personnel files of law-enforcement officers that it intended to call as witnesses if a defendant requested production of the files); see also *Pitchess v. Superior Court*, 522 P.2d 305 (Cal. 1974) (refusing to quash a trial court’s *subpoena duces tecum*, directing the disclosure to a criminal defendant who was accused with battery of deputy sheriffs of the records of citizens’ complaints of official misconduct against the police officers).

65. MODEL RULES OF PROF’L CONDUCT r. 1.6(a).

66. *Id.* at cmt. 2.

countervailing ethical obligations would often be irreconcilable.⁶⁷ For example, if a prosecutor discovered, in the course of “representing” an agent, that the agent had tampered with evidence, this knowledge would be squarely governed by *Brady* and *Giglio*, which—along with Rule 3.8(d)—would require its disclosure.⁶⁸ Rule 1.6, on the other hand, would seem to forbid the disclosure.⁶⁹ It is highly unlikely that the hypothetical dishonest agent would consent to the disclosure. It is possible that the disclosure would be “impliedly authorized,” in the same way that providing information in compliance with discovery rules generally is,⁷⁰ but Rule 1.2 complicates this otherwise easy ethical solution.

Under Rule 1.2, a lawyer generally must abide by a client’s decisions concerning the objectives of representation.⁷¹ The commentary to the rule indicates that “[t]he client [has the] ultimate authority to determine the purposes to be served by legal representation”⁷² While in a civil case, a plaintiff is unlikely to direct an attorney to dismiss a complaint to avoid complying with discovery rules (unless the complaint is meritless or a special situation exists, like protecting a trade secret), an agent who wanted to “protect” her or his misconduct from disclosure could presumably

67. *Cf.* *People v. Eubanks*, 927 P.2d 310 (Cal. 1996) (upholding a trial court’s order recusing the entire Santa Cruz County District Attorney’s Office from prosecuting Eubanks for the alleged theft of trade secrets from a computer-software company on the ground that the company’s contribution of approximately \$13,000 toward the cost of the district attorney’s investigation created a conflict of interest for the prosecutor because it evidenced a reasonable possibility that the prosecutor might not have exercised his discretionary functions in an even-handed manner); *People v. Choi*, 80 Cal. App. 4d 476 (2000) (disqualifying the entire district attorney’s office, when one prosecutor’s loss of a close friend had adversely affected his independent judgment in such a way that Choi’s right to a fair trial had been endangered); *but cf.* *State v. Kadivar*, 460 So. 2d 391 (Fla. Dist. Ct. App. 1984) (holding that Kadivar’s civil suit against the prosecutor’s office did not disqualify the office staff from representing the State in his criminal prosecution).

68. Courts routinely hold that evidence that perjury by a Government witness is *Brady* material that must be disclosed to the defense. *See, e.g.*, *United States v. Sanchez*, 969 F.2d 1409, 1415 (2d Cir. 1992); *United States v. Wallach*, 935 F.2d 445, 457–58 (2d Cir. 1991); *Schwartzmiller v. Winters*, 576 P.2d 1052, 1054–55 (1978).

69. *See* MODEL RULES OF PROF’L CONDUCT r. 1.6.

70. *Cf.* *Adams v. Franklin*, 924 A.2d 993, 998 (D.C. 2007) (explaining that a court order to compel disclosure “vitiates Rule 1.6”); *Allen Cty. Bar Ass’n v. Williams*, 766 N.E.2d 973, 975 (2002) (“A lawyer’s general legal duty . . . not to . . . disclose confidential client information . . . is superseded when the law specifically requires such use or disclosure.”); Michael H. Berger & Katie A. Reilly, *The Duty of Confidentiality: Legal Ethics and the Attorney-Client and Work Product Privileges*, 38 COLO. LAWYER 35, 37 n.20 (2009) (explaining that responding to a discovery request does not implicate Rule 1.6 because discovery requests technically go to the client and the lawyer is only acting as an agent in the transaction).

71. *See* MODEL RULES OF PROF’L CONDUCT r. 1.2(a).

72. *Id.* at cmt. 1.

instruct the prosecutor to dismiss the charges in order to protect the information—if, in fact, the agent were the “client” in the case.

In this scenario, the prosecutor would not only be bound to dismiss the charges on the “client’s” instruction, but would be ethically obligated to protect the information forever. Under Rule 1.9, a lawyer who has previously represented a client generally may not subsequently use information relating to such representation to the disadvantage of that former client.⁷³ This prohibition would frustrate not only remedying the misconduct (e.g., pursuing criminal charges against the agent for obstruction of justice),⁷⁴ but would interfere with the prosecutor’s ethical obligations of disclosure in future cases (e.g., other cases on which the agent had worked). The conundrum would become even intractable in cases in which there were multiple agents (which is the norm in federal criminal investigations).

For example, imagine that two FBI agents—Agent A and Agent B—are working on a criminal investigation. The AUSA is aware, through previous “representation” of Agent A (i.e., prosecuting a case in which Agent A was the investigator previously, which was subsequently dismissed at Agent A’s request), that Agent A committed perjury (clear *Giglio* information). The AUSA is ethically obligated to disclose the information to the defense (in any and all cases in which Agent A will testify for the Government). Agent A informs the AUSA (again) that protecting the information is her or his primary objective for the AUSA’s representation. Agent B, who may or may not be aware of Agent A’s prior misconduct, informs the AUSA that not seeing the defendant get away with a serious crime is her or his primary objective for the representation. Unlike a civil attorney representing two plaintiffs who have developed divergent objectives in litigation, the AUSA cannot declare a conflict of interest⁷⁵ and withdraw from representing one, but not the other, agent.

