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THE HAND-OFF PROCEDURE OR THE NEW SILVER PLATTER: HOW TODAY'S POLICE ARE SERVING UP POTENTIALLY TAINTED EVIDENCE WITHOUT EVEN REVEALING THE SEARCH THAT PRODUCED IT TO DEFENDANTS OR TO COURTS

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NOTE

THE HAND-OFF PROCEDURE OR THE NEW SILVER PLATTER: HOW TODAY'S POLICE ARE SERVING UP POTENTIALLY TAINTED EVIDENCE WITHOUT EVEN REVEALING THE SEARCH THAT PRODUCED IT TO DEFENDANTS OR TO COURTS

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INTRODUCTION

Imagine the following scenario: A police officer is investigating a major drug trafficking ring. She obtains a wiretap on the cell phone of the suspected kingpin of the organization. The wiretap enables her to overhear conversations between the top target of the wiretap and several other people in the drug ring. Before the wiretap produces sufficient evidence to support arrest and prosecution of the kingpin, it yields evidence of various crimes involving lower-level drug runners.

Traditionally, this officer would face a dilemma. On the one hand, she could arrest the low-level targets based on the evidence she had already obtained, but in the course of prosecuting them she would be forced to reveal the existence of the wiretap to these low-level targets, who would likely inform the kingpin, which would likely prevent her from obtaining any additional evidence against her top target. Alternatively, she could sit idly by while known criminal activity occurred, perhaps at immediate risk to the safety of the community, in order to keep the wiretap secret and continue building her case against the kingpin.

The "hand off" is a law enforcement technique that seeks to resolve this dilemma by enabling what I will call "midstream prosecutions." A hand off occurs when information from an initial investigation such as a wiretap is "handed off" from one police unit to another. The receiving unit conducts a subsequent and so-called independent investigation, and the subsequent investigation becomes the basis of a criminal prosecution during which the initial investigation is never revealed to the defendant or to the court. The hand off therefore allows police to conduct midstream prosecutions during ongoing covert investigations without "blowing their cover."

Although this technique appears to be commonplace,[1] courts have seldom examined it because it is almost always kept secret from them. On the rare occasions when the procedure has been challenged in court, law enforcement officials have described it openly, apparently confident that it raises no

1. *See infra* Part I.B.

constitutional or statutory problems, and that evidence produced after a hand off would be admissible under exceptions to the exclusionary rule even if the prior investigation were later found to be unconstitutional.[2] Despite this confidence, the hand off raises legal and policy problems, both of which I explore in this Note.

My purpose is to bring attention to the hand off and to explore its legal and policy framework. The Note proceeds in four Parts. In Part I, I describe the hand-off procedure and its common applications and review evidence of its prevalence. In Part II, I argue that the hand-off procedure creates significant threats to privacy even as it serves legitimate societal interests in effective law enforcement. Because the hand off has rarely been examined by courts, I look beyond the hand off in this Part to the analogous silver platter doctrine as a means of illuminating the procedure's legal and policy framework. Part II concludes with a case study of one well-documented use of the hand off, which demonstrates how the procedure's potential for abuse has resulted in actual privacy violations.

In Part III, I describe how the hand off interacts with current law. My central claim is that, although existing law does *not* create an obligation for police and prosecutors to disclose the existence of a pre-hand-off search either to criminal defendants or to courts in *every* post-hand-off prosecution, the policies underlying the Fourth Amendment, the exclusionary rule, and the federal wiretap statute weigh in favor of imposing a limited disclosure obligation that will allow midstream prosecutions while minimizing the risk of and incentives for police misconduct. In addition, I argue that disclosure is already required by statute in certain hand-off situations, where the pre-hand-off search involves a wiretap.

Finally, in Part IV, I outline two possible elements of a resolution to the problems the hand off creates, either of which would establish a qualified disclosure obligation that enables nondisclosure in certain exigent circumstances, upon specific judicial approval. Although I do not propose a polished solution, my discussion of these elements of a possible solution emphasizes the importance of striking an appropriate balance between the need for midstream prosecutions and the threat to privacy that broad and unscrutinized covert investigation powers create.

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2. *See, e.g.*, Whitaker v. Garcetti, 291 F. Supp. 2d 1132, 1139 (C.D. Cal. 2003) ("Defendants speak freely and openly about the 'hand off' procedure's express purpose of evading the revelation of the wiretap's existence. That they do not so much as hesitate in discussing its logistics, even while being cross-examined by defense counsel in criminal proceedings, demonstrates their ultimate confidence in the legality and propriety of the procedure." (footnote omitted)), *aff'd in part, dismissed in part, vacated in part, and rev'd and remanded in part*, 486 F.3d 572, 582-83 (9th Cir. 2007).

