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## The Police-Prosecutor Relationship and the No-Contact Rule: Conflicting Incentives after *Montejo v. Louisiana* and *Maryland v. Shatzer*

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**THE POLICE-PROSECUTOR RELATIONSHIP AND  
THE NO-CONTACT RULE: CONFLICTING  
INCENTIVES AFTER *MONTEJO V. LOUISIANA* AND  
*MARYLAND V. SHATZER***

CALEB MASON\*

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## I. INTRODUCTION

In two recent cases, *Montejo v. Louisiana*<sup>1</sup> and *Maryland v. Shatzer*,<sup>2</sup> the Supreme Court has held, for the first time, that overt custodial government contact with a represented criminal defendant after the Sixth Amendment right to counsel has attached, initiated by law enforcement agents for the purpose of securing a *Miranda* waiver and obtaining a statement and without the consent or presence of the defendant's lawyer, is constitutional in certain circumstances. This change in the constitutional landscape has serious implications for the interpretation and enforcement of one of the bedrock rules of professional responsibility: the rule that lawyers are forbidden from making contact with represented adverse parties.<sup>3</sup> It forces the question: Should the ethics rules be aligned with the constitutional rules in criminal cases? And if they diverge, can prosecutors effectively manage their investigations when key investigatory tactics are lawful for police but forbidden for prosecutors?

In the parallel context of undercover investigations, in which prosecutors direct undercover agents to elicit incriminating statements from represented defendants, the courts have uniformly interpreted the no-contact rule to allow for undercover contacts prior to the initiation of adverse judicial proceedings and the attachment of the Sixth Amendment right to counsel. But no court, commentator, or committee has ever announced or proposed such a rule for *overt* contacts. Before *Montejo* and *Shatzer*, there was no need to consider the question because the *Miranda* rules<sup>4</sup> tracked the ethical rules by way of *Michigan v. Jackson*.<sup>5</sup> But things have now changed. *Jackson* has been overruled, and *Montejo* and *Shatzer* force us to reconsider the standard analyses of the constitutional and ethical norms governing the following four scenarios, as applied to police and to prosecutors:

- 1) In systems—paradigmatically, federal court—in which counsel is appointed for defendants at their initial appearance, but the Sixth Amendment does not attach until an indictment or information is filed (up to thirty days later), may law enforcement custodially contact the defendant, post-appointment but pre-attachment, without counsel present, in the attempt to get a *Miranda* waiver, so long as the defendant has not invoked a right to counsel in a *Miranda* setting?

And may a prosecutor ethically direct or supervise agents in so doing?

- 2) May law enforcement custodially contact a represented criminal defendant *post-attachment*, where the defendant has been appointed counsel at an initial appearance but has not invoked his right to counsel in a *Miranda* setting?

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<sup>1</sup> *Montejo v. Louisiana*, 129 S. Ct. 2079, 2086 (2009).

<sup>2</sup> *Maryland v. Shatzer*, 130 S. Ct. 1213, 1222 (2010).

<sup>3</sup> MODEL RULES OF PROF'L CONDUCT R. 4.2 (2009) (enacted more or less verbatim in every state code).

<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436, 471-72 (1966).

<sup>5</sup> *Michigan v. Jackson*, 475 U.S. 625, 636 (1986).

And may a prosecutor ethically direct or supervise agents in so doing?

- 3) May law enforcement custodially contact a defendant, *pre-attachment*, in the attempt to get a *Miranda* waiver, where the defendant has invoked his right to counsel in a *Miranda* setting but has then been released from custody for two weeks?

And may a prosecutor ethically direct or supervise agents in so doing?

- 4) May law enforcement custodially contact a defendant, *post-attachment*, in the attempt to get a *Miranda* waiver, where the defendant has invoked his right to counsel in a *Miranda* setting but has then been released from custody for two weeks?

And may a prosecutor ethically direct or supervise agents in so doing?

In this paper, I examine the consequences of the divergence of ethical and constitutional rules, with particular attention to the institutional dynamics of criminal investigation and specifically the relationship between police and prosecutors. This relationship is of crucial importance because *Montejo* and *Shatzer* create a legal regime in which non-lawyer agents and officers may initiate investigative contact with represented defendants in circumstances in which prosecutors are absolutely forbidden to do so. This situation undermines the ability of prosecutors to effectively supervise the investigation of their cases and puts them in an untenable position when advising agents on the law.

In Part II of this paper, I set out the facts and holdings of the new cases. In Part III, I explain the scope and limits of the no-contact ethics rule as applied to criminal investigations. In Part IV, I apply the constitutional and ethical rules to four specific investigatory scenarios to show how the legal limits on police and prosecutorial investigations diverge. In Part V, I examine the potential consequences of divergent rules for police and prosecutors on permissible investigative methods. In Part VI, I consider the likely practical consequences of the new cases for defendants. I conclude that rather than lower the ethical bar for prosecutors, prosecuting agencies should raise the bar for their agents: Prosecutors should instruct their agents not to make *Montejo/Shatzer* contacts with defendants and should commit to a policy of not using any *Montejo/Shatzer* statements nonetheless obtained by law enforcement. Such a policy—already endorsed by the Justice Department for federal agents<sup>6</sup>—is, I think, necessary to maintain the integrity of the adversarial process, which is necessary for maintaining the social legitimacy of law enforcement.

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<sup>6</sup> See Brief for the United States as Amicus Curiae in Support of Overruling *Michigan v. Jackson* at 11-12, *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (No. 07-1529), 2009 WL 1019983 (stating that federal agents are unlikely to engage in *Montejo* contacts even if the Court allows them). Of course, that's just the Solicitor General's prediction. How the agencies' internal guidelines develop is a different matter—as are the informal practice norms that may develop.

## II. THE NEW CASES

## A. Montejo

Jesse Montejo shot and killed Jerry Ferrari.<sup>7</sup> Louisiana police investigating the murder arrested Montejo and read him his *Miranda* rights.<sup>8</sup> Montejo waived his rights and agreed to answer questions.<sup>9</sup> He admitted shooting Ferrari and said he had thrown the gun into a lake.<sup>10</sup> Two days later he was brought to court for his initial appearance.<sup>11</sup> The court appointed counsel for Montejo, who was then returned to jail.<sup>12</sup> Before Montejo had met the lawyer who had been appointed for him, two detectives came to his cell and asked if he would be willing to show them where the murder weapon was.<sup>13</sup> The detectives again read Montejo his *Miranda* rights, which he again waived. He agreed to go with the detectives to find the gun.<sup>14</sup> “During the excursion, he wrote an inculpatory letter of apology to the victim’s widow.”<sup>15</sup> The government introduced the letter at trial, over the objection that it had been obtained through a *Miranda* waiver obtained without counsel, after counsel had been appointed.<sup>16</sup>

The Louisiana courts held that because Montejo had never expressly invoked his right to counsel, the post-appointment waiver was valid and the letter was admissible.<sup>17</sup> The court distinguished *Michigan v. Jackson*, which had held that post-appointment waivers were presumed invalid where the defendant had requested counsel at an initial court appearance.<sup>18</sup> Under Louisiana procedure, the court reasoned, the defendant never requests anything; counsel is automatically appointed.<sup>19</sup> Therefore there was no invocation, and no *Edwards* bar on police re-initiation of contact.<sup>20</sup>

Montejo argued in the Supreme Court that the *Jackson* presumption of invalidity should be triggered by the fact that he had a lawyer, not by whether he had explicitly requested one.<sup>21</sup> It would be irrational, he urged, to draw such an important

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<sup>7</sup> *Montejo*, 129 S. Ct. at 2082.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 2083.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 2084.

constitutional distinction on the basis of the minutiae of state appointment hearing colloquies.<sup>22</sup> Whether the hearing judge said, “Now Mr. Defendant, do you want a lawyer?” (as the colloquy runs in Michigan), or “Now Mr. Defendant, I’m appointing a lawyer to represent you” (as the colloquy runs in Louisiana), the relevant fact, he argued, is surely that, as of that moment, the defendant *has* a lawyer.<sup>23</sup> The protection of *Jackson*—the presumptive invalidity of post-appointment waivers—should not vary state to state based on the seemingly irrelevant turn of phrase employed by courts; surely the relevant fact is the appointment itself.<sup>24</sup>

The Supreme Court agreed with Montejo that it would be irrational to apply *Jackson* based on the grammatical nuance of the state appointment procedures.<sup>25</sup> Its solution, however, was not to reverse his conviction, but rather to overrule *Jackson* and throw out the entire concept of a presumption of invalidity for post-appointment waivers.<sup>26</sup>

The Court’s reasoning was simple: *Miranda* rights can be waived, and the government may continue to seek a waiver until the suspect actually invokes his rights.<sup>27</sup>

When a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary. There is no “initial election” to exercise the right . . . that must be preserved through a prophylactic rule against later waivers. No reason exists to assume that a defendant like Montejo, who has done *nothing* at all to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring.<sup>28</sup>

Additionally, the initial appearance cannot count as a *Miranda* right-to-counsel invocation, the Court held, because a right-to-counsel invocation can only be made “when the defendant is approached for interrogation.”<sup>29</sup> *Miranda* rights, said the Court, cannot be invoked “anticipatorily.”<sup>30</sup> Therefore the *Edwards* presumption of invalidity for post-*invocation* waivers should not be extended to post-*appointment*

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2085.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 2091.

<sup>27</sup> Invocation of the right to silence requires the police to stop questioning, wait for a decent interval, then re-Mirandize when they re-start questioning. See *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). Invocation of the right to counsel required (at the time *Montejo* was decided—things are different now, after *Shatzer*!) the police to stop questioning entirely until the defendant’s counsel was present. See *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

<sup>28</sup> *Montejo*, 129 S. Ct. at 2087.

<sup>29</sup> *Id.* at 2091.

<sup>30</sup> *Id.*

waivers, because nothing that happens at the appointment hearing should be interpreted as an invocation of the right to have counsel present during questioning.

We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than “custodial interrogation.” . . . What matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing.<sup>31</sup>

In sum, until a suspect has invoked his right to counsel to a law-enforcement officer in response to a request for a *Miranda* waiver, law-enforcement officers may initiate contact to secure the suspect’s cooperation.