73. See MODEL RULES OF PROF’L CONDUCT r. 1.9(b); see, e.g., CAL. PENAL CODE § 1424 (2000); MO. RULES PROF’L CONDUCT r. 4-1.9 (2007) (barring lawyers from using information that they have learned about a former client in any subsequent case against that person).

74. See *supra* Part II(A)(1).

75. See MODEL RULES OF PROF’L CONDUCT r. 1.7(a) (prohibiting attorneys from representing a client when representation would be directly adverse to the representation of another client); *id.* at cmt. 23 (“Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). An [impermissible] conflict may exist by reason of substantial discrepancy in the parties’ testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.”); RESTATEMENT, *supra* note 44, at § 121 (“A conflict of interest is involved if there is substantial risk that the lawyer’s representation of the client would be materially or adversely affected by the lawyer’s

This is because the Government holds, at least, a *de facto* monopoly on the prosecution of federal crimes.⁷⁶ Neither assigning the case to a different AUSA⁷⁷ nor negotiating a plea bargain⁷⁸ will resolve the conflict either.

The Supreme Court, in the context of *Brady*, has employed language that seems explicitly to rule out this conception of an attorney-client relationship, while explaining why a prosecutor's *Brady* obligation includes seeking out and disclosing information that is in the files of investigating agencies:

Since . . . the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts

own interests or by the lawyer's duties to another current client, a former client, or a third person.").

76. See 18 U.S.C. § 3231 (1948) ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."); *Prigg v. Pennsylvania*, 41 U.S. 539, 615 (1842) (holding that only the federal government could enforce the federal fugitive-slave act); *The Antelope*, 23 U.S. 66, 123 (1825) (announcing the principle that one sovereign could not "execute the penal laws of another"); *Houston v. Moore*, 18 U.S. 1, 69 (1820) (holding that Pennsylvania lacked jurisdiction to court martial delinquent militia members despite a state statute purporting to create concurrent state jurisdiction over them); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2278 (2014); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600, 609–10 (2005) (describing the "sphere of exclusive responsibility" of federal prosecutors); see generally U.S. GEN. ACCOUNTING OFFICE, GAO-04-422, REPORT TO CONGRESSIONAL REQUESTERS, U.S. ATTORNEYS PERFORMANCE-BASED INITIATIVES ARE EVOLVING 2 (2004) [hereinafter "GAO REPORT"] (explaining that AUSAs are the principal litigators for the federal government in criminal proceedings); cf. *Garrett v. United States*, 471 U.S. 773, 800 n.2 (1985) (noting that the Government, rather than the court, is responsible for initiating a criminal prosecution, unless the charging decision is based on race, religion, or another arbitrary classification); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (explaining that prosecutors retain broad discretion in deciding whom to prosecute, subject only to constitutional restraints). Cf. Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243 (2011) (proposing that prosecutors be able to pursue convictions for federal crimes in state courts); Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 569–72 (1925) (proposing that federal criminal prosecutions be conducted in state courts). When states incorporate federal law, they are enforcing state, not federal, law. See *Pennsylvania v. Nelson*, 350 U.S. 497, 500–01 (1956). According to the DOJ's FY 2004 budget submission, AUSAs handle approximately ninety-five percent of the criminal cases that the DOJ prosecutes. See GAO REPORT, *supra*, at 15.

77. See MODEL RULES OF PROF'L CONDUCT r. 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9")

78. See *id.* at r. 1.7 cmt. 28 (explaining that "a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other").

themselves, as the final arbiters of the government's obligation to ensure fair trials.⁷⁹

As Justice Ginsburg has noted, in the context of civil-rights actions against the police for illegal arrests: "The principal player in carrying out a prosecution . . . is not [a] police officer but [a] prosecutor."⁸⁰

Similarly, the Supreme Court of California seems to have rejected this "attorney[-]client" characterization, holding, in the context of a State prosecutor's *Brady* obligation with regard to favorable information in the possession of a state police crime laboratory,

[The prosecutor] acknowledged the lab "worked closely with the District Attorney's Office in assisting it in the prosecution of cases[;]" and there is no serious dispute that in these circumstances it was part of the investigative "team." The prosecutor thus had the obligation to determine if the lab's files contained any exculpatory evidence, such as the worksheet, and disclose it to petitioner.⁸¹

The court's characterization of the crime-lab officers as part of the prosecution "team," and its requirement that the prosecutor disclose to the defense confidential material from the lab's files, is inconsistent with the recognition of an attorney-client relationship between the two.

b. Illegal Investigations

Similar irresolvable conflicts would arise in the context of criminal wiretap violations if federal agents were the clients of AUSAs. Title III of the Omnibus Crime Control and Safe Streets Act (the federal "Wiretap Act"),⁸² which has subsequently been amended by the Electronic Communications Privacy Act,⁸³ the Communications Assistance for Law

79. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). See generally 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(b), at 485 (2d ed. 1999) ("Lower courts have regularly held that the prosecution's obligation under *Brady* extends to the files of police agencies that were responsible for the primary investigation of the case."); Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379, 1382 (2000).

80. *Albright v. Oliver*, 510 U.S. 266, 279 n.5 (1994) (Ginsburg, J., concurring).

81. *In re Brown*, 952 P.2d 715, 719 (1998).

82. Electronic Communications Privacy Act, 18 U.S.C. §§ 2510–22 (1968).

83. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986).

Enforcement Act,⁸⁴ and the Foreign Intelligence Surveillance Act (“FISA”)⁸⁵ create a host of criminal penalties for illegal electronic surveillance.⁸⁶ Federal courts have jurisdiction over criminal violations of FISA only when federal officers or employees acting under color of law commit these violations.⁸⁷ The DOJ has exclusive jurisdiction to prosecute these crimes in federal courts.⁸⁸ A large share, presumably most, of the individuals who commit them are law-enforcement agents, working on criminal investigations that are or will be federal prosecutions (i.e., “clients” of the DOJ, under the “representation” conception).⁸⁹ If these agents were actually the clients of the agency charged with prosecuting them, criminal wiretap violations would be largely unenforceable because the DOJ could not both “represent” and prosecute the violators.⁹⁰

The ABA Standards require prosecutors to notify the defense if the defendant’s conversations or premises have been subjected to wiretapping

84. Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994).

85. Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 (1978).

86. *See, e.g.*, 18 U.S.C. § 2511 (prohibiting the domestic interception of wire, oral, and electronic communications and the subsequent disclosure or use of illegally intercepted communications and imposing a five-year statutory-maximum sentence for violations of its provisions); 18 U.S.C. § 3121 (prohibiting the domestic installation pen-register and trap-and-trace devices without prior judicial authorization and imposing a one-year statutory-maximum sentence for violations of its provisions); 50 U.S.C. § 1809(c) (establishing a statutory-maximum sentence of five years imprisonment for illegal foreign electronic surveillance). Both the Wiretap Act and FISA prescribe authorization procedures that must be followed before electronic surveillance can be conducted. *See* 18 U.S.C. §§ 2516–17; 50 U.S.C. §§ 1802–05. The FBI has investigative jurisdiction over violations of Sections 2511, 3121, and 1809. *See* 28 U.S.C. § 533 (granting the FBI the authority to investigate all federal crimes that are not assigned exclusively to the jurisdiction of another agency).

87. *See* 50 U.S.C. § 1809(d) (“There is Federal jurisdiction over an offense under this section if the person committing the offense was an officer or an employee of the United States at the time the offense was committed.”); *see also* United States v. Koyomejian, 970 F.2d 536, 540 (9th Cir. 1992) (*en banc*) (holding that “FISA applies only to surveillance designed to gather information relevant to foreign intelligence”).

88. *See supra* notes 3–22 and accompanying text.

89. AUSAs receive most of their criminal referrals from federal investigative agencies or “become aware of criminal activities in the course of investigating or prosecuting other cases.” GAO REPORT, *supra* note 76, at 15. They also “receive criminal matters from state and local investigative agencies or, occasionally, from private citizens.” *Id.*

90. *Cf.* State v. Latigue, 502 P.2d 1340, 1342 (Ariz. 1972) (disqualifying the district attorney’s office from prosecuting Latigue because the chief deputy county attorney had previously represented him); ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 134 (1935) (opining that a former state’s attorney who had entered private defense practice could not represent a defendant that he had previously prosecuted because the public would “naturally infer” that the attorney would take advantage of his prior connections with the prosecutor’s office).

or other electronic surveillance as part of the investigation of the case.⁹¹ The purpose of the rule is to allow the defense an opportunity to challenge the legality of the surveillance and the admissibility of any fruits of the surveillance efforts.⁹² Like in the perjury example *supra*, however, Rules 1.2 and 1.6 would seem to prevent an AUSA from complying with these standards, if it is her or his “client” who engaged in the wiretapping, at least in the absence of the “client’s” consent.

2. *Attorney-Client Privilege*

In addition to the ethical rules governing confidentiality and loyalty, evidentiary law would be significantly altered if an agent were the “client” of a prosecutor. The doctrine of attorney-client privilege shields communications between lawyers and clients from discovery.⁹³ Under *Upjohn Co. v. United States*,⁹⁴ this privilege would extend to much of the investigating agency if the agency were construed as an organizational client.⁹⁵

There is surprisingly little case law on the question of whether a Government agent or official enjoys an attorney-client privilege when communicating with a Government attorney in the context of a criminal prosecution,⁹⁶ but the dearth of case law exists primarily because Government agents and officials almost never assert such a privilege in situations in which, if one existed, one would expect them to do so. The United States Court of Appeals for the Seventh Circuit addressed a somewhat analogous situation in *In re Witness Before the Special Grand*

91. See CRIM. JUSTICE STANDARDS FOR DISCOVERY, std. 11-2.1(c) (AM. BAR ASS’N 1992). Some states require such disclosure in their rules of criminal procedure. See, e.g., ALASKA R. CRIM. P. (16)(b)(2)(ii); ARIZ. R. CRIM. P. 15.1(b)(i); ARK. R. CRIM. P. 17.1(b)(ii); COLO. R. CRIM. P. 16 (a)(i)(VI); FLA. R. CRIM. P. 15.1 (b)(i); MD. R.P. 4-263 (a)(2)(A); PA. R. CRIM. P. 305 (B)(1)(g).

92. See CRIM. JUSTICE STANDARDS FOR DISCOVERY, std. 11-2.1 cmt. c.

93. See *Jenkins v. Bartlett*, 487 F.3d 482, 490 (7th Cir. 2007) (“The attorney-client privilege protects communications made in confidence by a client to his attorney in the attorney’s professional capacity for the purpose of obtaining legal advice.”) (citing *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997)).

94. *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (holding that a corporation’s attorney-client privilege covers communications from the control group of a corporation to corporate counsel seeking advice, including communications contained in internal corporate reports, investigation notes, and interviews with lower level employees).

95. See Michael Stokes Paulsen, *Who “Owns” the Government’s Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 474 (1998) (arguing that the Government has the “same attorney-client privilege that exists for a corporation or other organizational entity”).

96. See Walter Pincus, *No Clear Legal Answer: The Uncertain State of the Government Attorney-Client Privilege*, 4 GREEN BAG 2D 269 (2001).