I. UNDERSTANDING THE HAND-OFF PROCEDURE

The core elements of the hand-off procedure are (1) an initial investigation; (2) communication from the initial investigators to some different law enforcement unit that involves, at the very least, a tip on where to look for criminal activity; and (3) a subsequent investigation conducted by the unit receiving the information. The procedure is specifically designed to "wall off" the prior investigation from the subsequent one, enabling law enforcement authorities to bring midstream criminal prosecutions during a covert investigation without revealing the existence of the covert investigation to courts, to the individuals prosecuted after the hand off, or to other individuals who remain the targets of the ongoing pre-hand-off investigation.[3]

The procedure obviously benefits law enforcement and society's interest in the successful investigation and prosecution of crimes. Large criminal investigations, especially in the context of sophisticated drug trafficking networks or organized crime more generally, routinely rely on extended covert investigations that may include confidential informants, undercover police officers, communications surveillance in the form of wiretaps[4] and/or pen registers,[5] and myriad other covert investigatory techniques. Many of these practices are highly resource intensive, and in order to be effective they must be carried out without the knowledge of the targets of the investigation.

Investigators engaged in a long-term, resource-intensive investigation who become aware of specific instances of imminent criminal behavior that are ancillary to their main objectives have a legitimate interest in being able to thwart that behavior, especially if it is immediately threatening to public safety, without revealing the existence of the ongoing investigation. Without the hand off, they would be forced to choose between allowing potentially dangerous criminal conduct to proceed unabated while building a case against higher-level

3. *See* KEN WALLENTINE, STREET LEGAL: A GUIDE TO PRE-TRIAL CRIMINAL PROCEDURE FOR POLICE, PROSECUTORS, AND DEFENDERS 61 (2007).

4. Wiretaps are governed not only by the Fourth Amendment, *see, e.g.*, Katz v. United States, 389 U.S. 347 (1967), but also by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522 (2006). Title III imposes requirements in addition to the Fourth Amendment's requirement of probable cause, such as requiring officers applying for a wiretap order to provide information about the viability of other, less intrusive procedures. 18 U.S.C. § 2518(1)(c). *See generally* 18 U.S.C. § 2518.

5. A pen register is an electronic device that records "dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted" but does not record the content of the communications. 18 U.S.C. § 3127(3) (2006). Because they are not Fourth Amendment searches, *see* Smith v. Maryland, 442 U.S. 735, 744 (1979) (analyzing pen registers under a pre-Internet version of the statute that defined the term with regard to phones only), pen registers are easier to obtain than wiretaps. Under Title III, they merely require a court order which a judge "shall" issue "if the court finds that the attorney for the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation." 18 U.S.C. § 3123(a)(1) (2006).

or more dangerous criminals, or averting an immediate instance of criminal activity at the cost of allowing the broader criminal enterprise to discover the covert investigation and presumably avoid prosecution, at least for some time. The hand off is designed and supported as a means of avoiding this dilemma by enabling midstream prosecution of the immediate crime without revealing the existence of the ongoing investigation. As we shall see, however, a procedure that gives the government unconstrained power to hide part of its investigation from courts and defendants presents society with a new dilemma because the added benefit in terms of law enforcement comes at a potentially serious cost to privacy.[6]

A. *Example of a Hand Off:* United States v. Man Nei Lui

A typical hand off occurred during a recent United States-led, international investigation into drug trafficking, codenamed Operation Sweet Tooth.[7] Operation Sweet Tooth lasted twenty-four months, ranged over twelve separate judicial districts in the United States, and culminated in 291 arrests and the execution of ninety-eight search warrants both in the United States and Canada, yielding 931,300 tablets of MDMA ("Ecstasy"), 1,777 pounds of marijuana, and $7.75 million in United States assets.[8] As part of this investigation, Drug Enforcement Administration (DEA) agents obtained a wiretap on a private cellular telephone belonging to a man named Eric Zi Ping Lei in San Francisco on March 30, 2005.[9] On April 23, 2005, approximately six and one-half months before the international takedown in Operation Sweet Tooth,[10] information obtained in the March 30, 2005, wiretap led federal investigators to believe that a man named Man Ning Tao was in possession of several ounces of cocaine in a certain car on the streets of San Francisco. Not wanting to reveal the existence of the ongoing federal investigation, but hoping to prevent this

6. For an illuminating and concise discussion of the meaning of "privacy" as it relates to law and government surveillance, see Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 245-46, 249 (2008) (describing "'[p]rivacy'" to include, *inter alia*, an "instrumental interest" in "concealment of personal information" from the government or others based on "the desire that such information not be used against oneself").

7. *See* Press Release, Drug Enforcement Admin., DEA Dismantles International Ecstasy Trafficking Groups (Nov. 17, 2005), http://www.justice.gov/dea/pubs/pressrel/pr111705p.html [hereinafter Press Release DEA Dismantles International Ecstasy Trafficing Groups]; Press Release, Drug Enforcement Admin., Operation Sweet Tooth Nets Arrests From Bay Area Ecstasy Investigation (Nov. 18, 2005), http://149.101.1.32/dea/pubs/states/newsrel/sanfran111805b.html.

8. Press Release, DEA Dismantles International Ecstasy Trafficking Groups, *supra* note 7.

9. Government's Reply to Defendants' Motion to Suppress Evidence at 2, United States v. Man Nei Lui, No. CR-05-00723-JW (N.D. Cal. Feb. 13, 2007), 2007 WL 2718824 [hereinafter Feb. 13 Motion].