#### B. Shatzer

Michael Shatzer was in prison for sexual assault.<sup>32</sup> While he was serving his sentence, detectives received information about another crime he was alleged to have committed.<sup>33</sup> They went to the prison, brought Shatzer to an interview room, and read him his *Miranda* rights.<sup>34</sup> He invoked his right to counsel, and the detectives ended the interview and left.<sup>35</sup> Ending the interview was the correct action under the *Edwards* rule, which provides that a suspect’s invocation of the *Miranda* right to counsel requires termination of questioning until counsel is present.<sup>36</sup> Under *Edwards*, unless the suspect re-initiates the interview, any subsequent *Miranda* waiver will be presumed invalid.<sup>37</sup>

Shatzer was not charged with the second offense, so a lawyer was not appointed for him.<sup>38</sup> More than two years later, while Shatzer was still in prison on the original offense, the detectives received more information about the alleged second crime.<sup>39</sup> They returned to the prison, brought Shatzer to an interview room, and read him his *Miranda* rights.<sup>40</sup> This time Shatzer waived his rights and made an incriminating statement.<sup>41</sup> He was charged with the second crime, and the statement was admitted against him, over his objection that it had been obtained in violation of the *Edwards*

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<sup>31</sup> *Id.*

<sup>32</sup> *Maryland v. Shatzer*, 130 S. Ct. 1213, 1217 (2010).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

<sup>37</sup> *Id.*

<sup>38</sup> *Shatzer*, 130 S. Ct. at 1218.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

rule.<sup>42</sup> The Maryland Court of Appeals reversed under *Edwards*, and the State appealed.<sup>43</sup>

The Supreme Court unanimously reversed, holding for the first time that the *Edwards* presumption of invalidity for a post-invocation waiver of the right to counsel has a time limit of two weeks, if the suspect has been out of custody.<sup>44</sup>

When . . . a suspect [who has invoked his right to counsel] has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends.<sup>45</sup>

The Court's reasoning is thus that the initial presumption of coercion engendered by the experience of custodial interrogation can dissipate over time, and when it has dissipated, the rationale for the prophylactic *Edwards* rule no longer applies.

The Court's explanation for why *two weeks* is sufficient is less clear. While the *Shatzer* case itself involved a *two-year* interval, the Court chose not to decide the case on its facts. Instead, it held that *two weeks* is "plenty of time."<sup>46</sup> The Court invoked the common criminal procedure theme that law enforcement officers need clear rules to follow and asserted that it would be "impractical" to leave the precise duration of the *Edwards* limitations period to case-by-case litigation.<sup>47</sup> So the Court had to pick a number, and two weeks was the winner.<sup>48</sup> It is impractical to leave the

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1223. The Court also held, interestingly though not relevant to this Article, that *Shatzer* was constructively "out of custody" during the intervening two years, because he was returned to the general prison population, and was in prison on another conviction. Thus, while he was confined, he was not in custody based on the alleged second offense. *Id.* at 1216.

<sup>45</sup> *Id.* at 1221.

<sup>46</sup> *Id.* at 1223.

<sup>47</sup> *Id.* at 1222.

<sup>48</sup> Professor Kerr commented wryly at the time:

As a matter of policy, I think that's a pretty good rule. But why precisely 14 days? That is, 336 hours, or exactly 20,160 minutes? There is no 14-day Clause in the Constitution. (I checked.) Why not 15 days? Or 13.491 days? As far as I can guess, the only reason 14 days was chosen is that it's easy to remember and seemed in the right ballpark. Jews started measuring seven days as a time period in the 6th Century BC; the Romans then adopted it, measuring time in 7-day weeks; and two-thousand-odd years later, on February 24, 2010, a majority of the Justices on the Supreme Court thought that one of those was too short, three was too long, and two seemed about right. And how did the Justices know that 14 days would be about right? Based on their extensive experience being arrested, perhaps? Presumably not. But no matter. Fourteen days seemed about right, and so the 14-day rule became the law.

Orin Kerr, *Does the Constitution Have a 14-Day Clause?*, SCOTUSBLOG (Feb. 25, 2010, 11:45 AM), <http://www.scotusblog.com/2010/02/does-the-constitution-have-a-14-day-clause/>.



answer to that question for clarification in future case-by-case adjudication; law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful.<sup>49</sup> “It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”<sup>50</sup>

*Shatzer* thus complements *Montejo*. While *Montejo* applies to represented defendants who have not invoked their right to counsel when asked to waive it, *Shatzer* applies to those who *have* invoked it, and its holding is easily summarized: When can you re-approach? If you let the guy go free<sup>51</sup> and wait two weeks, then re-arrest him.

### C. Restatement of the New Rule

Here, in sum, is the jurisprudential significance of these cases: *Montejo* wipes out *Jackson* and pushes the analysis to *Edwards*. Then *Shatzer* announces a two-week limit on *Edwards*. This is a big change.

*Montejo* holds that the Sixth Amendment can be validly waived, post-attachment, by a represented defendant, without the knowledge of the defendant’s lawyer.<sup>52</sup> *Montejo* emphatically rejects the claim that the fact of representation is relevant to the validity of the waiver. *Montejo* overrules *Jackson* and holds that *Edwards* provides sufficient protection for defendants invoking the right to counsel.<sup>53</sup> *Edwards*, not the fact of attachment or of representation, is the source of any prohibition on contact.

*Shatzer* then dramatically limits *Edwards*, holding that the post-invocation prohibition on government-initiated contact lasts only two weeks.<sup>54</sup> So combining the two holdings, we reach the following restatement: (1) the fact of representation is irrelevant to the validity of an uncounseled waiver; (2) the fact of Sixth Amendment attachment is irrelevant to the validity of an uncounseled waiver; (3) *Edwards* supplies the limits on government waiver requests; and (4) *Edwards* is now limited to two weeks, so the government can renew an uncounseled custodial waiver request post-invocation after a two-week period of release from custody.

In short, after two weeks of freedom, a *Shatzer* defendant is identically situated to a *Montejo* defendant. Under *Montejo*, the government may initiate uncounseled, custodial, post-attachment contact with a represented defendant to seek a waiver, unless there’s an *Edwards* bar. And under *Shatzer*, the *Edwards* bar lapses after two weeks. Thus, after two weeks of freedom, a post-attachment defendant who has invoked and acquired counsel can be re-arrested,<sup>55</sup> and then re-approached by the government in an attempt to secure a waiver.

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> The case may also be a release back to the general population.

<sup>52</sup> See *supra* Part II.A.

<sup>53</sup> *Id.*

<sup>54</sup> See *supra* text accompanying note 44.

<sup>55</sup> This is assuming probable cause, obviously. But that’s no big hurdle after *Whren v. United States*, 517 U.S. 806 (1996) (pretextual arrest permissible if based on probable cause) and *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (arrest for minor traffic violation

So does this mean that even when a defendant invokes his right to counsel, if there is a long period between charge and trial, and the defendant is out on bail, the government can re-arrest him every two weeks, and then, without his lawyer, ask if he wants to talk? Yes, it does, as a constitutional matter. The more difficult question is whether the prosecutor, as an ethical matter, can participate.

### III. THE NO-CONTACT RULE

#### A. Background

The no-contact rule has been part of every formal code of legal ethics since the nineteenth century.<sup>56</sup> It provides that a lawyer cannot knowingly communicate about a matter with a person who the lawyer knows (or should know) is represented in that matter by another lawyer.<sup>57</sup> It is found, in almost verbatim language, in every state ethics code, which apply to federal as well as state prosecutors; by statute, federal prosecutors are covered by the state rules in any district where they practice.<sup>58</sup>

There is, however, one major exception: Contacts are permitted if they are “authorized by law.”<sup>59</sup> Among the contacts uniformly held to be authorized by law are undercover investigatory contacts initiated by prosecutors where the target has not yet been indicted.<sup>60</sup> In this respect, the ethics rule exception tracks the limits of the Sixth Amendment. The Sixth Amendment prohibits the deliberate elicitation of incriminating statements from criminal defendants after the right to counsel has attached, which is at either indictment (in federal prosecutions) or some earlier point

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permissible under Fourth Amendment). One would imagine it going down like this: You get the guy on one charge; he invokes and makes bail. So you wait two weeks, follow him until he violates a traffic law, then arrest him, get him back in the interrogation room, and try again. Can you do that? *Shatzer* says yes, you can. See *Shatzer*, 130 S. Ct. at 1223. Of course, if he invokes again, you have to stop. There’s still no badgering allowed. See *Montejo*, 129 S. Ct. at 2090. But if you’re polite, you can repeat the scenario every two weeks. Pretext is permissible. If the guy runs a stop sign, you can bring him in.

<sup>56</sup> See generally John Leubsdorf, *Communicating with Another Lawyer’s Client: The Lawyer’s Veto and the Client’s Interest*, 127 U. PA. L. REV. 683, 684 (1979) (tracing the rule to an 1836 treatise).

<sup>57</sup> See, e.g., MODEL RULES OF PROF’L CONDUCT R. 4.2 (2009).

<sup>58</sup> The McDade Amendment, codified at 28 U.S.C. § 530B (2006), subjects federal attorneys to the ethics rules of the state where they practice. For pre-McDade Amendment regulations, see Communications with Represented Persons, 59 Fed. Reg. 39,910 (Aug. 4, 1994) (providing DOJ regulation exempting Department attorneys from state and federal court rules prohibiting contacts with represented persons) (replaced by Ethical Standards for Attorneys for the Government, 64 Fed. Reg. 19,273 (Apr. 20, 1999) (to be codified at 28 C.F.R. pt. 77)).

<sup>59</sup> For example, Rule 4.2 of the Model Rules provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

MODEL RULES OF PROF’L CONDUCT R. 4.2 (2009).

<sup>60</sup> See, e.g., *United States v. Brown*, 595 F.3d 498, 515 (3d Cir. 2010) (collecting cases).

(in most state prosecutions) that marks the beginning of “formal adversarial proceedings.”<sup>61</sup> Under *Massiah v. United States*,<sup>62</sup> pre-attachment undercover investigations, including those directed by prosecutors, are permissible, and the ethics rules track that holding.<sup>63</sup> Thus there is neither a constitutional nor an ethical reason why prosecutors should not direct and supervise agents in making undercover contact with represented criminal suspects, so long as the suspects have not been indicted.

Because the Sixth Amendment protection for defendants begins at indictment (or the equivalent state procedure), pre-indictment, overt contact by law enforcement is constitutionally permissible.<sup>64</sup> Several courts have held that the no-contact prohibition “entifies” (comes into being) at the moment the Sixth Amendment attaches.<sup>65</sup> No attachment, no ethical prohibition. Other courts have held that the no-contact rule attaches at the time of representation and thus is in force pre-attachment.<sup>66</sup> In either event, though, certain contacts might still be “authorized by law.” Thus, for example, the Third Circuit held pre-attachment, undercover contacts to be “authorized by law” even under the Pennsylvania rule, which does apply pre-attachment.<sup>67</sup>

In jurisdictions where the no-contact obligation only entifies at attachment, prosecutors are placed in an ethical position different from all other attorneys: They are permitted to contact represented defendants because (as a legal fiction) there is as

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<sup>61</sup> See *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

<sup>62</sup> *Massiah v. United States*, 377 U.S. 201 (1964).

<sup>63</sup> See, e.g., *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993) (“The duty to avoid ex parte contacts does not apply to pre-indictment, noncustodial conversations with a suspect.”); *State v. Lang*, 702 A.2d 135 (Vt. 1997) (“[T]he rule has an exception for communications authorized by law, and we believe it applies to these undercover operations.”).

<sup>64</sup> *Kirby*, 406 U.S. at 688.

<sup>65</sup> See *United States v. Lopez*, 4 F.3d 1455, 1460 (9th Cir. 1993) (“The prosecutor’s ethical duty to refrain from contacting represented defendants entifies upon indictment for the same reasons that the Sixth Amendment right to counsel attaches.”); *United States v. Balter*, 91 F.3d 427, 436 (3d Cir. 1996) (construing New Jersey’s ethics rules and holding that “[b]y its terms, Rule 4.2 applies to a ‘party’ represented in a ‘matter.’ . . . [A] criminal suspect is not a ‘party’ until ‘after formal legal or adversarial proceedings are commenced.’ . . . Moreover, even if a criminal suspect were a ‘party’ within the meaning of the Rule, pre-indictment investigation by prosecutors is precisely the type of contact exempted from the Rule as ‘authorized by law.’” (internal citations omitted)).