Jury.⁹⁷ Federal prosecutors were investigating a “licenses for bribes” scandal in the Illinois Secretary of State’s office.⁹⁸ The central question in the case was whether the former Chief Legal Counsel to the Secretary of State could refuse, on the basis of the attorney-client privilege, to disclose communications with a state officeholder when called to testify before a federal grand jury about conversations that he had with the Secretary of State in his official capacity as General Counsel.⁹⁹

The court held, at the DOJ’s *insistence*,¹⁰⁰ that no such government attorney-client privilege existed in the context of the federal criminal investigation.¹⁰¹ In reaching this holding, the court noted:

Unfortunately, there is no clear-cut answer to this question because, outside of [the Illinois Secretary of State] and the Clinton administration,¹⁰² only one government body, the Detroit City Council, has ever attempted to claim such a privilege in the criminal context. Thus, one could argue either that, since historically the privilege has never been claimed, recognizing it would be an extension, or that, since no court has ever recognized a civil-criminal distinction to the privilege, creating one here would constitute an exception.¹⁰³

The court reasoned:

[G]overnment lawyers have responsibilities and obligations different from those facing members of the private bar. While the latter are appropriately concerned first and foremost with protecting their clients—even those engaged in wrongdoing—from criminal charges and public

97. *In re* Witness Before Special Grand Jury 2000-2, 288 F.3d 289 (7th Cir. 2002).

98. *Id.* at 290.

99. *Id.* at 290–91.

100. The Government contended that the privilege between a government attorney and his official client did not extend to criminal proceedings. *See id.* at 292.

101. *See id.* at 290.

102. *Witness Before Special Grand Jury*, 288 F.3d at 292; *see In re Lindsay*, 158 F.3d 1263 (D.C. Cir. 1998) (rejecting the White House Counsel’s assertion of attorney-client privilege to cover his conversations with the President); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997).

103. *In re* Witness Before Special Grand Jury 2000-2, 288 F.3d 289, 292 (7th Cir. 2002) (internal citation omitted) (holding that Government attorneys could not assert a governmental attorney-client privilege as a basis for withholding information from a federal grand jury conducting a criminal investigation).

exposure, government lawyers have a higher, competing duty to act in the public interest. They take an oath, separate from their bar oath, to uphold the United States Constitution and the laws of this nation Their compensation comes not from a client whose interests they are sworn to protect from the power of the state, but from the state itself and the public fisc. It would be both unseemly and a misuse of public assets to permit a public official to use a taxpayer-provided attorney to conceal from the taxpayers themselves otherwise admissible evidence of financial wrongdoing, official misconduct, or abuse of power.

* * *

Public officials are not the same as private citizens precisely because they exercise the power of the state. With this responsibility comes also the responsibility to act in the public interest. It follows that interpersonal relationships between an attorney for the state and a government official acting in an official capacity must be subordinated to the public interest in good and open government, leaving the government lawyer duty-bound to report internal criminal violations, not to shield them from public exposure

An officeholder wary of becoming enmeshed in illegal acts may always consult with a private attorney, and there the privilege unquestionably would apply In fact, analogous rules apply in the corporate realm, where attorneys are repeatedly admonished to advise corporate officials that they are not personal clients of the attorney and may wish to retain other counsel.¹⁰⁴

3. *Attorney Malpractice*

If prosecutors were “representing” agents, they would open themselves up to claims of legal malpractice, since an attorney-client relationship imposes upon an attorney the duty to exercise the degree of

104. *Witness Before Special Grand Jury*, 288 F.3d at 293–94 (internal citations omitted) (footnote omitted). *Cf. Osborne v. Johnson*, 954 S.W.2d 180 (Tx. App. 1997) (holding that communications between a department chair and the university’s counsel were not within the attorney-client privilege).

skill, care, and knowledge commonly exercised by members of the profession on a client's behalf.¹⁰⁵ For example, if an agent referred a case to an AUSA, and the evidence was legally sufficient to sustain criminal charges, but the AUSA declined to charge the case, could the agent sue the AUSA for malpractice for failure to prosecute the case?¹⁰⁶ If a prosecutor calls an agent to testify, and the agent unknowingly waives privileges (e.g., the privilege against self-incrimination) while testifying, and the information contained in the testimony is later used against the agent, can she or he sue the prosecutor for malpractice for failing adequately to advise him or her?¹⁰⁷ Such a suit has never been brought, which strongly suggests that the client-relationship conception is mistaken.

105. See *Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994). The elements of a claim of legal malpractice action are (1) an attorney-client relationship, (2) negligence or breach of contract by the attorney, and (3) that causes the client an injury in fact. See *Phillips v. Clancy*, 733 P.2d 300 (Ariz. App. 1986); *Tante v. Herring*, 453 S.E.2d 686 (Ga. 1994); *Atlas Tack Corp. v. Donabed*, 712 N.E.2d 617 (Mass. App. 1999); *Klemme v. Best*, 941 S.W.2d 493 (Mo. 1997).

106. Cf. *Wassall v. DeCaro*, 91 F.3d 443 (3d. Cir. 1996) (holding that, under Pennsylvania law, plaintiffs could maintain a malpractice action against their attorney based on the failure to prosecute, even though they had agreed to the dismissal of the case); *Sitton v. Clements*, 385 F.2d 869 (6th Cir. 1967) (upholding the judgment against attorney for negligently failing to institute a client's civil assault case within the one-year limitation period); cf. also *Crafton v. Van den Bosch*, 196 S.W.3d 767 (Tenn. App. 2005) (holding that a legal-malpractice action accrued when an attorney refused to file the petition that he was retained to file); *Hartman v. Rogers*, 174 S.W.3d 170 (Tenn. App. 2005) (holding that a cause of action for legal malpractice accrued when a divorce attorney failed to use a deed of trust to impeach the client's wife's testimony at trial); *Dickerson v. Brown*, 146 S.W.3d 62 (Tenn. App. 2003) (holding that a cause of action for legal malpractice, arising from attorney's representation of client in criminal trial that resulted in first-degree murder conviction, accrued, and the one-year statute of limitations for malpractice claims began to run, accrued when the date attorney withdrew from his representation of client in the criminal matter). Of course, prosecutors have nearly impenetrable immunity from prosecution for damages. See *infra* Part II(C)(4). In that hypothetical situation, the agent would presumably be more interested in equitable relief (an injunction forcing the AUSA to file the charges) rather than damages.