10. *See supra* note 7. A "takedown" marks the end of a covert investigation and often involves near simultaneous execution of a multitude of search and arrest warrants.

cocaine from reaching end users, the federal investigators asked a San Francisco Police Department (SFPD) officer to conduct a "wall stop" on Man Ning Tao's car, in order to "'wall[] off' the federal presence from the target and . . . make the target believe that any subsequent seizure of contraband from his vehicle was merely fortuitous."[11] SFPD officers conducted the wall stop after observing a broken taillight.[12] They obtained consent to search the car and discovered six ounces of cocaine.[13] The occupants of the car, Man Ning Tao and another man, Man Nei Lui, were charged in state court, where their case proceeded for almost six months before they learned that there had been a federal investigation prior to the traffic stop. In fact, they learned about the federal investigation only after the international takedown for Operation Sweet Tooth occurred on November 17, 2005. Once the takedown was complete, the need to keep the federal wiretap on Eric Zi Ping Lei's phone secret disappeared, so the state and federal prosecutors agreed to dismiss the charges that were pending in state court and arraign the defendants on federal charges.[14] The defendants later sought unsuccessfully to have the federal indictment dismissed, arguing that the hand off and the concealment of federal involvement during state court proceedings amounted to government misconduct.[15]

Man Nei Lui did not ultimately present the problems I am primarily concerned with in this Note because the federal investigation was voluntarily revealed to the defendants before they were convicted. Accordingly, these defendants ultimately *did* have an opportunity to challenge the search that led to their arrests, which is why so much information about this hand off is in the public record. However, Man Ning Tao and Man Nei Lui could easily have been convicted in state court *before* the takedown without ever learning about

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11. Feb. 13 Motion, *supra* note 9, at 8.

12. *Id.* at 8-9. The government has argued that where the hand-off procedure is in the form of a wall stop, in which subsequent investigators conduct a traffic stop based on an actual traffic violation, the existence of probable cause for the traffic stop renders the stop objectively reasonable, regardless of the nature or existence of any prior investigation. *See, e.g.*, Government's Opposition to Defendants' Motion to Dismiss the Indictment for Government Misconduct at 13, United States v. Man Nei Lui, No. CR-05-00723-JW (N.D. Cal. June 14, 2007), 2007 WL 4566392 [hereinafter June 14 Motion]. *See generally* Whren v. United States, 517 U.S. 806 (1996). But the holding in *Whren*, that police who otherwise *lack* probable cause may rely on a pretextual traffic stop to investigate suspected criminal activity, does not necessarily mean that police whose suspicion derives from prior police illegality can simply cleanse the taint of that illegality by conducting a pretextual traffic stop. *But see* United States v. Pedraza-Bucio, No. 2:08 CR 698(TC), 2009 WL 1110332, at *3 (D. Utah Apr. 23, 2009).

13. Feb. 13 Motion, *supra* note 9, at 9.

14. *See* June 14 Motion, *supra* note 12, at 2-3.

15. *See* Notice of Motion and Defendants' Motion to Dismiss the Indictment for Government Misconduct at 2-3, United States v. Man Nei Lui, No. CR-05-00723-JW (N.D. Cal. May 29, 2007), 2007 WL 4566415 [hereinafter May 29 Motion].

the federal investigation.[16] The case therefore remains a useful example that can illuminate the problems that arise when pre-hand-off searches are never revealed either to criminal defendants or to courts.

Although hand offs are defended by law enforcement authorities as a means of protecting legitimate ongoing investigations like the one in *Man Nei Lui*, the core elements of the hand off exist whenever a prior investigating authority provides a tip to another unit and then seeks to wall off the prior investigation from the subsequent one. The effect, whether or not there is a legitimate justification, is to shield a subset of police investigatory conduct that contributes to a current prosecution from both judicial and adversarial scrutiny. As we shall see, the reasons to be concerned about the procedure revolve around the fact that there is no judicial scrutiny to ensure that there are legitimate reasons for the hand off every time it occurs. Because there is no judicial scrutiny, the hand off enables police to conduct prior investigations that overstep constitutional constraints on their power, secure in the knowledge that they can "wall off" the prior investigation and still prosecute any crime they may discover, so long as the information revealed by the prior investigation can be "rediscovered" by legitimate means in a subsequent operation.

B. *The Prevalence of the Hand-Off Procedure*

The hand-off procedure is aimed at secrecy, so it should be no surprise that it is difficult to uncover data on its exact prevalence. However, every explicit mention of the procedure that I have found treats the procedure as routine. And it is telling that the procedure appears in at least one criminal procedure guidebook for police,[17] in at least one state's law enforcement training curriculum,[18] and in cases from a broad geographic range of courts.

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16. Indeed, the defendants rejected a plea bargain that was offered to them by the San Francisco District Attorney's Office before the state charges were dismissed. *Id.* at 5-6.