<sup>66</sup> For example, Minnesota courts interpret the rule to apply pre-attachment. See *State v. Miller*, 600 N.W.2d 457, 467 (Minn. 1999).

[B]ecause the interests protected by MRPC 4.2 and the constitutional protections relating to an individual’s right to counsel are fundamentally different, there is no rational basis to conclude that the application of the protection afforded should necessarily be coextensive. Thus we do not perceive that the application of MRPC 4.2 should be limited, in a criminal context, to contacts with an attorney’s client after the client has been charged.

*Miller*, 600 N.W.2d at 467.

<sup>67</sup> See *United States v. Brown*, 595 F.3d 498, 516 (3d Cir. 2010).

yet no “matter”; the “matter,” under these cases, is the formal charge, not the investigation. This distinction is unique to the criminal context: In no other litigation context does the obligation not to contact a represented party depend on whether there are formal judicial proceedings underway. Commentators and defense attorneys have complained about this, of course. One defense attorney wrote:

This disparate treatment of “parties” not yet indicted or charged in criminal cases is unfair, undermines the policy behind [Rule] 4.2 and demonstrates a cynical view of defense counsel’s role in the criminal justice system. . . . [T]he government’s legitimate right to investigate suspected crimes should not trump [Rule] 4.2’s policy of protecting parties from overzealous lawyers, preserving the integrity of the attorney-client relationship, preventing the inadvertent disclosure of privileged information and facilitating settlement. All lawyers owe the same duties under the ethical rules no matter whom they represent or how legitimate their litigation goals.<sup>68</sup>

He points out that in civil litigation, the pre-filing period, when most settlements are worked out, is obviously and necessarily subject to the rule.<sup>69</sup> Why then, he asks, not also in criminal cases, in which pre-attachment settlements (depending, of course, on the jurisdiction’s attachment rules) are also the norm? The case law, however, is generally to the contrary: Criminal investigations are different.<sup>70</sup>

#### B. What Does “Authorized by Law” Mean?

The no-contact rule forbids contacts with represented defendants, but expressly allows contacts that are “authorized by law.”<sup>71</sup> There is no dispute that *Montejo/Shatzer* contacts are directed at represented persons, nor that the contacts concern the subject matter of the representation. Thus, the only question is whether they should be considered “authorized by law.” The rule does not create those authorizations; it incorporates those created by other sources of law. The Model Rules commentary, for example, states that contacts authorized by law “include constitutionally permissible investigative activities of lawyers representing

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<sup>68</sup> Lawrence Palles, *Submitted Prosecutors Should Be Forbidden from Contacting Parties Ex Parte When Those Parties Are Represented by Counsel and Not Charged with Criminal Offenses*, ARIZ. ATT’Y, June 2005, at 41, 42.

<sup>69</sup> *Id.* at 46.

<sup>70</sup> Although, in what looks like an outlier with somewhat unusual facts, the Minnesota Supreme Court held in *Miller* that the no-contact rule was violated when government attorneys who had been involved in a civil investigation of a corporation and its management, in which they had communicated only through the defendant’s counsel, then opened a criminal investigation and immediately interviewed defendants without counsel present. *Miller*, 600 N.W.2d at 468.

[T]he question is whether there is a rational basis to conclude that a change in the nature of the investigation from civil to criminal justifies allowing the prosecutor’s contact with appellant as “authorized by law,” when contact was clearly prohibited by MRPC 4.2 when the proceeding was civil in nature. We believe there is none.

*Id.*

<sup>71</sup> MODEL RULES OF PROF’L CONDUCT R. 4.2 (2009).

governmental entities.”<sup>72</sup> So it is at least facially plausible that a Supreme Court opinion stating explicitly that the Constitution is not violated by certain overt government contacts with a represented defendant should make said contacts “authorized by law” for purposes of applying the rule.

For example, the California no-contact provision, Rule 2-100, provides that the rule “shall not prohibit . . . [c]ommunications otherwise authorized by law” and then explains that the rule is binding “unless a statutory scheme or case law will override the rule.”<sup>73</sup> The comment gives examples of relevant statutory schemes, and then states: “Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.”<sup>74</sup>

So does the “relevant decisional law” governing “the authority of government prosecutors and investigators to conduct criminal investigations” include Sixth Amendment cases like *Montejo* and *Shatzer*? The Ninth Circuit says no. It has interpreted the California rule as referring only to explicit authorization for government attorneys to contact represented defendants.

The “authorized by law” exception to Rule 2-100 requires that a statutory scheme expressly permit contact between an attorney and a represented party. . . . Nothing in these [statutory] provisions [cited by the government] expressly or impliedly authorizes contact with represented individuals beyond that permitted by case law. [Therefore], “the authority of government prosecutors and investigators to conduct criminal investigations” is “limited by the relevant decisional law” to contacts conducted prior to indictment in a non-custodial setting.<sup>75</sup>

Furthermore, the commentary also states that the “authorized by law” exception applies “when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found the Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.”<sup>76</sup>

A change in a constitutional rule will not necessarily translate into a change in the ethical rule and will not serve as a defense against ethics charges. This is because the ethical rule has a very different doctrinal basis from the constitutional rules of the Fifth and Sixth Amendments: While those provisions give rights to defendants, the no-contact rule gives a right to attorneys. As the Second Circuit put it in *Hamad*, another no-contact case: “The sixth amendment [sic] and the disciplinary rule serve separate, albeit congruent purposes.”<sup>77</sup> And the Supreme Court of Michigan explained: “The provisions of the code are not constitutional or

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<sup>72</sup> *Id.* cmt. 2.

<sup>73</sup> CAL. RULES OF PROF’L CONDUCT R. 2-100 discussion (1992).

<sup>74</sup> *Id.*

<sup>75</sup> *United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993).

<sup>76</sup> MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 2 (2009).

<sup>77</sup> *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988).

statutory rights guaranteed to individual persons. They are instead self-imposed internal regulations prescribing the standards of conduct for members of the bar.”<sup>78</sup>

The no-contact prohibition is waivable only by the attorney, not by the client. Accordingly, Fifth and Sixth Amendment case law addressing the validity of defendants’ waivers of their rights is unlikely to translate into exceptions to the no-contact rule. As the Vermont Rules of Professional Conduct explain: “The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.”<sup>79</sup>

In short, the argument for reading a *Montejo/Shatzer* exception into the no-contact rule’s “authorized by law” provision is untenable. Of course, some states might decide to adopt one. But as the codes now stand, the exception is not available. My research assistants and I surveyed the no-contact rule case law for all fifty states in an attempt to predict whether *Montejo/Shatzer* contacts would be held to be ethics violations. We found, as expected, that almost all the states have case law stating expressly that the no-contact rule cannot be waived by the client; this nearly-uniform interpretation rules out the possibility of a *Montejo/Shatzer* exception under existing law, because *Montejo* and *Shatzer* are waiver cases. There is not a shred of authority in any state supporting the proposition that a client waiver can render over uncounseled contact “authorized by law.”<sup>80</sup>

### C. Undercover Investigations

The only other context in which constitutional criminal procedure case law has been imported into the no-contact rule is undercover investigations. In that context, courts were faced with the *Massiah* rule, which holds that pre-attachment, deliberate elicitation by undercover agents of incriminating statements from represented defendants is permissible under the Sixth Amendment.<sup>81</sup> Despite the fact that constitutionally permitted contacts are not necessarily also ethically permitted, however, courts have uniformly interpreted the no-contact rule to track the constitutional rule established by *Massiah*,<sup>82</sup> so that any undercover contact constitutionally permitted by *Massiah* is also ethically permissible.

<sup>78</sup> *State v. Green*, 274 N.W.2d 448, 454 (Mich. 1979).

<sup>79</sup> V.T. RULES OF PROF’L CONDUCT R. 4.2 cmt. 5 (2009).

<sup>80</sup> *See, e.g.*, *United States v. Talao*, 222 F.3d 1133, 1138 (9th Cir. 2000); *see also Lopez*, 4 F.3d at 1462 (holding that a criminal defendant did not have a right not to be contacted and consequently could not waive application of section 2-100).

<sup>81</sup> *Massiah v. United States*, 377 U.S. 201, 207 (1964).

<sup>82</sup> *See, e.g.*, *United States v. Brown*, 595 F.3d 498, 516 (3d Cir. 2010) (holding that pre-indictment use of undercovers to elicit incriminating statements is permissible under applicable state ethics rules); *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993); *United States v. Ryans*, 903 F.2d 731, 740 (10th Cir. 1990); *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986); *United States v. Dobbs*, 711 F.2d 84, 86 (8th Cir. 1983); *United States v. Weiss*, 599 F.2d 730, 740 (5th Cir. 1979); *cf. United States v. Heinz*, 983 F.2d 609, 613 (5th Cir. 1993) (holding the same as a general matter, but egregious prosecutorial misconduct can be a violation); *United States v. Hammad*, 858 F.2d 834, 840 (2d Cir. 1988); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir. 1983); *United States v. Lemonakis*, 485 F.2d 941, 956 (D.C. Cir. 1973); *United States v. Marcus*, 849 F. Supp. 417, 422 (D. Md. 1994).

Indeed, in the *Hammad* decision from the Second Circuit, which is one of the few instances in which a federal court has found a no-contact violation, the court took care to emphasize that the prosecutor's conduct—creating a “sham” grand jury subpoena to trick the target—went beyond the mine-run of undercover investigations.<sup>83</sup> In most cases, the court stated, “the use of informants by government prosecutors in a pre-indictment, non-custodial situation, absent the type of misconduct that occurred in this case, will generally fall within the ‘authorized by law’ exception.”<sup>84</sup>

Significantly, the Ninth Circuit has held that the no-contact rule does not apply at all prior to attachment, explaining that “[t]he prosecutor's ethical duty to refrain from contacting represented defendants entitles upon indictment for the same reasons that the Sixth Amendment right to counsel attaches.”<sup>85</sup> Thus, prosecutors may authorize undercover contacts with represented defendants up until the initiation of formal adversarial proceedings, when the Sixth Amendment right to counsel attaches. It is irrelevant that the defendant has a lawyer, has been charged by complaint, and knows an indictment is coming.

One might well ask why the ethical obligation should entitle only upon indictment—after all, many pre-indictment suspects know that they are under investigation—some defendants may know that an indictment is forthcoming; others know that they are targets and retain counsel precisely to help them *avoid* indictment.<sup>86</sup> This is standard operating procedure in white-collar cases, where an indictment can functionally be a “death sentence.”<sup>87</sup> It is also standard operating procedure in districts with “fast-track” programs, which offer substantial discounts for pre-indictment pleas. And it is of necessity standard operating procedure in every federal case in which the defendant is arrested on a complaint, because the rules of criminal procedure provide for appointment of counsel at the initial appearance.<sup>88</sup> Thus, there is in most federal criminal cases a window of two weeks

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<sup>83</sup> *Hammad*, 858 F.2d at 840.