107. Compare *Williams v. Ely*, 668 N.E.2d 799 (Mass. 1996) (holding that lawyers were liable for gift tax liabilities that clients incurred due to the lawyers' negligence because they had an attorney-client relationship), with *Buras v. Marx*, 892 So. 2d 83 (La. App. 2004) (holding that an attorney who did not have an attorney-client relationship with a purported client did not have a duty to advise the individual); *Spinner*, 631 N.E.2d at 542 (holding that trust attorneys did not owe a duty of care to trust beneficiaries because they were not the attorneys' clients); *Page v. Frazier*, 445 N.E.2d 148 (Mass. 1983) (holding that a bank attorney who conducted a title examination could not be held liable to mortgagors for an alleged negligent because there was no attorney-client relationship). See generally *Tamposi v. Denby*, 136 F. Supp. 3d 77, 117 (D. Mass. 2015) (describing the doctrine of legal malpractice for failure adequately to advise a client under Massachusetts law).

4. *Prosecutorial Immunity*

Prosecutors generally have absolute immunity from suit for their discretionary decision-making.¹⁰⁸ This immunity derives, at least in part, from the fact that they are not private attorneys representing individual clients, but instead are public prosecutors representing the sovereign. If, however, AUSAs are attorneys for individual case agents, then their argument for immunity from subsequent suits for damages for the decisions that they make in the course of that representation is less compelling.¹⁰⁹ While lowering the high bar of prosecutorial immunity might be a salutary development for the exercise of prosecutorial discretion, surely such a decision should be made intentionally, in an effort to combat prosecutorial misconduct or prevent wrongful convictions,¹¹⁰ rather than as an inadvertent extension of reconceptualizing a lawyer-client relationship between prosecutors and their investigating agents.

5. *The Cause-Lawyer Analogy*

In some ways, prosecutors who view themselves as representing the law-enforcement agencies and agents with whom they work face ethical conflicts that are the mirror image of those faced by criminal-defense attorneys who view themselves as representing a “cause” rather than individual clients.¹¹¹ Because the AUSAs work on a volume of cases with the same individual agents and agencies (e.g., the district’s local FBI agents), an AUSA who sees himself or herself as representing that law-

108. See *Van de Kamp v. Goldstein*, 555 U.S. 335, 339–340 (2009); *Kalina v. Fletcher*, 522 U.S. 118, 124–29 (1997); *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976) (holding that prosecutors had absolute immunity from damages liability under 42 U.S.C. § 1983 for misconduct in the course of performing their traditional duties); see, e.g., *State v. Superior Court*, 921 P.2d 697, 701 (Ariz. App. 1996); *Culpepper v. Smith*, 792 S.W.2d 293, 300 (Ark. 1990); *Falls v. Superior Court*, 49 Cal. App. 4th 1031, 1043 (1996); *McDonald v. Lakewood Country Club*, 461 P.2d 437, 441 (Colo. 1969); *DeLaurentis v. New Haven*, 597 A.2d 807, 816 (Conn. 1991); *Stebbins v. Wash. Metro. Area Transit Auth.*, 495 A.2d 741, 744 (D.C. 1985); *Hansen v. State*, 503 So. 2d 1324, 1326 (Fla. Dist. Ct. App. 1987); *Robbins v. Lanier*, 402 S.E.2d 342, 343–44 (Ga. App. 1991); *Burr v. City of Cedar Rapids*, 286 N.W.2d 393, 395 (Iowa 1979).

109. See *Burns v. Reed*, 500 U.S. 478, 485–87 (1991) (denying a prosecutor absolute immunity for advice given to police).

110. Cf. Edwin M. Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201 (1941); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399 (2006); Keith S. Rosenn, *Compensating the Innocent Accused*, 37 OHIO ST. L.J. 705, 715–17 (1976).

111. See MODEL RULES OF PROF’L CONDUCT pmb. 9 (“Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system[,] and to the lawyer . . .”); see generally Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195 (2005).

enforcement monolith may find conflicts between that view of representation and effectuating justice in the individual case and for the individual defendant, victim, and community before him or her.¹¹² Unless the (agent) “client” shares the AUSA’s philosophy about justice in the individual case, the AUSA would be bound to advance the “client’s” interest at the expense of her or his personal conscience, creating yet another difficult ethical conflict for that prosecutor.¹¹³

II. Troubling Extentions of the Client Philosophy

There is already a robust literature about cognitive biases and their effect on prosecutorial decision-making,¹¹⁴ particularly in conjunction with the adversarial nature of the American criminal-justice system.¹¹⁵ As Justice Frankfurter once observed, “[T]he appearance of impartiality is an

112. See Etienne, *supra* note 111, at 1253 (explaining the conflicts of interest that can arise when “one client’s representation” becomes “materially limited by concerns for the class of clients generally and the moral and political cause of the attorney”).

113. See Williams v. Reed, 29 F. Cas. 1386, 1390 (C.D. Me. 1824) (admonishing that an attorney’s duty of loyalty to the client required “exclusive devotion” to the client’s interest); cf. Susan Sterett, *Caring About Individual Cases: Immigration Lawyering in Britain*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 293, 306 (Austin Sarat & Stuart Scheingold eds., 1998) (“One’s duty as a lawyer is to one’s client, not to the mass of other potential clients. So if there’s a point you can get a result for your client on you have to pursue it. You can’t say I won’t take this point because it might be worse for other people unless the client wants to adopt altruistic self-sacrifice as part of his or her instructions to you.”).