17. The wall stop appears in a guide to pretrial criminal procedure for police published by the American Bar Association in 2008. WALLENTINE, *supra* note 3. In this book by the Chief of Law Enforcement for the Utah Attorney General, *id.* at xv, the author gives no indication of its frequency, but it is common enough for him to discuss it in a generalized way, noting for example that "many wall stops are impromptu." *Id.* at 62.

18. The wall-stop procedure is part of the training curriculum for narcotics investigation offered by the California Narcotics Officers Association. The course listing is available at Cal. Comm'n on Peace Officer Standards & Training, Course Catalog, http://www.post.ca.gov/publications/course_catalog/3832.asp (last visited Nov. 23, 2009). Although I have been unable to view the relevant content of the training material, the online course catalog explains that a course called "Narcotics Inv.-Patrol" is "[a] comprehensive course that will provide patrol personnel with information on how to combat the drug abuse problem while assigned to patrol. Topics will include drug abuse recognition, use of informants, *wall stop procedures*, cannabis clubs, report writing and courtroom testimony." *Id.* (emphasis added); *see also* Search Warrant and Affidavit at 7, United States v. Dossman, No. 05-CR-00270 (E.D. Cal. Nov. 3, 2005), 2005 WL 6041304 ("In November 2003, I attended the California Narcotic Officers Association Conference that included courses, but was not limited to[,] Major Drug Trafficking investigations, Hotel / Motel Drug Interdiction,

At least one of the terms "hand off," "wall stop," or "wall off" is used to signify the procedure I describe in this Note in filings[19] and decisions[20] in at least twenty-three[21] cases in eleven different jurisdictions stretching from California to Georgia.[22] These references to the procedure make it clear that its use is not rare. For example, one DEA Special Agent testified that the hand off is "a 'wall off' procedure that DEA *sometimes* employs to protect the integrity of an ongoing federal investigation."[23] And a federal prosecutor explained the

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Cool Stops / *Wall Stops*, and Methamphetamine Clandestine Laboratory Investigative Techniques." (emphasis added)).

19. I discovered a total of twenty-three discrete cases using these terms in one or more filings with the meaning I give them here. To cast my net as broadly as possible, I searched for any of the phrases "wall stop" and "wall off" (and their variants as a single word, hyphenated, etc.), and for the word "hand off" (and its variants) in the same sentence as "procedure" "practice" or "traffic stop." For criminal filings, I searched Westlaw's "CR-FILING-ALL" and "FED-FILING-ALL" databases, hoping to capture both motions to suppress in state and federal court and potentially also § 1983 actions in federal civil litigation. I developed these search terms by reading filings and decisions in *Whitaker v. Garcetti* and *United States v. Man Nei Lui*, both of which I knew to discuss the procedure based on personal experience, before I began my research. These searches may be underinclusive because there is no consensus terminology for referring to the hand-off procedure, but other researchers have found a similar dearth of results. *See* Whitaker v. Garcetti, 291 F. Supp. 2d 1132, 1145 (C.D. Cal. 2003) ("Remarkably, the issue of whether such a procedure is constitutionally permissible seems to have never been decided."); *id.* at 1146 (noting that a legal challenge to the hand-off procedure occupied a "precedently vacuous realm").

20. Using the search terms described above in Westlaw's "ALLCASES" database, I found the procedure mentioned in judicial decisions in only five cases: (1) *Whitaker v. Garcetti*, 291 F. Supp. 2d 1132 (involving a hand off to a different local unit to protect a local wiretap, challenged under § 1983 and remanded on technical grounds without directly addressing the propriety of the procedure); (2) *United States v. Singh*, 363 F.3d 347, 353-54 n.8, 358 (4th Cir. 2004) (reversing district court's suppression of evidence from a wall stop conducted to protect the identify of a confidential informant); (3) *United States v. Oung*, 490 F. Supp. 2d 21 (D. Mass. 2007) (involving a wall stop by local police to protect a federal investigation that was not challenged); (4) *United States v. Pedraza-Bucio*, No. 2:08 CR 698(TC), 2009 WL 1110332, at *1, *3 (D. Utah Apr. 23, 2009) (denying a motion to suppress evidence gleaned from a wall stop); (5) *United States v. Santana*, No. 2:03-CR-186 W, 2003 WL 23356402, at *5 (D. Utah Nov. 19, 2003) (involving a wall stop to protect a "task force" investigation that was not challenged).

21. This is not the sum of the filings cases and decision cases, because I have avoided double counting discrete cases in the total, and of course the term sometimes appears in both filings and decisions related to the same discrete case.

22. Although I searched both state and federal courts, I was able to find references to the procedure only in federal cases and filings. The eleven jurisdictions are the Northern, Eastern, Central, and Southern Districts of California; the Northern and Southern Districts of Georgia; the Northern District of Illinois; the District of Massachusetts, the Middle District of North Carolina; the District of Oregon; and the District of Utah. The procedure also appears in cases from two Circuit Courts of Appeals: the Fourth Circuit (in a case arising out of the Middle District of North Carolina); and the Ninth Circuit (in a case arising out of the Central District of California).