<sup>84</sup> *Id.* The only other circuit court decision I am aware of in which the court upheld a finding of an ethical violation also concerned unusual conduct that converted otherwise permissible contact into a violation. See *Lopez*, 4 F.3d 1455. The prosecutor in *Lopez* had sought and obtained a court order to communicate with a represented defendant, who had contacted the prosecutor because he did not trust his attorney. *Id.* at 1457. The district court found, however, that the prosecutor had misled the magistrate judge who issued the order, and the Ninth Circuit accepted that finding, holding that “judicial approval cannot absolve the government from responsibility for wrongful acts when the government has misled the court in obtaining its sanction.” *Id.* at 1461.

<sup>85</sup> *Lopez*, 4 F.3d at 1460.

<sup>86</sup> This is, after all, the primary function of expensive white-collar defense lawyers.

<sup>87</sup> Particularly, this is the case if the defendant is a corporation. See, e.g., Christopher Wray & Robert Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thomson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1097 (2006) (“Because indictment often amounts to a virtual death sentence for business entities, a corporate prosecution provides the government an ‘opportunity for deterrence on a massive scale.’” (quoting Memorandum from Larry D. Thompson, Deputy Att’y Gen., to Heads of Dep’t Components and United States Attorneys (Jan. 20, 2003), [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm))).

<sup>88</sup> FED. R. CRIM. P. 41(a).

or more in which the defendant is represented but the Sixth Amendment has not attached. Does *Lopez* allow for prosecutors to contact defendants in that period without the presence or consent of counsel? It appears to.<sup>89</sup>

Of course, prosecutors never have. I prosecuted hundreds of reactive cases and never would have dreamed of directly contacting a pre-attachment defendant who had been appointed counsel. Aside from internal department regulations, there was a constitutional reason: *Jackson*. Before *Montejo*, neither police nor prosecutors would have contemplated making direct contact with a represented defendant even in a pre-indictment in a fast-track case because it was barred by *Jackson*.<sup>90</sup> But now that the constitutional bar imposed by *Jackson* has been wiped away, is there any ethical bar, in states where the ethical obligation doesn't entify until indictment? The answer, I think, is likely no.

The courts holding that pre-indictment, undercover contacts are permissible justified their holdings with reference to the purposes of the ethics rules and the balancing of social harms and benefits of criminal investigation. For example, in *United States v. Balter*,<sup>91</sup> the Third Circuit held that a federal prosecutor did not violate New Jersey's no-contact rule<sup>92</sup> when he used a confidential informant to contact a represented person in the course of a pre-indictment investigation. The court held both that "the rule d[oes] not apply to a criminal suspect prior to the commencement of adversarial proceedings against the suspect," and also that even if it did apply, "pre-indictment investigation by prosecutors is precisely the type of contact exempted from the Rule as 'authorized by law.'"<sup>93</sup> The court explained its holding on policy grounds. "Prohibiting prosecutors from investigating an unindicted suspect who has retained counsel would serve only to insulate certain classes of suspects from ordinary pre-indictment investigation. Furthermore, such a rule would significantly hamper legitimate law enforcement operations by making it very difficult to investigate certain individuals."<sup>94</sup>

The Third Circuit recently reiterated its *Balter* holdings in *United States v. Brown*. "The question before us then is whether AUSA Daniel was 'authorized by law' to use a confidential informant to communicate with a represented suspect in the course of a pre-indictment investigation."<sup>95</sup> The court held that the "well-established investigative technique" employed by the prosecutor—sending an undercover informant to contact the defendant with instructions on what to say—was within the "authorized by law exception" and thus did not violate the rule.<sup>96</sup> This

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<sup>89</sup> It bears emphasis that the contact in *Lopez* was direct, not undercover. *Lopez*, 4 F.3d at 1457.

<sup>90</sup> See *supra* text accompanying note 18.

<sup>91</sup> *United States v. Balter*, 91 F.3d 427, 436 (3d Cir. 1996).

<sup>92</sup> The rule was identical to ABA Model Rule 4.2: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless authorized by law to do so." *Balter*, 91 F.3d at 435 (quoting N.J. RULES OF PROF'L CONDUCT R. 4.2 (2004)).

<sup>93</sup> *Balter*, 91 F.3d at 436.

<sup>94</sup> *Id.*

<sup>95</sup> *United States v. Brown*, 595 F.3d 498, 515 (3d Cir. 2010).

<sup>96</sup> *Id.* at 516.



was so, the court held, even though the Pennsylvania no-contact rule applies before adversarial proceedings have begun, because such contacts are within the “authorized by law” exception, even if other kinds of pre-indictment contact might violate the rule. “[W]e do not believe the McDade Amendment prohibits federal prosecutors in Pennsylvania from using a well-established investigatory technique simply because the Pennsylvania courts have not considered whether such conduct is permissible.”<sup>97</sup>

Is it perhaps significant, then, that the targets of pre-indictment undercover investigations are virtually never in custody?<sup>98</sup> One rationale for the exception is that undercover investigation is simply so vital to law-enforcement that absent explicit legislative action courts should not assume it to be barred.<sup>99</sup> Indeed, most states’ ethics commentary follows the ABA Model Rules and specifically identifies “pre-indictment, non-custodial” contacts as among those authorized. If the contact is pre-indictment and non-custodial, should it matter whether it’s undercover or overt? Some courts have held that so long as the contact is pre-attachment, it is per se permissible whether overt or covert. As one district court commented in approving overt contact under the rule:

Although these cases usually involve undercover contacts, most of the decisions approve pre-indictment contacts in categorical terms. Research shows that no court has ever suppressed evidence in a criminal case because a prosecutor violated Rule 4.2 in the course of an investigation before the grand jury indicted the defendant.<sup>100</sup>

Although the contacted defendant in *Binder* was not in custody, such dicta (“most of the decisions approve pre-indictment contacts in categorical terms”)<sup>101</sup> at least allows for a plausible argument that *any* pre-attachment contact is permissible. As to post-attachment contact, it is highly unlikely that any court would allow it under the ethics rules, because the “authorized by law” exception for undercover contacts has never been applied post-attachment. Let us now turn, then, to the four scenarios described at the outset to see whether meaningful guidance for law enforcement and defendants can be gleaned from the new holdings.

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<sup>97</sup> *Id.*

<sup>98</sup> *See, e.g.,* United States v. Dobbs, 711 F.2d 84 (8th Cir. 1983) (no ethical violation because subject not in custody).

<sup>99</sup> The same reasoning explains why the ethical rule, 8.4 in the ABA Model Rules, forbidding lawyers from engaging in “dishonesty, fraud, deceit or misrepresentation,” has never been held applicable to undercover work in criminal cases. Every court to consider the matter has simply stated that there is a law-enforcement exception that applies to prosecutors. As one recent commentator points out, a general public-policy rationale would also seem to support exceptions for some private attorneys too, such as for civil rights investigations. *See* Barry Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 SEATTLE U. L. REV. 123 (2008).

<sup>100</sup> United States v. Binder, 167 F. Supp. 2d 862, 866 (E.D.N.C. 2001).

<sup>101</sup> *Id.*

IV. FOUR SCENARIOS: *MONTEJO* AND *SHATZER*, PRE- AND POST-ATTACHMENTA. *Pre-Attachment Montejo Contacts*

## 1. Police

May police initiate contact, pre-attachment, with a represented defendant who has been appointed counsel but has not yet invoked in a *Miranda* setting? Yes. *Jackson*'s prophylactic rule barred police-initiated questioning after the appointment of counsel and held any waivers thus obtained invalid as a matter of law. *Jackson* is now overruled, and the new rule is clear: *Until a defendant invokes his Miranda rights during an attempted custodial interrogation, the police may initiate contact and seek a waiver.*<sup>102</sup>

## 2. Prosecutor

In any state with case law holding that the ethical obligation “entifies” upon attachment of the Sixth Amendment, there is no ethical bar to the prosecutor participating. In such a state, the prosecutor is in the same position as the police: The only reason not to make such contacts was *Jackson*, and *Jackson* is overruled. Thus, for prosecutors in such jurisdictions—for example, in California—the same rule applies: *Until a defendant invokes his Miranda rights during an attempted custodial interrogation, the prosecutor may initiate contact and seek a waiver, as well as direct the police to do so.*<sup>103</sup>

Of course, the situation is different in states, such as Pennsylvania and Minnesota, where the no-contact rule has been interpreted to apply to pre-attachment contact. But even in such states, prosecutors may have a colorable argument for permissibility, depending on the specific test the courts use to evaluate alleged violations. Conduct may be covered by, but permissible under, the rule. In Minnesota, for instance, the rule is applied on a case-by-case basis to pre-attachment as well as post-attachment contact. The test, in either scenario, is whether the prosecutor has gone beyond “appropriate and commonly accepted investigatory activity of police.”<sup>104</sup>

Adverse counsel's contacts with an attorney's client can be disruptive and deleterious to the attorney's relationship with a client irrespective of whether the client has been charged with a crime, and the need for an attorney's counsel in an adverse interview is certainly no less before the client is charged than after. We hold that the appropriate analysis is to look at alleged violations on a case-by-case basis, examining the totality of the circumstances of the contact to determine if it went beyond appropriate and commonly accepted investigatory activity of police to implicate issues relating to the fair administration of justice on the part of the prosecuting attorney.<sup>105</sup>

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<sup>102</sup> *Montejo*, 129 S. Ct. at 2091.

<sup>103</sup> *Id.*

<sup>104</sup> *Miller*, 600 N.W.2d at 467.

<sup>105</sup> *Id.*

This test may make the ethics rule dependent on the constitutional rule to some extent, because the constitutional rule will, over time, set the boundaries of “appropriate and commonly accepted investigatory activity.” Now that *Montejo* and *Shatzer* are the law, police contact with represented defendants in those scenarios could (and, one assumes, will) become “commonly accepted investigatory activity of police.” The only reason police didn’t do post-appointment interviews with willing defendants without their counsel present was *Jackson*. There is now, as the Supreme Court itself said expressly, no reason not to do it.<sup>106</sup> Of course, some agencies, notably the federal DOJ, prohibit such contacts in their own internal rules, but one imagines not every police department will follow suit. Thus, if the Minnesota no-contact rule derives its scope from what police may legitimately do, and what they habitually do, there may be an argument before too long that *Montejo* and *Shatzer* have turned *Miller* on its head.

To be sure, though, there is surely some distance between police conduct that is not unconstitutional, and police conduct that is “appropriate and commonly accepted.”<sup>107</sup> And in jurisdictions without a clear holding, the custodial nature of the contact might tip the balance in a functional inquiry into whether a *Montejo* interview is “deleterious to the attorney’s relationship” with the client.<sup>108</sup> I would think the *Miller* rationale would favor finding a violation: Certainly if *Montejo*’s lawyer had been present, he would have advised *Montejo* not to make the incriminating statements that ultimately were used at his trial.