114. See, e.g., Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1603–13 (2006); Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQUETTE L. REV. 83 (2007); Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212 (1992); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006); Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315 (2003); see also Hon. Alex Kozinski, Preface to *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., at xxxviii (2015) (“Faced with a remote possibility of being found out, and the likelihood that nothing bad will happen even if they are, many prosecutors will turn a blind eye or worse.”).

115. See, e.g., Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 484, 490–92 (2006); Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911 (2011); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 204–15 (1988); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 65 FORDHAM L. REV. 851, 869 (1995); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 132 (2004); Wilson, *supra* note 48; Marvin Zalman & Ralph Grunewald, *Reinventing the Trial: The Innocence Revolution and Proposals to Modify the American Criminal Trial*, 3 TEX. A&M L. REV. 189 (2015); cf. Etienne, *supra* note 111, at 1248 (explaining that attorneys have a very difficult time objectively distinguishing between arguments on the basis of their merit).

essential manifestation of its reality.”¹¹⁶ As Judge Kozinski more recently noted, in describing the “moral hazard” that perverse incentives and tunnel vision can create:

Prosecutorial misconduct is a particularly difficult problem to deal with because so much of what prosecutors do is secret. If . . . prosecutors rely on the testimony of cops they know to be liars, or if they acquiesce in a police scheme to create inculpatory evidence, it will take an extraordinary degree of luck and persistence to discover it—and in most cases it will never be discovered.¹¹⁷

These concerns with cognitive biases and misconduct, however, are greater when a prosecutor views an investigating agent not only as a member of the prosecutor’s “team,” but the client driving and motivating the decision-making.¹¹⁸

A. Disclosure of Favorable Evidence to the Defense

Prosecutors’ obligations to disclose favorable information to defendants in criminal prosecutions, discussed *supra*, come from multiple sources: the Due Process Clauses of the Fifth and Fourteenth Amendments, statutes,¹¹⁹ procedural rules,¹²⁰ court rules,¹²¹ rules of professional

116. *Dennis v. United States*, 339 U.S. 162, 182 (1950) (Frankfurter, J., dissenting).

117. Kozinski, *supra* note 114, at xxiii (internal citations omitted) (footnotes omitted).

118. Other commentators have raised similar concerns about the “victims’ rights” movement and the reconceptualizing of prosecutors as representatives of crime victims. See Bennett L. Gershman, *Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559 (2005); see, e.g., the Crime Victims’ Rights Act, 18 U.S.C. § 3771 (a)(3)(2004) (creating a right of presence for crime victims during court proceedings); FED. R. CRIM. P. 60(a)(2) (implementing the statutory victims’ right of presence); see generally David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims’ Rights Act of 2004*, 28 PACE L. REV. 623 (2008); John Kyl, et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581, 587–88 (2005).

119. See, e.g., The Jencks Act, 18 U.S.C. § 3500 (2000).

120. See, e.g., FED. R. CRIM. P. 12, 12.1–3, 16, 26.2, 46(j).

121. See, e.g., D. MASS. R. 116.2(A)(2) (requiring federal prosecutors to disclose “all information that is material and favorable to the accused because it tends to [c]ast doubt on defendant’s guilt as to any essential element in any count in the indictment or information; [c]ast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable . . . [or] [c]ast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief”).

conduct,¹²² and court orders in individual cases. Because the constitutional discovery rules are “inevitably imprecise,” the Supreme Court has admonished that prudent prosecutors “will resolve doubtful questions in favor of disclosure.”¹²³

Much of the literature on the role of implicit biases in criminal adjudication focuses specifically on these constitutional and ethical discovery obligations that prosecutors navigate.¹²⁴ One example of the implicit-bias concerns that would arise if a prosecutor views an investigating agent or agency as a “client” exists in the context of these disclosure obligations, which are mandatory in operation but involve significant exercises of subjective judgment in their execution. For the purpose of the ethical rules, a prosecutor who makes a good-faith judgment that evidence does not trigger disclosure pursuant to ethical obligations does not violate Rule 3.8, even if that determination is later determined to have been erroneous.¹²⁵ A prosecutor “representing” the agency and holding information that is favorable to the defense is even less likely to see the value of such evidence and her or his decision not to disclose it, while the product of cognitive biases, would almost always be in “good faith” in the sense of the ethical rules (and, therefore, any meaningful enforcement mechanism for the failure to disclose).

B. Suppression Hearings

Suppression hearings are common in criminal cases. Procedurally, they arise when the defendant seeks to challenge the admissibility of prosecution evidence, based on allegations that it was illegally obtained. Like all attorneys, when faced with a motion to suppress evidence that the defense alleges was illegally obtained, a prosecutor must initially decide if she or he has a good-faith basis to oppose it. This involves assessing both the facts and the law underlying the claim.

Under Rule 3.8, a prosecutor who believes that the defense motion is meritorious, should concede the illegality of the agents’ action.¹²⁶ This

122. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 3.8.

123. United States v. Agurs, 427 U.S. 97, 108 (1976). See, e.g., State v. Dunivin, 829 P.2d 799, 801 (Wash. App. 1992).

124. See, e.g., MARK FUHRMAN, DEATH AND JUSTICE (HarperCollins Publishers 2003) (noting how one prosecutor’s dismissal of “red flags” in evaluating forensic evidence led to an innocent man being prosecuted for murder); see generally Alafair S. Burke, *supra* note 114, at 1594–96 (2006) (describing the operation of confirmation bias and its possible effects in prosecutors’ offices); Findley & Scott, *supra* note 114.