23. United States's Opposition to Defendant's Motion to Suppress at 12 n.2, United States v. Pineda, No. 1:06-CR-00350-WSD/LTW (N.D. Ga. July 26, 2007), 2007 WL

procedure in general terms, intimating that it is used routinely: "So-called wall stops are where agents conducting a broader investigation point another officer toward a target and instruct the officer to seek probable cause and lawful authority independent of the larger investigation—such as traffic offenses and consent—to stop, search, and (if appropriate) arrest the target."[24]

Perhaps the best indication of the procedure's prevalence in at least one major jurisdiction arose after a Los Angeles Superior Court ordered the Los Angeles District Attorney (LADA) to provide notice to criminal defendants and state prisoners whose lines were tapped but who were never so informed.[25] As directed, the LADA issued a press release on June 1, 1998, which stated: "Since 1993, our office has filed 85 cases in which wiretap surveillance techniques were utilized. . . . The defendants in 58 cases were provided with no information concerning the wiretap surveillance while their cases were pending."[26] This information is interesting not only because it demonstrates how frequently the procedure was used by one police department, but more importantly because it shows how many hand offs resulted in actual prosecutions in this one jurisdiction before the procedure ever came to the attention of a court.

It therefore seems clear that the hand-off procedure occurs much more often than it appears in court papers. This follows from the nature of the procedure, which keeps part of a covert investigation hidden from the defendant and the court. And even without considering the problem of concealment, the cases and references I have found are likely to understate the procedure's true frequency simply because there is no consensus terminology used to label it, which makes a comprehensive search for relevant descriptive terms very difficult to construct.[27]

4860940 (emphasis added).

24. Response of the United States to Juarez's Brief in Support of Defendant's Request to Preclude Government from Relying on Information Gathered from Wiretaps and DEA Surveillance to Justify the Detention of Mr. Lucero-Espino and the Search of His Vehicle at 3 n.1, United States v. Juarez-Mendoza, No. 03CR0210BTM (S.D. Cal. June 18, 2003), 2003 WL 25630357.

25. *See Whitaker*, 291 F. Supp. 2d at 1139 n.14.

26. Press Release, Statement of District Attorney Gil Garcetti (June 1, 1998), http://pd.co.la.ca.us/da.htm. The LADA asserted in the same press release that "[i]n every one of these cases, the wiretap surveillance was judicially authorized and monitored. Additionally, in cases in which the wiretap surveillance revealed exculpatory information, this information was provided to the defendants." *Id.*; *see also D.A.'s Office Admits Secret Wiretapping*, L.A. TIMES, June 2, 1998, at B3 ("After insisting for months that its actions were appropriate and legal, the district attorney's office Monday announced that it would immediately notify dozens of criminal defendants—some already serving prison terms—that their prosecutions resulted from previously undisclosed wiretaps.").

27. *See supra* notes 19-20. One purpose that this Note may serve is to bring conformity to the terminology, which would enable better empirical data to be gathered in the future.

With regard to how long the procedure has been in use, there is some indication that an early form of hand off was in use as early as 1956. The 1957 Supreme Court case of *Benanti v. United States* addressed a motion to suppress evidence gathered by state officials in 1956

II. WHY THE HAND-OFF PROCEDURE IS PROBLEMATIC

A. *Comparison to the Silver Platter Doctrine*

Although there are good reasons to believe that the hand off is commonly used, it is also apparent from the dearth of reported cases that its goal of secrecy has largely been achieved. Accordingly, I have found it useful in exploring the public policy considerations that ought to inform a thoughtful analysis of the procedure to compare it to a historical technique that shares some of its key characteristics: the now defunct silver platter doctrine.[28]

The silver platter doctrine arose as an exception to the exclusionary rule. It allowed federal and state authorities to prosecute crimes using evidence derived from concededly unconstitutional investigations, so long as whichever authority did the prosecuting had not been responsible for the constitutional violation. That is, federal investigators could provide ill-gotten evidence to state prosecutors "on a silver platter," and state investigators could do likewise for federal prosecutors.[29]

The similarities between the hand-off procedure and the law enforcement

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in violation of the federal wiretap law and then introduced by federal prosecutors in a federal prosecution. 355 U.S. 96 (1957). The Second Circuit's opinion in the case explained that "[i]t was not until the cross-examination of one of the police officers at the trial that the [federal] prosecutor or any of his assistants had any knowledge or suspicion of the fact that there had been a wiretap." 244 F.2d 389, 390 (2d Cir. 1957). *Benanti* does not necessarily suggest a hand off in the modern form, conducted with the prospective purpose of walling off part of an investigation from public or judicial scrutiny, but it is interesting as an early example of keeping part of a covert investigation hidden from the court and the defendant (and, in this case, the prosecutor), even while using the evidence that it produced, presumably to avoid scrutiny of an illegal or potentially illegal action. More recently, the district court judge in *Whitaker* noted that the procedure "appear[ed] to have first been used by the [Los Angeles Police Department] and the office of the [Los Angeles District Attorney] in the mid-1980's," 291 F. Supp. 2d at 1138, but gave no indication of the sources he relied on for this information.