This is exactly what happened in *United States v. Ward*.<sup>109</sup> The prosecutor, without defense counsel present, visited the suspect, who had not been indicted but knew he was a target and had retained defense counsel.<sup>110</sup> The prosecutor told the suspect that the government’s case was strong, an indictment was coming, and suggested that the suspect should think about cooperating.<sup>111</sup> Defense counsel moved for suppression based on the allegedly improper contact. The government argued in district court that this contact was not improper because the no-contact rule did not apply pre-indictment.<sup>112</sup> The court acknowledged the “impressive number of

<sup>106</sup> *Montejo*, 129 S. Ct. at 2086-87.

No reason exists to assume that a defendant like *Montejo*, who has done *nothing at all* to express his intentions with respect to his *Sixth Amendment* rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring.

*Id.* (emphasis in original).

<sup>107</sup> One thinks, for example, of Lago Vista police officer Bart Turek, whose arrest of Gail Atwater for not wearing her seatbelt did not violate Atwater’s Fourth Amendment rights, but did cost Turek his job and a Supreme Court tongue-lashing. See *Atwater v. Lago Vista*, 532 U.S. 318 (2001).

<sup>108</sup> See, e.g., *United States v. Durham*, 475 F.2d 208, 210-11 (7th Cir. 1973) (pre-indictment custodial interview “raised questions” under no-contact rule).

<sup>109</sup> *United States v. Ward*, 895 F. Supp. 1000 (N.D. Ill. 1995).

<sup>110</sup> *Id.* at 1003.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1004.

opinions persuasively reasoning that [the no-contact rule] does not and should not apply to pre-indictment, non-custodial contacts.”<sup>113</sup>

The court, however, did not endorse the government’s interpretation of the ethical rule. Instead, it denied the defendant’s suppression motion because suppression would not be a proper remedy for an ethical violation in any event.<sup>114</sup> Thus it did not decide the ethical issue. The court made it plain, however, that if it had been forced to decide the ethics issue, it would have found a violation:

Given that the stated purpose of the meeting was to confront Ward with the allegedly overwhelming nature of the evidence against him and to discuss his cooperation options, the danger for Ward of uncounseled communication with the Government is readily apparent. Couple this danger with the power of the prosecutor to control the timing of the indictment and the triggering of constitutional protections which would prohibit such contact and the potential for prejudice and abuse of power increases. In contrast to the covert use of informants, the Court finds the balance of competing interests weighs in favor of prohibiting overt contacts with represented parties for the purposes of discussing cooperation with the Government.<sup>115</sup>

What the court describes is, of course, every *Montejo* contact—with the added factor that the *Montejo* defendant, unlike Ward, will be in custody. Without some very clear black-letter protection, it would be a reckless prosecutor who signed off on one of these interviews. My advice to prosecuting authorities around the country: Don’t do these interviews, and don’t use them, until your legislature or courts give you very clear authority.

### B. Post-Attachment *Montejo* Contacts

#### 1. Police

As to the police, the same rule applies to post-attachment *Montejo* contacts as to pre-attachment contacts: Until a defendant invokes his *Miranda* rights *during an attempted custodial interrogation*, the police may initiate contact and seek a waiver. It is irrelevant whether the Sixth Amendment right to counsel has attached, because, per *Montejo*, the right can be waived; and it is irrelevant whether counsel is present, because, per *Montejo*, counsel’s presence is not necessary for a valid waiver. Thus the same rule applies: *Until a defendant invokes his Miranda rights during an attempted custodial interrogation, the police may initiate contact and seek a waiver.*<sup>116</sup>

#### 2. Prosecutors

The no-contact rule is always applicable post-attachment, and prosecutors cannot make contact with a represented defendant except as “authorized by law.” And it is doubtful, as explained above, that a court would treat *Montejo* as creating a new

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<sup>113</sup> *Id.* at 1008.

<sup>114</sup> *Id.* at 1007.

<sup>115</sup> *Id.* at 1006.

<sup>116</sup> *Montejo*, 129 S. Ct. at 2091.

“authorized by law” exception for three reasons: First, *Montejo* is a Sixth Amendment case, and the no-contact rule does not necessarily follow the Sixth Amendment; second, the *Montejo* Court itself assumes that *Montejo* contacts would be unethical for prosecutors; and third, *Montejo* is a waiver case, and the no-contact prohibition is not waiveable by clients.

### C. Pre-Attachment Shatzer Contacts

The paradigmatic pre-attachment *Shatzer* contact will occur in the following way: Assume a federal court proceeding, where the Sixth Amendment doesn’t attach until indictment. DEA agents arrest a suspect for drug trafficking. The government files a complaint charging, say, 21 U.S.C. § 841. The suspect invokes his right to counsel; the interview is terminated per *Edwards*; the suspect appears in court and is appointed counsel; bail is set, and the suspect makes bail and is released. Appointed defense counsel calls the prosecutor and they talk about possible terms of a plea agreement. The prosecutor tells defense counsel that he can offer very good terms if the suspect will disclose his supplier. Defense counsel consults with her client and tells the prosecutor that he’s not going to snitch.

Now, two weeks later, the suspect has not yet been indicted on the federal charges (the government has thirty days to do so). He has gone back to work, but unluckily sells drugs to a local police officer working undercover. He is arrested. The local police run his sheet, see the pending federal charges, and call the DEA agents. The agents arrive at the local jail, approach the suspect, re-Mirandize him, and ask him if he would like to change his mind and cooperate. After all, they remind him, federal cooperation can make the state beef disappear too.<sup>117</sup> This time, he says yes, and agrees to flip and incriminate his connections. No one ever calls his lawyer.

#### 1. Police

As before, the question is a straightforward one for the police or agents: Yes, they may do this.<sup>118</sup>

#### 2. Prosecutors

For the prosecutor, it’s a closer call. To be sure, this is a pre-indictment scenario, and in states such as California, the prosecutor may successfully rely on case law such as *Lopez* to assert the absolute inapplicability of Rule 4.2 prior to attachment. However, I would be cautious in any state where the case law even arguably left room for pre-attachment applicability. If a state applied a functional test such as whether the contact undermined the purposes of the attorney-client relationship, I think a court could well see this as a violation. After all, the client indisputably has an attorney on the matter, despite the legal fiction that there is no “matter” pre-indictment: Here, the court has appointed the attorney to represent the defendant on the federal charge, and the attorney has already begun negotiations with the prosecutor on that charge. And the defendant has already told the police, in the first interview, that he wants his attorney to serve as a buffer. To be sure, after *Shatzer*, he can *constitutionally* change his mind, but *that’s* not the ethical question in a state

<sup>117</sup> As a matter of comity, self-interest, and overwork, state prosecutors are almost always willing to hand a case over to the feds.

<sup>118</sup> See *supra* Part IV.A.1.

like Minnesota. The question, rather, is whether the contact served to undermine the attorney-client relationship on the federal charge. And given that, by definition, a *Shatzer* scenario involves a relationship that is at least two weeks old, and has already been sought out and relied on by the defendant, it would seem that *Shatzer* contacts would be more readily seen as violating the rule than *Montejo* contacts on such a test.

#### D. Post-Attachment *Shatzer* Contacts

##### 1. Police

For the police, as with *Montejo* contacts, attachment is irrelevant. The rule is the same: Give a guy two weeks of freedom, and you can re-initiate custodial interrogation in the attempt to get a waiver. Obviously, a cycle of biweekly pretext arrests followed by a custodial re-initiation might lead to an inference of badgering in violation of *Edwards*<sup>119</sup>—but short of badgering, the contact is constitutional, and if you do get lucky and get your waiver, it will stand.

##### 2. Prosecutors

I cannot see any possibility of post-attachment *Shatzer* contacts being permitted under the ethics rules, for all the reasons given thus far. Thus, as noted below, this is an area in which difficult cases are likely to arise. I think it not unlikely that a defendant, out on bail post-indictment, with a lengthy pre-trial period, might be arrested (in good faith, presumably by another agency on other grounds) and the agents handling the first case might learn of the arrest and decide to re-approach. As discussed below, I see no possibility of permissible prosecutorial involvement and a real danger of imputed involvement through ratification if the prosecutor uses a statement obtained in this way.

#### E. Discussion

Both the time of attachment, and the relevance of attachment for the no-contact rule, vary from state to state. In some jurisdictions, for example California and New Jersey, the no-contact rule only binds prosecutors once formal adversarial proceedings have begun and the Sixth Amendment has attached.<sup>120</sup> In others, for example Pennsylvania and Minnesota, the rule applies before attachment as well.

Thus, while *Montejo* itself involved post-attachment contact,<sup>121</sup> in other jurisdictions (notably the federal system), the same facts would not give rise to attachment. And the rule itself may or may not track attachment in any event. For example, in New Jersey, prosecutors would not be barred from making post-appointment, pre-indictment contact with a defendant, while across the river in Pennsylvania, they would.

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<sup>119</sup> Both *Montejo* and *Shatzer* emphasize the *Edwards* anti-badgering rule. See, e.g., *Shatzer*, 130 S. Ct. at 1220.

<sup>120</sup> See, e.g., *New Jersey v. CIBA-GEIGY Corp.*, 589 A.2d 180, 183 (N.J. Super. Ct. App. Div. 1991).

<sup>121</sup> *State v. Montejo*, 974 So. 2d 1238, 1260 (La. 2008) (“In this case, defendant’s right to counsel attached at the 72-hour hearing held on the morning of September 10, 2002, at which time indigent defense counsel was appointed to represent him.”), *vacated*, 129 S. Ct. 2079.

There is no question, however, that the *constitutionality* of *Montejo* contacts extends past attachment. The *Montejo* Court explicitly decided the case as a post-attachment scenario:

It is worth emphasizing first what is *not* in dispute or at stake here. Under our precedents, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all “critical” stages of the criminal proceedings. Interrogation by the State is such a stage.

....

In practice, *Montejo*’s rule would prevent police-initiated interrogation entirely once the Sixth Amendment right attaches . . . . That would have constituted a “shockingly dramatic restructuring of the balance this Court has traditionally struck between the rights of the defendant and those of the larger society.”<sup>122</sup>

It is important to note, however, that while in many states a similar attachment rule (*viz.*: attachment at early stages of proceedings, such as initial appearance or complaint) applies, in the federal system it emphatically does not. Sixth Amendment attachment in federal criminal prosecutions comes *only* at indictment or waiver thereof. So every federal defendant arrested on a complaint (which is, in some districts, for example the southwest border, virtually every defendant) and appointed counsel at his initial appearance has a two-week or so window during which he is represented, but he does not yet have Sixth Amendment rights. In California, the prosecutor’s no-contact obligation has not yet “entified” during that period. And this window would cover every *Montejo* situation—*viz.*: where the defendant waived *Miranda* and made an initial statement, and then the detectives want to follow up again after the initial appearance.

The window could also stretch to some *Shatzer* scenarios, because the maximum period between arrest and indictment is thirty days,<sup>123</sup> and can be extended further in certain circumstances.<sup>124</sup> Thus, where the defendant is arrested on a complaint, invokes, is appointed counsel, then makes bail and is released from custody, I think the answer has to be the same once two weeks have passed, because a *Shatzer* defendant with two weeks of freedom *is* a *Montejo* defendant.