125. See MODEL RULES OF PROF’L CONDUCT r. 3.8 cmts. 1–9.

126. Cf. John S. Edwards, *Professional Responsibilities of the Federal Prosecutor*, 17 U. RICH. L. REV. 511, 511 (1983) (describing the prosecutor’s dual role as a zealous advocate who

ethical obligation, however, becomes murky if the agent whose putatively unconstitutional actions is a “client” to whom the prosecutor has a fiduciary duty of advocacy. For example, if an AUSA conceded that a DEA agent had unconstitutionally seized a defendant or searched her or his property, that concession could create civil liability, under *Bivens v. Six Unknown Agents*,¹²⁷ for that agent. If the agent in question were the AUSA’s “client,” the AUSA would be ethically forbidden from subjecting her or his client to that liability under the rules of professional responsibility.

It is presumably for these reasons that courts, the Model Code of Professional Responsibility, and the NDAA forbid prosecutors from making charging decisions for the purpose of shielding investigating agents from civil liability.¹²⁸ Viewing agents who may have committed misconduct during the course of a criminal investigation as “clients” would only heighten the temptation to engage in unethical “covering” of such behavior.¹²⁹

C. Charging Decisions

It is a truism that prosecutors exercise an enormous amount of subjective judgment in their charging decisions, which are highly discretionary and largely unreviewable by courts.¹³⁰ This discretion that

“must be vigorous and vigilant in attacking crime, but must temper his zeal with a recognition that his broader responsibilities are to seek justice”); George T. Frampton, Jr., *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 MD. L. REV. 5, 7 (1976) (“The prosecutor . . . is both an advocate in the criminal justice system and also an administrator of that system.”); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1557 (1981) (observing that prosecutors within the adversary system are “expected to be more (or is it less?) than an adversary”). *But see* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 804 (1987) (recognizing the need for prosecutors to be zealous advocates); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1159 (1973) (urging that prosecutors act primarily as zealous advocates).

127. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

128. *See, e.g.,* Boyd v. Adams, 513 F.2d 83, 89 (7th Cir. 1975); MacDonald v. Musick, 425 F.2d 373, 375 (9th Cir. 1970) (“It is no part of the proper duty of a prosecutor to use a criminal prosecution to forestall a civil proceeding by the defendant against policemen, even where the civil case arises from the events that are also the basis for the criminal charge.”); Gray v. City of Galesburg, 247 N.W.2d 338, 341 (Mich. App. 1976); ABA MODEL CODE OF PROF’L RESPONSIBILITY DR 7-105(A) (AM. BAR ASS’N 1980); NATIONAL DISTRICT ATTORNEY’S ASS’N, NATIONAL PROSECUTION STANDARDS, at std. 43.5 (providing that a prosecutor “should not file charges for the purpose of obtaining from a defendant a release of potential civil claims”).

129. *See* James A. Trowbridge, *Restraining the Prosecutor: Restrictions on Threatening Prosecution for Civil Ends*, 37 ME. L. REV. 41, 57–62 (1985).

130. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 813 (1987); Garrett v. United States, 471 U.S. 773, 791 (1985); United States v. Kajoyan, 8 F.3d 1315, 1324 (“Much of what the United States Attorney’s office does isn’t open to public scrutiny or judicial review.”); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965) (explaining that a court cannot interfere with an AUSA’s decision to bring charges); MONROE H. FREEDMAN & ABBE SMITH,

prosecutors possess to decide whether to initiate and sustain prosecutions, select or decline individual charges, negotiate plea agreements, and grant (or withhold) immunity has been well canvassed.¹³¹ If an investigating agent were the “client” of an AUSA, essentially the “plaintiff” in the criminal complaint, then the AUSA could not decline prosecution, dismiss charges, or plea bargain (for less-serious charges or sentencing leniency)

UNDERSTANDING LAWYERS’ ETHICS 326–28, (3d ed. 2004); Horwitz, *Taking the Cop out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases* *supra* note 13, at 1305; Katherine Lowe, *Prosecutorial Discretion*, 81 GEO. L.J. 1029, 1029–32 (1993); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2135 (1998) (explaining how, via plea bargaining, “the prosecutor acts as the administrative decision-maker who determines, in the first instance, whether an accused will be subject to social sanction, and if so, how much punishment will be imposed”); Richman & Stuntz, *supra* note 76, at 608–12; Hans P. Sinha, *Prosecutorial Ethics: The Charging Decision*, 41 PROSECUTOR 32, 33 (2007) (“If a prosecutor wants to bring charges against someone, the prosecutor will be able to do so.”); *see, e.g.*, *Borderkircher v. Hayes*, 434 U.S. 357, 364 (1978) (holding that it was constitutionally permissible for a prosecutor to threaten to bring significantly enhanced charges as a means of inducing a defendant to plead guilty to the current ones); *Ganger v. Peyton*, 379 F.2d 709, 713 (4th Cir. 1967); *see also* *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“[A] presumption of regularity supports’ their prosecutorial decisions and, ‘in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.’”) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)). The only significant limits on prosecutorial discretion in the federal system are those contained in the DOJ guidelines. *See* OFFICE OF THE U.S. ATTORNEYS, *U.S. Attorneys Manual*, U.S. DEP’T JUSTICE ; *see generally* Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971). These guidelines, however, are internal regulations and are legally unenforceable by defendants. *See, e.g.*, *United States v. Blackley*, 167 F.3d 543, 548–49 (D.C. Cir. 1999) (holding that the DOJ guidelines for prosecutors created no enforceable rights for Blackley); *United States v. Piervinanzi*, 23 F.3d 670, 682 (2d Cir. 1994) (holding that the DOJ guidelines did not create substantive rights for Piervinanzi); *United States v. Busher*, 817 F.2d 1409, 1411 (9th Cir. 1987) (holding that the DOJ guidelines did not create substantive or procedural rights for Busher).