28. The term was coined by Justice Frankfurter in *Lustig v. United States*, 338 U.S. 74, 78-79 (1949) ("The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter.").

29. The silver platter doctrine reaches as far back as the announcement of the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914). While excluding evidence obtained when federal officials violated the Fourth Amendment, the *Weeks* Court admitted evidence unlawfully seized by local police officers, concluding that "the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies." *Id.* at 398; *see also* Elkins v. United States, 364 U.S. 206, 210 (1960) (describing *Weeks* as the source of the silver platter doctrine). The silver platter doctrine was formally announced by the Supreme Court in *Byars v. United States*, 273 U.S. 28, 33-34 (1927) (excluding unlawfully obtained evidence where state police acted solely for the purpose of aiding in the enforcement of federal law, but leaving in place "the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account") and *Gambino v. United States*, 275 U.S. 310, 314, 317 (1927) (same).

activities underlying the silver platter doctrine are readily apparent. Both are designed to enable the introduction of evidence against an accused without regard to the propriety of the law enforcement activity that produced the evidence. And both seek legal sanction for this effort by employing different law enforcement agents at different points in the process of investigation and prosecution to support an argument that the conduct of one set of agents has become legally irrelevant to a later investigation and prosecution.

Because of these similarities, it is instructive to examine the policy reasons that eventually led the Supreme Court to abandon the silver platter doctrine in *Elkins v. United States* in 1960, after it had been in place for several decades.[30] The most important ground for the decision in *Elkins* was of course the legal conclusion that the exclusionary rule *must* extend to evidence illegally seized by state officials because the Fourth Amendment's protections against unreasonable searches and seizures had been incorporated against the states in *Wolf v. Colorado*.[31] *Wolf* removed "[t]he foundation upon which the admissibility of state-seized evidence in a federal trial originally rested."[32] But because the legal framework of the hand off is different, the more interesting grounds for the decision for our purposes are the policy grounds.

Speaking generally about the virtues of the exclusionary rule on its way to excluding silver platter evidence, the Court quoted at length from Justice Jackson's observations about the need for exclusion to protect the rights of the *innocent* to be free from unreasonable searches that never reach any court:

> Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.
>
> Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.[33]

This focus on the power of exclusion to protect the Fourth Amendment rights of the innocent was an important basis for the rejection of the silver platter doctrine—the *Elkins* Court was concerned that allowing silver platter prosecutions would undermine the privacy protection that the exclusionary rule is supposed to provide.

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30. 364 U.S. 206 (1960).

31. 338 U.S. 25, 27-28 (1949).

32. *Elkins*, 364 U.S. at 213.

33. *Id.* at 217-18 (quoting Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting)).

As important as these considerations were in *Elkins*, they are perhaps even more important in an evaluation of the hand off because the hand off directly contributes to the problem that Justice Jackson was concerned about—that only a small portion of searches ever come before any court. The hand off expands the set of unexamined searches to include not only those that turn up no incriminating evidence, but also some portion of those in which there *is* evidence of guilt, further restricting the ability of the Court to supervise law enforcement activity and ensure its legality.[34]

In the silver platter context, the concern about failing to extend exclusion to evidence seized illegally by state officials touched on federalism.[35] The crux of the concern was that the federal government would undermine efforts by states to deter unlawful searches and seizures so long as it preserved an incentive for unlawful state-level searches by providing an opportunity for the fruits of those searches to be used to secure federal convictions. Although the hand off does not necessarily implicate the same federalism concerns,[36] it similarly tends to undermine other efforts at deterrence by creating an easy and quasi-legal process for cleansing an unlawful or questionable investigation of adverse consequences to law enforcement, entirely without judicial scrutiny (at least when the investigation is covert). Neither constitutional tort liability nor the exclusionary rule can adequately deter misconduct by police equipped with the hand off because the hand off enables police to conceal tortious conduct from potential civil plaintiffs and simultaneously allows police to make use of evidence they discover illegally (or through a search of questionable legality) so long as it can be "rediscovered" after a hand off by constitutionally permissible means.[37]

Put aside for a moment the problem of the outright crooked cop. Neither the hand off nor the silver platter doctrine is necessary to enable Fourth Amendment violations by a hypothetical police officer with no regard for the Constitution. It is conceivable that this officer could covertly break into your home, discover something incriminating, and then engineer rediscovery by means that would pass judicial muster without ever handing off a tip to another officer or serving up ill-gotten evidence to the agents of another sovereign. The hand off is unlikely to change this wanton malfeasant's behavior.

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34. Moreover, the hand off introduces a selection bias to the subset of searches courts actually see by enabling police to unilaterally choose which searches to conceal, at least when the pre-hand-off search is covert.

35. *See Elkins*, 364 U.S. at 221.

36. The silver platter doctrine's federalism problems do not accompany the hand off because the hand off does not necessarily make it possible to pursue prosecutions in the courts of one sovereign that would be impermissible in the courts of another sovereign.