The hard issues will arise upon indictment, when the Sixth Amendment attaches and the prosecutor’s ethical obligation entifies. The ABA model rule explicitly limits the scope of the “authorized by law” exception to pre-attachment contacts.<sup>125</sup> *Montejo* and *Shatzer* now allow for post-attachment contact in particular circumstances. Of course, a legislature or bar committee could revise the rule or commentary to include a *Montejo/Shatzer* post-attachment exception. But until that happens, prosecutors should be cautious, because the argument that the exception

<sup>122</sup> *Montejo*, 129 S. Ct. at 2085, 2087 (citations omitted).

<sup>123</sup> 18 U.S.C. § 3161(b).

<sup>124</sup> 18 U.S.C. § 3161(h) (setting out conditions for the exclusion of time).

<sup>125</sup> MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 5 (“Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.”).

naturally arises from the cases is quite weak. I think that post-attachment, the limits of action for police now diverge from those of prosecutors. I further believe that every prosecutor's office in the country will come to the same conclusion, and so we will have to deal with this divergence unless and until it is addressed legislatively.

#### V. DIVERGING INCENTIVES AND THE POLICE-PROSECUTOR RELATIONSHIP

I doubt that any such expansion of the exception for post-attachment contacts is likely to be forthcoming, whether from the legislature or the courts. Legislatures are slow to act and are historically protective of attorneys' privileges and prerogatives.<sup>126</sup> Direct contact with a represented, opposing party, authorized by a government lawyer, after initiation of adversarial proceedings is too much for courts and bar committees to force into the "authorized by law" exception. We may well get decisions saying flatly: Post-attachment *Montejo/Shatzer* contacts are unethical. And of course, until the courts say something, there's the uncomfortable legal terrain of uncertainty, which prosecutors across the country are now trying to navigate.

The problem, however, is that from the moment these cases were decided there ceased to be, as the *Montejo* Court emphatically told us, any reason at all for the police themselves not to make these contacts. The Court dismissed any suggestion that the ethical rules governing prosecutors should have any relevance to its decision at all.

Thus these cases force on us the immediate and vexing problem of the police-prosecutor relationship. As a legal matter, to what extent is the prosecutor ethically responsible for the conduct of law-enforcement officers and agents? And as practical matter, to what extent can the prosecutor in fact control the conduct of law-enforcement officers and agents? The prosecutor must supervise investigations, but is not in a direct chain of command with the enforcement agencies.<sup>127</sup> This is true at the state and federal levels and makes all the more frustrating the Supreme Court's unwillingness in *Montejo* and *Shatzer* to engage with the practical realities of criminal investigation. I will argue that the practical realities of criminal investigation require—as a policy matter if not as a constitutional matter—that the ethical rules on contact with defendants be the same for police and agents as for prosecutors. We could bring the prosecutors' standard "down" or the cops' standard "up," but we have to do one or the other.

Several broad features of the police-prosecutor relationship bear emphasis in this context. First, prosecutors are charged with supervising criminal investigations and

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<sup>126</sup> This makes sense since legislatures are largely made up of lawyers, and generally favor rules protective of the profession, as Charles Black has famously argued in the context of evidentiary privileges. See Charles Black, *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 50 (1975).

[A]s a lawyer, I own I find it embarrassing that a group of lawyers, having so summarily dealt with the privacies of marriage and medicine, proceed, without any satisfactory explanation of the vast difference, to shield our own profession so amply. I wonder what kind of Rules we would have gotten if the doctors had drawn them.

*Id.* at 50. It's important to note that while legislatures are traditionally no friend of criminal defendants, this no-contact rule is about the *lawyers*, not the perps. *Id.* at 50.

<sup>127</sup> See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 755-56 (2003).



are held accountable for the conduct of police and agents working their cases. Second, the police and agents working a case are not under the direct control of the assigned prosecutor, and the agencies themselves are not, with very few exceptions, under the direct supervision of the prosecuting office. Third, prosecutors, as attorneys, have independent cultural ties and professional obligations that may not always align with those of police and agents.

#### A. Agency Priorities

Prosecutors supervise criminal investigations. They do not simply take cases in, fully made out and wrapped up in a red ribbon. As a matter of policy and of practice, prosecutors are involved in both proactive (pre-arrest) and reactive (post-arrest) investigations from the earliest stage possible. Indeed, prosecutorial involvement in police investigations is a key component in the modern professionalization of law enforcement and the great reductions in police corruption and brutality. And courts hold prosecutors responsible for law-enforcement conduct in myriad ways.

Furthermore, prosecutors do not directly control enforcement resources. There are overlapping chains of authority. This is *not* like civil litigation, where the investigators are direct employees of the lawyers. In the federal system, for example, investigating agents work for a number of different agencies, some of which are under the umbrella of DOJ, and some of which are not. And even agencies that are within DOJ, notably the FBI, are notoriously independent. In state systems, likewise, police departments do not answer directly to district attorneys' offices.

Further complicating matters, some agencies, again paradigmatically the FBI, have multiple priorities, some of which diverge from the prosecutor's goal of charging and convicting perpetrators of crime. The FBI has security and intelligence-gathering missions as well, which have repeatedly led to practices—warrantless wiretapping, black bag searches, facilitation of and participation in organized crime, long-term cultivation of criminals as informants—inimical to the development of admissible evidence.<sup>128</sup> This institutional duality has only been magnified in the post-9/11 era, as the Bureau has shifted large numbers of agencies to counterterrorism work where intelligence, rather than convictions, is the primary goal.

A similar duality is present in many local police departments, which may measure public-safety success in terms of, for example, the number of guns or amount of drugs seized, rather than in convictions. If the goal is to seize guns rather

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<sup>128</sup> This duality has been present since the creation of the FBI, and has manifested itself in the Bureau's approach to organized crime, civil rights, and communism. *See generally, e.g.*, RHODRI JEFFREYS-JONES, *THE FBI: A HISTORY* (2007). Intelligence-gathering and prosecution of crimes are notoriously incompatible bedfellows. Most recently, and strikingly, after 9/11 the Bureau explicitly announced its focus on intelligence and security rather than prosecution. *See, e.g.*, Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201 (2004) ("Attorney General John D. Ashcroft and F.B.I. Director Robert S. Mueller III have repeatedly said that they view preventing another terror attack as their main priority, rather than securing criminal convictions."); Robert S. Mueller, III, Director, FBI, Speech at Stanford Law School (Oct. 18, 2002) (announcing that "in the wake of September 11, our first and abiding priority, plain and simple, is counterterrorism").

than to prosecute illegal possessors, the incentives with regard to stop-and-frisk policies will obviously be different. A constitutionally over-broad stop-and-frisk policy will seize a lot of guns; many of those stopped will, however, have meritorious suppression claims, so the charges will go nowhere. But return of contraband is not a remedy, so the gun is off the streets. The most dramatic example of this calibration of incentives was the NYPD's Street Crimes Unit in the Guiliani Administration.<sup>129</sup>

### B. Training, Supervision, and Direction

If *Montejo/Shatzer* contacts are held to violate the no-contact rules, then clearly a prosecutor could not, in a particular case, direct an agent to engage in such contacts. But the situation is more complicated, because the prosecutor's professional relationship with law enforcement agents is not one of boss and employee.

Consider the central, and vital, prosecutorial function of advising agents on the legal limits of investigatory tactics. Training law-enforcement officers on constitutional developments is a key prosecutorial function; so is answering legal questions posed by law enforcement. Sooner or later, one way or another, word will filter down through the ranks that the Supreme Court has cleared the way for renewed contact in these two situations. If leading a training on new *Miranda* developments, or if asked by an agent what the cases held, a prosecutor could, no doubt, ethically explain the rules announced by the cases. The governing regulation for federal attorneys distinguishes prosecutorial training and advice-giving from supervision and direction.<sup>130</sup> But where, in the context of working a case together, is the line between explaining the rule announced by the cases (okay), and suggesting, advising, authorizing, or ratifying the contact (not okay)?

Here's an example: The (pre-*Montejo*) FBI Legal Handbook for Special Agents includes<sup>131</sup> the following directive:

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<sup>129</sup> See, e.g., David Kocienewski, *Success of Elite Police Unit Exacts a Toll on the Streets*, N.Y. TIMES, Feb. 15, 1999, at A1.

Some street crimes officers also said they felt pressured by the department's emphasis on crime statistics, and that they are forced to adhere to an unwritten quota system that demands that each officer seize at least one gun a month. "There are guys who are willing to toss anyone who's walking with his hands in his pockets," said an officer, who spoke on the condition of anonymity. "We frisk 20, maybe 30 people a day. Are they all by the book? Of course not; it's safer and easier to just toss people. And if it's the 25th of the month and you haven't got your gun yet? Things can get a little desperate."

*Id.*

<sup>130</sup> 28 C.F.R. § 77.4(f) (2010).

Investigative Agents. A Department attorney shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under section 530B. A Department attorney who in good faith provides legal advice or guidance upon request to an investigative agent should not be deemed to violate these rules.

*Id.*

<sup>131</sup> Or, at least, the version on the Bureau's public FOIA page does. Whether it has been revised in response to *Montejo*, I don't know.

If an accused, during the course of an initial appearance or other court proceeding, requests to be represented by legal counsel or accepts the court appointment of counsel, no interview of the accused may take place concerning the charge for which the accused has appeared in court unless

- (a) the accused's counsel is present; or
- (b) the accused initiates the contact . . . or
- (c) contact is necessary to acquire information critical to life . . . or
- (d) the contact has been approved by the United State's Attorney's office.<sup>132</sup>

It would appear that the Handbook was written to comply with the prevailing constitutional rules, because it directly tracks the pre-*Montejo* law. Now, however, after *Montejo*, the manual is more restrictive than the prevailing constitutional rule. Subsection (d) makes clear that consultation with the AUSA is expected in ambiguous circumstances.

So what happens when an FBI agent comes to an AUSA and says, "Hey, look, the Manual says no contact after counsel's been appointed, but I heard about this new case, and I went to my SAC, and he said go ask the AUSA"? That is exactly what one would expect, and hope for, in a professional law enforcement agency. So you're the AUSA: What do you say? Assume the no-contact rule applies: Either you're post-attachment or you're in a state where the rule applies pre-attachment. Do you say, "Well, yes, *you* are constitutionally permitted to do it, and I am permitted to *tell* you that you are constitutionally permitted to do it, but I am not ethically permitted to *direct* you to do it"? (And of course you both know that it could help your case.)

The agent leaves your office and does the interview. He gets a good waiver and then a solid, incriminating statement from the defendant. You call defense counsel: "Let's talk about your plea; your guy just confessed." Defense counsel finds out what happened, starts yelling, then files an ethics complaint against you. Are you in trouble or not?

Or take a typical state case, where the police are working largely independently. A detective goes out and does the interview without asking the prosecutor first and then brings the statement to the prosecutor for use at trial. Ex hypothesi, the detective was not directed by the prosecutor to do the interview. Nor are all the detective's actions imputed to the prosecutor as a matter of law, because the detective is not the prosecutor's employee and works for a separate agency with an independent interest in interviewing the suspect. As explained above, in the normal investigatory hierarchy, the prosecutor lacks the power to expressly forbid the contact. Nor is it likely that the prosecutor would be able to preemptively urge the police not to do the interview, because law enforcement officers or agents are virtually always working a case before a prosecutor is assigned to it. Given the legality of the contact, and the possibility of other agency priorities (for example,

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<sup>132</sup> FBI LEGAL HANDBOOK FOR SPECIAL AGENTS, 7-4.1(7), available at <http://www.fbi.gov> (search "Legal Handbook for Special Agents" in the search bar; click on the first link; click on hyperlink that reads "Legal Handbook for Special Agents (Released 2003)"). Exceptions (b) and (c) are the standard *Edwards* and *Quarles* exceptions. Exception (d) is a trickier case; the handbook says it concerns "extenuating circumstances such as defense counsel's involvement in the criminal offense or other serious conflicts of interest." *Id.*

intelligence gathering or seizure of weapons), it's likely that agents may have reasons for wanting to engage in these contacts even if told by the prosecutor to lay off.