131. *See* *Ball v. United States*, 470 U.S. 856, 859 (1985) (recognizing the long standing rule that prosecutor’s have broad discretion in their charging decisions); *Bordenkircher*, 434 U.S. at 364 (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”); Albert W. Alschuler, *The Prosecutor’s Role in the Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413 (2010); Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 672; *see, e.g.*, *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (“[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation’ so long as ‘the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’”); *see generally* *Ball*, 470 U.S. at 859 (recognizing the long-standing rule that prosecutors have broad discretion in making charging decisions); Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383 (1976); Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors’ Offices*, 22 CORNELL J. LAW & POL. 53 (2012); Melilli, *supra* note 130, at 673–76 (discussing the discretion that the adversary system affords to prosecutors).

unless the agent consented. Any plea agreement that implicitly conceded agent error—for example, moving to dismiss a more serious charge for insufficient evidence—could have adverse employment consequences or remove a barrier to the agent’s civil liability, which would violate the AUSA’s fiduciary and ethical duties to the “client.” In fact, these charging decisions could not really be described as “discretionary” at all, if the DEA agent were the client, because Rule 1.2 would require the AUSA to follow the “client’s” direction. While a host of commentators have advocated shifting some of the adjudicatory discretion away from prosecutors, none have suggested that the shift should go in the direction of the police.¹³²

The USAM, at least by omission, rejects this construct, implying that the investigating agent or agency is not the client when an AUSA makes these discretionary decisions. As the section governing “principles of federal prosecution” eloquently explains:

The manner in which Federal prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances—recognizing both that serious violations of Federal law must be prosecuted, and that prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results. Other prosecutorial decisions can be equally significant. Decisions, for example, regarding the specific charges to be brought, or concerning plea dispositions, effectively determine the range of sanctions that may be imposed for criminal conduct. The rare decision to consent to pleas of *nolo contendere* may affect the success of related civil suits for recovery of damages. Also, the government’s position during the sentencing process will help assure that the

132. See, e.g., Wayne A. Logan, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. 1695, 1695–96 (1990).

court imposes a sentence consistent with the Sentencing Reform Act.¹³³

D. Criminal Misconduct

In addition to criminal violations of the Wiretap Act, the DOJ has exclusive jurisdiction to (and often does) prosecute a host of federal crimes that could be committed by investigating agents—crimes like criminal civil-rights violations, obstruction of justice,¹³⁴ witness tampering,¹³⁵ perjury,¹³⁶ and making false statements in the course of a criminal adjudication.¹³⁷ Other commentators have decried the unwillingness of prosecutors' offices to act upon clear evidence of police misconduct.¹³⁸ As Judge Kozinski explained:

Police investigators have vast discretion about what leads to pursue, which witnesses to interview, what forensic tests to conduct and countless other aspects of the investigation. Police also have a unique opportunity to manufacture or destroy evidence, influence witnesses, extract confessions and otherwise direct the investigation so as to stack the deck against people they believe should be convicted. And not just small-town police in Podunk or Timbuktu. Just the other day, “[t]he Justice Department and FBI [] formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all [of the 268] trials in which they offered evidence against criminal

133. OFFICE OF THE U.S. ATTORNEYS, *U.S. Attorneys Manual Title 9: Criminal* § 9-27.001, U.S. DEP'T JUSTICE, <http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution> (last visited Oct. 28, 2015).

134. See Victim and Witness Protection Act of 1982, 18 U.S.C. § 1505 (2006) (criminalizing the obstruction of federal proceedings).

135. See *id.* at § 1512 (criminalizing federal witness tampering).

136. See *id.* at § 1621 (criminalizing perjury in federal proceedings); *cf.* Kozinski, *supra* note 114, at xxv (describing the “long and documented history of lying in court” of a Phoenix police detective and the “dogged refusal” of the local district attorney’s office to disclose his disciplinary record).

137. See 18 U.S.C. § 1623 (criminalizing making false declarations to a federal grand jury).

138. See Kozinski, *supra* note 114, at xxxvi n.198 (“If evidence of such widespread misconduct in the highest level of a metropolitan police department is unworthy of even an investigation by the U.S. Justice Department, one must wonder what is.”); *cf.* Jonathan Abel, *Buoying Brady’s Burden*, DAILY J. (Mar. 19, 2015), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/888703/doc/slspublic/Daily%20Journal%20-%20Jonathan%20Abel%20-%20Buoying%20Brady’s%20Burden%20-%202019Mar2015.pdf> (critiquing prosecutors’ reluctance to disclose *Brady* evidence concerning police misconduct).

defendants over more than a two-decade period before 2000.” . . . How can you trust the professionalism and objectivity of police anywhere after an admission like that? There are countless documented cases where innocent people have spent decades behind bars because the police manipulated or concealed evidence¹³⁹

Remedying agency misconduct is even less likely if the perpetrators were the clients of the watchdogs.

Conclusion

How did this happen? At what point did AUSAs start believing that they had case agents, rather than justice, as clients? More importantly, how can they be disabused of this philosophy?

There are serious problems in the criminal-justice system with wrongful convictions, police and prosecutorial misconduct, and questionable surveillance techniques. Prosecutors are in the best position to tackle these problems, but they cannot do so if they are “representing” the police. As the California Supreme Court has admonished, “Not only is a government lawyer’s neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole.”¹⁴⁰ Or, to paraphrase Al Capone: It’s easier to get things done with a kind word and a gun than a kind word alone.

139. Kozinski, *supra* note 114, at x (internal citations omitted) (footnotes omitted).

140. *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 351 (Cal. 1985).