37. In recent exclusionary rule cases the Court has increasingly relied on the power of internal police discipline to deter misconduct. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 598-99 (2006). The hand off does not necessarily undermine this deterrent except that, to the extent that it is actually condoned by courts, it signals to internal reviewers that no inquiry into the legality or propriety of pre-hand-off searches or concealment decisions is necessary.

The much more troubling problem is the impact that either the hand off or the silver platter doctrine might have on the behavior of the honest, enterprising police officer who vigorously fulfills her obligations of service to the community by investigating crime up to the very limits allowed under the Constitution.[38] For this officer, the availability of the hand off threatens to alter fine judgments about what constitutes good, aggressive police work and what constitutes an unreasonable invasion of privacy. It does this in at least two ways. First, the hand off makes it easier to "get away with" marginally invasive behavior because that behavior is unlikely to be scrutinized by a judge. Even for the honest officer, this may subtly influence decisions about how much marginal activity to conduct, or how to conduct marginal activity. But perhaps more importantly, if the officer believes that the hand off *legally* cleanses evidence gained in a prior investigation that may or may not have been unlawful, then the officer is given to believe that under the Fourth Amendment what a suspect doesn't know doesn't hurt him. In other words, an officer might conclude that the reasonableness of a search depends not only on whether there is probable cause to support it, but also on whether, if the search is carried out, its target will *know* about the search and *feel* that her privacy has been invaded. I am not suggesting that this scrupulous officer, once equipped with the hand off, will go berserk and launch a series of patently unconstitutional covert searches, but I am suggesting that the hand off will blur this officer's judgment about what is "reasonable" in covert searches. This blurring will expand government snooping at direct cost to societal interests in privacy.

Although the silver platter doctrine and the hand-off procedure raise similar concerns about undermining the importance and effectiveness of Fourth Amendment limitations on searches and seizures, it is important to recognize that the analogy is imperfect. Four differences are readily apparent. First, and most importantly, the silver platter doctrine did not necessarily involve any secrecy or concealment, whereas concealment is at the heart of the hand-off procedure. The second and closely related difference is that the silver platter doctrine generally involved a *conceded* constitutional violation, whereas the propriety of the hand off has been questioned *whether or not* the pre-hand-off investigation was unlawful. Thus silver platter prosecutions were allowed even after concededly unlawful searches by the investigating authority that had been fully disclosed to the prosecuting authority, the court, and the defendant.[39] By contrast, proponents of the hand off generally do not concede any illegality in

38. For an illuminating discussion of the fine line between exemplary vigorous law enforcement and overstepping constitutional bounds, see William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 444-45 (1997).

39. *See, e.g.*, Center v. United States, 267 U.S. 575 (1925) (per curiam) (admitting evidence seized by state officials over Fourth Amendment challenge in federal court because there was no federal participation); *cf.* Feldman v. United States, 322 U.S. 487, 492-93 (1944) (admitting evidence elicited in a state proceeding under state immunity in a federal prosecution over Fifth Amendment challenge because there was no federal participation).

the pre-hand-off investigation, but claim the right to keep the existence and nature of that investigation hidden from defendants and courts.

Taken together, these first two differences yield somewhat equivocal implications in a comparison of the hand off and the silver platter doctrine. In one obvious sense they suggest that the hand off is less problematic than the silver platter doctrine. It is perfectly sensible to conclude that a conceded constitutional violation is a matter of greater concern than the mere possibility that a violation may have occurred and been concealed. But in another sense these differences make the hand off *more* problematic than silver platter prosecutions—rather than a transparent if unjust legal doctrine, the hand off is a *sub rosa* technique for walling off swathes of intrusive government activity from public and judicial scrutiny while preserving an incentive for intrusion by allowing the government to put the products of its actions to direct use in criminal prosecutions. So long as this concealment is permitted to continue unregulated, there is not only no judicial recourse for overzealous or even malicious infringements of privacy but also no political recourse—no form of public oversight whatsoever to cabin aggressive covert law enforcement actions or to urge their abandonment. By contrast, the transparency of the silver platter doctrine opened it to public condemnation, which apparently influenced the Supreme Court's ultimate decision to abandon it.[40]

As a third difference, silver platter prosecutions required a degree of cooperation between two separate sovereigns—state or local authorities on the one hand and federal authorities on the other. By contrast the hand-off procedure can be performed fully within a single law enforcement agency merely by transferring a tip from one agent or unit to a second agent or unit that has no explicit knowledge of the pre-hand-off investigation. It might be argued that this makes the hand off more problematic than the silver platter doctrine because it enables a single authority to cleanse its hands of a constitutional problem by transferring an investigation to a different investigatory unit under its own control. Indeed, this is what occurred in *Whitaker v. Garcetti*, a case I describe in more detail below.[41] A single law enforcement agency is perhaps more likely to abuse the procedure than two authorities operating in conjunction with each other because post-hand-off investigators who are under the same direction and policies as the pre-hand-off investigators may be less likely to provide any sort of check on the process. By contrast, cooperation between two different authorities (either state authorities on the one hand and federal on the other, or two independent agencies under the same sovereign) creates at least the possibility that one will critically evaluate the priorities and techniques of the other. Of course, the very existence of silver platter

40. *Elkins*, 364 U.S. at 208 n.2 (adverting to the mass of commentary and scholarship condemning the doctrine while deciding to overturn it).