The question is whether in any of these situations—where the prosecutor gives accurate legal advice knowing that the agent will follow it, but does not direct the agent to do so; where the prosecutor gives no advance direction but then later uses the evidence; or where the prosecutor issues a no-contact order that the agents disregard, and then uses the fruits of their contact—the prosecutor has violated his ethical duty and is subject to sanction. There would obviously be no constitutional barrier to the introduction of the evidence; the only question would be whether the prosecutor would risk bar discipline.<sup>133</sup>

It is at least arguable that trial use could constitute ratification.<sup>134</sup> Prosecutors have been held to have ratified police conduct by exploiting it after the fact.<sup>135</sup> And certainly as an institutional matter, one could argue that the *regular* use by prosecutors of constitutionally obtained evidence that they could not ethically participate in gathering would seem to be a de facto ratification of the police practice of gathering the evidence. If we were dealing with corporate responsibility for employee actions, liability would be fairly clear.<sup>136</sup>

But we're not. And that fact makes this a more difficult problem than the usual "see no evil" dilemma in criminal investigation, which arises when a prosecutor doesn't ask questions about agents' methods, and thus gets a reputation as a go-to guy for agents inclined to use unsavory or illegal tactics. It is more difficult because, first, in this case, the "evil" is not actually evil—the cop who does a *Montejo/Shatzer* interview and gets a statement has done *nothing wrong*—and second, the ethical analysis on imputed responsibility is much less clear for criminal investigation than

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<sup>133</sup> Every court that has considered this issue has said suppression wouldn't be an appropriate remedy even if the conduct was unethical. *See, e.g., Hammad*, 858 F.2d at 840; *Lopez*, 4 F.3d at 1464.

<sup>134</sup> This is arguable, but by no means certain. *See, e.g., ABA Comm. on Ethics & Prof'l Responsibility*, Formal Op. 95-396, n.55 (1995) (stating that the use of evidence is not ratification if the attorney was not involved in improper acquisition).

<sup>135</sup> *See, e.g., Miller*, 600 N.W.2d at 458 (holding that prosecutor ratified police officer's action in interviewing suspect outside the presence of counsel by failing to terminate the interview after learning of it, and thereby violated no-contact rule).

<sup>136</sup> *See, e.g., United States v. Potter*, 463 F.3d 9, 25-26 (1st Cir. 2006) (stating a corporation cannot "avoid liability by adopting abstract rules" that forbid its agents from engaging in illegal acts, because "[e]ven a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents"); *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions."); *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for acts of its employees done contrary to express instructions and policies, but . . . the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation."); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972) (noting that a corporation "could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks").

for civil litigation. In sharp distinction from civil litigation, in criminal investigation the agents don't work for the lawyers. Dan Richman puts his finger on it: "One often hears rookie prosecutors refer to 'my agents.' Most soon learn to drop the possessive."<sup>137</sup>

Prosecutorial insistence on agency abstention from perfectly legal, investigatively valuable tactics is a recipe for open conflict with the agency, concomitant lack of agency cooperation, and—worse—lack of full disclosure to the prosecutor about agents' investigative activities.<sup>138</sup> Such lack of disclosure can lead to myriad ethical and constitutional violations, which is why achieving close prosecutorial supervision of investigations from as early on as possible is the policy of the Justice Department. The best way to thwart this policy is to drive a wedge between the incentives of the two institutions. Richman's reaction to the McDade Amendment presciently anticipates the *Montejo/Shatzer* problem:

[A] significant regulatory gap has now been created between prosecutors and agents, as agents, not bound by the ethics rules, remain free to contact represented targets overtly and covertly, so long as they do not involve prosecutors in such endeavors. . . . To the extent one's goal is to ensure prosecutorial involvement in investigative decisionmaking, the McDade Amendment and the unreflective application of ethical rules governing investigations to prosecutors generally are thus large steps in the wrong direction (and unlikely to prove effective in restraining investigative contacts with represented parties).<sup>139</sup>

When Professor Richman wrote the above, *Jackson* was still the law, *Edwards* was still unlimited temporally, and agents were thus barred from initiating custodial contact in *Montejo* and *Shatzer* situations. *Montejo* and *Shatzer* drive the wedge even deeper, and put the prosecutor in a very difficult ethical position. The competent prosecutor is on notice of Supreme Court case law, and is on notice of what the investigating agents are doing. Thus the situation will arise, for example, in which a defendant has invoked and is out on bail, and the agents—who will themselves almost certainly be aware of *Shatzer*—propose going to talk to him to see if they can coax a waiver out of him now that he's free. The agents tell the prosecutor their plan. What should the prosecutor tell them? This is a real dilemma. One horn is the ethical rule: no contact. There is no way around that one—if you're doing your job, the agents will ask you before they buttonhole the guy, and you're on the hook if you authorize or ratify: You are in charge now, and these guys *are* "your" agents as far as the rule is concerned.

The other horn is that the Court has just said it is perfectly legal for the agents to go out and make contact. There is no reason for the cops not to do it.

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<sup>137</sup> Richman, *supra* note 127, at 756. I should note that I was lucky enough to work in an office that provided good training and mentoring on the subtleties of the prosecutor-agent relationship, but I still tripped over this locution, and its analogous practical manifestations, from time to time. One quickly learns the difference between making suggestions and giving orders.

<sup>138</sup> See, e.g., Lininger, *supra* note 128, at 1268 (considering the problem of internal agency regulation of police conduct in light of the fact that internal regulations are unenforceable by the courts).

<sup>139</sup> Richman, *supra* note 127, at 821-22.

Many lawyers would here interject, “So what! There’s no dilemma. You tell them not to do it. Period.” I sympathize with the sentiment, I think, but it’s not that simple. The prosecutor has a duty to—and surely, is ethically permitted to—accurately explain constitutional case law to law enforcement personnel. So say you’re doing training for investigative agents. I think you *have* to talk about *Montejo* and *Shatzer*, and you *have* to say: “This is legal. You may approach, you may ask for a waiver, and if you get one the evidence will come in.” You then say (presumably): “Prosecutors are bound by rules of attorney ethics, which clearly forbid this contact, whether in person or by proxy.” I think you have to say both, or you are misleading the agents.

Then you finish the training session and you leave, and the agent bosses sit around and plan strategy. They’re not dumb: They have to recognize that the Supreme Court is inviting them to do this. So the agents come up with their own policy: You can do this, but you can’t tell the prosecutor about it first.

Assume the agents develop this strategy. It seems to me it works once. The first time it happens, the prosecutor bosses will have a talk with the agent bosses. And once they do, all the prosecutors are now on notice of the agents’ strategy, and thus extremely vulnerable to ethics charges if they exploit *Montejo* or *Shatzer* statements. So what do you do? Do you call in your agents and have everyone sign a document memorializing your direct order not to do *Shatzer* waiver requests? And suppose the agents do it anyway, after signing? The evidence is admissible, sure, but are you still on the hook ethically? Again, I think that gambit works only once.

Furthermore, what kind of relationship can you have with the investigating agents if you’re giving an express instruction to refrain from an action and they’re ignoring you? I for one would not want to be the prosecutor arguing to the ethics board that I should not be held accountable for what my agents did, because hey, they just ignore my instructions.<sup>140</sup> Either the arrangement was a sham, or I am an incompetent prosecutor and have only saved my ethics bacon by declaring my professional ineptitude.

There is some evidence that the possibility of sanctions for prosecutors can meaningfully constrain agent investigatory behavior. In 2000, the Oregon Supreme Court held that the Oregon ethics rule that prohibited deception by attorneys prohibited all lawyers—including prosecutors—from supervising undercover

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<sup>140</sup> This was the trap Tom Cruise set for Jack Nicholson in “A Few Good Men,” which I can’t resist quoting here.

[Nicholson]: Ever put your life in another man’s hands, ask him to put his life in yours? [Cruise]: No, sir. [Nicholson]: We follow orders, son. We follow orders or people die. It’s that simple. Are we clear? . . . [Cruise]: Colonel, I have just one more question. Why, if you gave an order that Santiago wasn’t to be touched, and your orders are always followed, then why would he be in danger, why would it be necessary to transfer him off the base? [Nicholson]: Sometimes men take matters into their own hands. [Cruise]: No sir. You made it clear just a moment ago that your men never take matters into their own hands. Your men follow orders or people die. So Santiago shouldn’t have been in any danger at all, should he have, Colonel? [Nicholson]: You little bastard.

A FEW GOOD MEN (Columbia Pictures 1992), available at <http://www.godamongdirectors.com/scripts/fewgood.shtml>.

investigations.<sup>141</sup> The Oregon legislature subsequently revised the rule to allow for supervision of undercover investigations, but the revision did not take effect until 2002, and in the interim undercover investigation largely stopped in the state.<sup>142</sup>

Professor Lininger argues that because prosecutors are so central to modern criminal investigations, ethical restrictions on prosecutors' conduct can meaningfully control the conduct of investigating agencies:

[C]lose cooperation between prosecutors and police would persist even if prosecutors are subject to stricter rules than police . . . [because] police need prosecutors to unlock the door to the closet where the most valuable investigative tools are kept: wiretaps, FISA warrants, grand jury investigations, plea agreements offering leniency in exchange for cooperation, etc.<sup>143</sup>

Lininger is arguing for revisions of state ethics rules to prohibit suspicionless infiltration of religious groups, a practice that, like *Montejo* and *Shatzer* contacts, is otherwise legal. His point is simple: If prosecutors won't touch the evidence the police generate, the police won't bother generating it. Perhaps that dynamic will prevail in *Montejo* and *Shatzer* scenarios. Time will tell.<sup>144</sup>

#### VI. PRACTICAL CONSEQUENCES FOR DEFENDANTS

Finally, will there be dire consequences as police and prosecutors put the new cases into practice? Justice Stevens pointed out in dissent in *Montejo* that "generations of police officers have been trained to refrain from approaching represented defendants."<sup>145</sup> His point was simply that *Jackson* was not "unworkable," which is certainly true. Nor will *Montejo* prove "unworkable" as successive police academy classes cut their teeth on its rule rather than *Jackson*'s. The salient question is whether *Montejo*'s practical consequences will be significant and bad.

<sup>141</sup> See *In re Gatti*, 8 P.3d 966, 976 (Or. 2000).

<sup>142</sup> See Lininger, *supra* note 128, at 1273-74; *Gatti*, 8 P.3d at 976. Lininger comments that "for the two-year period in which 'the Gatti rule' remained in effect, proactive criminal investigations ground to a halt in Oregon" and quotes a federal official publicly proclaiming the rule's effect: "F.B.I. Agent Nancy Savage, the Special Agent in Charge of the F.B.I. office in Eugene, Oregon, commented on a national television broadcast that the Gatti rule had 'shut down major undercover operations' in Oregon." Lininger, *supra* note 128, at 1274-75.

<sup>143</sup> Lininger, *supra* note 128, at 1274.

<sup>144</sup> Richman illustrates this general dynamic with an example from Great Britain. A judge dismissed a criminal charge in a case in which the police, unbeknownst to and unauthorized by the prosecution, had promised immunity. The prosecution argued that the promise had been made before any prosecutors were even involved with the investigation, but the High Court was unmoved: "If the Crown Prosecution Service find that their powers are being usurped by the police, the remedy must surely be a greater degree of liaison at an early stage." Richman, *supra* note 127, at 781 (quoting *R. v. Croydon Justices ex rel. Dean*, [1993] 3 All E.R. 129, 135). And embroiling a prosecutor in an ethics investigation is far worse than getting one case dismissed.

<sup>145</sup> *Montejo*, 129 S. Ct. at 2098 n.4 (Stevens, J., dissenting).

On this question I am provisionally inclined to say no. It remains true that when a suspect invokes his right to counsel in a *Miranda* setting, the police are obligated to cease questioning, are trained to cease questioning, and generally do cease questioning. And *Edwards* still bars re-initiation after invocation if the defendant remains in custody. *Montejo* changes only the answer to the question whether the police may still request a waiver when the suspect has not yet invoked, but has been appointed counsel. It changes nothing substantively about the interaction between the police and the defendant, and it is undisputed that the police already had the authority to seek a post-arrest *Miranda* waiver, even if the suspect had already hired a lawyer. So the practical effect will be only in situations where the defendant has either already waived and made a statement, or has neither waived nor invoked because the police have not yet had time to question him, and is, at the time of appointment, willing to make further statements to the police, but would change his mind if his attorney was present.

To be sure, this is not by any means a trivial set of defendants. Any competent defense attorney will tell his client not to say anything, and not to say anything more if he's already made statements, until the attorney can assess the strength of the government's case. It is reasonable to think that some unknown but not insignificant percentage of defendants who would otherwise have talked would decide to clam up after being so advised by counsel. So the practical effect of *Montejo* is likely to be to produce, at this margin, somewhat more confessions than would be produced by the *Jackson* rule.

However, these are all confessions that by hypothesis would have been made anyway but for an accident of timing—either the defendant had not yet been interviewed at all, or he had but his statements were incomplete. In the former case, the defendant in a *Montejo* scenario who does not want to talk need only do what any pre-appointment defendant need do: invoke. In the latter case, the defendant has already made the decision to waive and give a statement. So there is no new set of defendants who will attempt to exercise their rights but will be unable to do so under the new rule. In that respect, *Montejo* is perhaps less significant—and less troubling—than cases like *Butler*<sup>146</sup> and *Davis*,<sup>147</sup> which did have the effect of rendering some defendants' attempts to invoke ineffective.

So the *Montejo* bottom line is likely to be that defendants who waive in a *Montejo* setting would have waived pre-appointment too, as indeed *Montejo* himself did. The result changes only for those defendants who would have been persuaded by counsel not to waive. Are they being unfairly penalized by the *Montejo* rule, or did they, rather, previously enjoy an unwarranted windfall under the *Jackson* rule? *Miranda* itself suggests the latter interpretation, I think. After all, *Miranda* did not hold that no custodial interrogation can take place without the suspect having a lawyer present. The Court could have announced such a rule, but it has never done so. The government, in short, gets one bite at the waiver apple and does not have to go through counsel to get its bite. Every criminal suspect has to face the waiver/invocation decision alone, once.

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<sup>146</sup> *North Carolina v. Butler*, 441 U.S. 369 (1979) (recognizing implicit *Miranda* waiver and declining to impose express waiver requirement).

<sup>147</sup> *Davis v. United States*, 512 U.S. 452 (1994) (requiring express statement for invocation of *Miranda* rights and declining to find implicit invocation).



That, at least, was a fair statement of the law up until *Shatzer*, which adds: unless the suspect is out of custody, in which case the suspect has to face the waiver/invocation decision alone, once every two weeks, if he is re-arrested. Will this holding create major upheaval? Again, I am inclined to doubt it. While the suspect is free, there isn't any custodial interrogation: The defendant out on bail can walk away, or close his door, or say "No, thank you."<sup>148</sup> By definition, a defendant out on bail has no *Edwards* protections: The police can always approach him and ask whether he wants to talk. *Edwards* only barred re-initiation of *custodial* interrogation. So for *Shatzer* to apply, a defendant has to be released and then, after two weeks, re-arrested for something else. That's not an unheard-of occurrence, to be sure, but it certainly doesn't happen in the majority of criminal cases.

Furthermore, in the *Shatzer* situation, we have a defendant who knows his rights, has been told his rights not just by the police, but by a judge, and subsequently (presumably) by his own attorney. It would be absurd to describe a *Shatzer* defendant who waived on a second or third custodial contact as being unaware of his right not to talk to the police: First, he has to be re-*Mirandized*, and second, by hypothesis this person has been arrested, was *Mirandized*, invoked, had an initial appearance, got a lawyer, made bail, and then was released. His own experience has just *proved* that you can invoke and the invocation will be honored: By hypothesis this person has *already resisted* the inherent coerciveness of custodial interrogation. And the *Shatzer* court emphasized that *Edwards* continues to prohibit badgering.<sup>149</sup> As long as the regular biweekly arrests are based on probable cause, then they're unlikely to be found to be badgering under *Whren*.<sup>150</sup> Of course, the claim could be made—but the point is that in such a scenario, the proper target of the defendant's ire would be *Whren*, not *Shatzer*.

So, as a purely predictive matter, I don't think the sky will fall here for defendants. I think *Jackson* was a workable rule but *Montejo* will be too. And I don't think that putting a time limit on *Edwards* for non-custodial defendants will have significant impacts on investigations. Its impact on the relationship between police and prosecutors, however, could be significant.

## VII. CONCLUSION

As noted above, there's a very strong argument that the no-contact rule is too close to the heart of legal ethics for *Montejo/Shatzer* contacts to be permissible. The rule is central to the professional identity of every lawyer, and rightly so: Channeling communications through the lawyers is the only way to make any litigation work. Criminal practice is no exception. Overtly contacting a represented, opposing party

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<sup>148</sup> I say all this with a full awareness of the hollowness of much of the Court's consent jurisprudence and the strong criticisms thereof made by David Cole and many others. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 17-22 (1999) (criticizing the Court's consent cases). Still, the sharpest criticism of the consent cases is that consent may be found even where the suspect did not know he had the right to refuse the search request. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). However much contemporary interrogation jurisprudence has chipped away at *Miranda's* foundations, it remains true that no admissible custodial interrogation can proceed absent the suspect's knowledge of the right not to participate.

<sup>149</sup> *See, e.g.*, *Shatzer*, 130 S. Ct. at 1220.

<sup>150</sup> *Whren v. U.S.*, 517 U.S. 806 (1996).

and asking him to talk to you without his attorney present might just be too much for any court to countenance.<sup>151</sup>

If so, the question arises about the best administrative and legislative response. Richman argues that, in some contexts, judicial enforcement of strong constructive agency presumptions can have salutary results:

Those states that treat police and prosecutors as independent actors in the plea agreement context would do well to reconsider a framework that seems blind to the virtues of coordination within the enforcement bureaucracy. Here again, as we saw in the Brady context, treating the “government” as a single unit when it comes to defendants’ rights makes it more likely that enforcers will productively collaborate.<sup>152</sup>

I’ve gone back and forth on this a bit, but I think I am now settled on the view that the no-contact rule is too integral to the practice of law to be discarded in *Montejo/Shatzer* contexts. I do not think courts will or should extend the exception for undercover contacts to *Montejo/Shatzer* contacts without legislative revision of the rules.

The rationale for allowing prosecutorial supervision of pre-attachment undercover investigations makes sense: First, pre-attachment, it’s not necessarily clear<sup>153</sup> what the “subject matter of the representation” is—the defendant may suspect that he’s a target, but has no way of knowing what he’ll ultimately be charged with. Second, the type of contact at issue—“false friend” contact by an informant or an agent posing as a co-conspirator—is not the kind of contact contemplated by the no-contact rule.

*Montejo/Shatzer* contexts are different on both scores. There is a subject matter of the representation—the defendant has been charged and has counsel representing him on that charge. And while a cop’s request for a *Miranda* waiver is not “lawyerly wiles” exactly, it’s surely closer to legalese than a conversation with someone you think is just one of your conspirators.<sup>154</sup> And it is hard to imagine a decision as to which defense counsel’s advice is more valuable than the decision whether or not to make a statement. Indeed, in my experience, the *Miranda* waiver decision is functionally the decision about whether to plead.<sup>155</sup>

The simplest solution, doctrinally at any rate, would be for state legislatures to revise the ethics rules to explicitly include *Montejo/Shatzer* contacts in the “authorized by law” exception. I don’t think this is going to happen, however. So the best option for prosecutors will be to insist that agents and officers not take advantage of the *Montejo/Shatzer* holdings. Prosecutors should explain to their

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<sup>151</sup> See, e.g., *State v. Miller*, 600 N.W.2d 457 (Minn. 1999).

<sup>152</sup> Richman, *supra* note 127, at 829-30.

<sup>153</sup> Often, it is clear—but this is a legal fiction, and my point is just that it’s at least coherent in theory.

<sup>154</sup> This is especially true when the officers say—as they are perfectly entitled to do—things like: “If you have anything to tell us, this might be your only chance.”

<sup>155</sup> To be sure, some defendants waive, make a statement denying guilt, then go to trial, but that’s relatively rare. Usually the ones that go to trial invoke, and the ones that talk plead. This is, I’ve always imagined, one of the biggest frustrations (among many) of defense practice: Often, your client has already confessed by the time you’re appointed.

agents and officers that any investigative activity ultimately aimed at proving a suspect's guilt in court is potentially, and reasonably, chargeable to the prosecutor. Since the prosecutor is the one who will ultimately have to take responsibility for the agents' conduct, the agents should not violate the no-contact rule. And in order to credibly rebut allegations of sub rosa encouragement of the practice, prosecutors should announce—and follow—a policy of not using statements obtained in violation of the rule.<sup>156</sup>

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<sup>156</sup> Indeed, DOJ did this preemptively in its *Montejo* brief, in which it stated that regardless of the *Montejo* holding, federal agents would not interview suspects in *Montejo* scenarios. See Brief for the United States as Amicus Curiae in Support of Overruling *Michigan v. Jackson* at 11-12, *Montejo*, 129 S. Ct. 2079 (No. 07-1529), 2009 WL 1019983.

[A]lthough federal law enforcement agents generally are not constrained by the ethical rules that apply to prosecutors, law enforcement interests are not well-served when law enforcement agents have an incentive to communicate with represented defendants without direction from prosecutors. Accordingly, even if this Court were to overrule *Jackson*, that decision likely would not significantly alter the manner in which federal law enforcement agents investigate indicted defendants.

*Id.*