41. In *Whitaker*, the hand-off occurred between one unit of the Los Angeles Police Department (LAPD) and another, in order to keep an LAPD wiretap secret from the defendants. 291 F. Supp. 2d 1132, 1138 (C.D. Cal. 2003); *see infra* Part II.B.

prosecutions (while the doctrine remained in effect) makes it clear that whatever check the cooperation of separate agencies under separate sovereigns might provide was insufficient to prevent illegal searches at that time. Accordingly, this difference is probably of little practical importance.

Finally, the silver platter doctrine involved the transfer of "evidence" served up on a silver platter, whereas the hand off involves the lesser transfer of a "tip" or a "lead" about where to look for evidence, and requires that the subsequent investigators gather "evidence" on their own in a manner that they can defend before a court.[42] As I note below in my analysis of the hand off's legal framework, this difference might be used to argue that post-hand-off investigations are per se "attenuated" from pre-hand-off investigations, rendering the pre-hand-off investigations legally irrelevant to a future prosecution, at least for purposes of the exclusionary rule.[43] But such an argument would be unpersuasive. First, it is not clear that one can meaningfully distinguish between "evidence" and a mere "lead" as an epistemological matter. Second, it is not clear that the law enforcement authorities conducting hand offs really restrict the information they give to the subsequent investigations.[44] Third, even if there were a definable formal difference that law enforcement agents scrupulously adhered to, it is not at all clear that it would be regularly or automatically sufficient to create the requisite attenuation.[45] And finally, even if the hand off *did* regularly create attenuation

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42. *See, e.g.*, WALLENTINE, *supra* note 3.

43. *See infra* Part III.B.2.

44. *See, e.g.*, *Whitaker*, 291 F. Supp. 2d at 1152 n.41 ("Although the receiving unit is deliberately not told that the source of the information is a wiretap (in order to allow the members of the receiving unit to testify at trail [sic] to their investigation without referencing the wiretap and without falsely testifying), cross-examination of certain Defendants reveals that a 'wink-nod' communication often exists as the 'hand off' occurs, allowing the receiving unit to draw the obvious inference that the specific evidence was acquired through a wiretap."); Government's Preliminary Response to Defendant's Discovery Motions and Motion to Suppress at 1, United States v. Vereen, No. CR406-09 (S.D. Ga. Apr. 7, 2006), 2006 WL 5050235 ("In addition to the facts set forth in the report, the government believes that the trooper had received a BOLO (be on the lookout) for defendant's vehicle based upon a report that it was engaged in drug trafficking, and *was also provided the probable location of the secret compartment in which the drugs were located*. This information came from a DEA wiretap case in Florida which revealed the intended shipment. However, due to security concerns regarding the (then) ongoing Florida investigation, the trooper was instructed to 'wall off' the case, that is, if the vehicle was spotted, it was not to be stopped unless independent probable cause, i.e., a traffic violation, was developed." (emphasis added)). Even where care is taken to provide only the minimum information, see for example, WALLENTINE, *supra* note 3, some information sharing is implicit and unavoidable—if a local officer is contacted by an agent of the Drug Enforcement Administration to conduct a wall stop, she is highly likely to understand that she is likely to find drugs in the car if she searches it, regardless of whether the DEA agent mentions the drugs or not.

45. The differences between transferring *evidence* on a silver platter and transferring a *tip* in a hand-off procedure (that is intended to lead to evidence) cannot guarantee the independence of the post-hand-off investigation so as to avoid any taint from the initial

as a matter of law for exclusionary rule purposes, we might still be concerned that condoning the intentional concealment of swathes of investigatory activity from defendants and courts would create an incentive for unlawful searches or at least undermine other deterrents to Fourth Amendment violations.

B. *Why the Hand-Off Procedure Is Problematic: A Case Study*

Whitaker v. Garcetti, a 2003 case from the Federal District Court for the Central District of California, provides an illuminating example of the threat posed by the hand-off procedure.[46] In *Whitaker*, Los Angeles Police Department (LAPD) officers obtained wiretaps on several phone lines associated with two wireless communications carriers.[47] The police alleged in affidavits supporting the wiretap applications that one of the companies was "an operation to facilitate the sale of narcotics and the collection of U.S. currency which are the proceeds of narcotics sales,"[48] and that the other was a "'corrupt' cell phone retailer . . . whose role is to facilitate communication among large scale narcotics dealers by providing cellular phones, pagers, and other services in a manner which minimizes the risks to the dealer."[49] Based on these affidavits, the Los Angeles Superior Court granted wiretap applications for thirty-one different phone lines associated with the two carriers.[50] The police eventually intercepted more than thirty thousand conversations over eleven months from the phones associated with one carrier and "dozens of thousands" of conversations over the course of twenty-two months from the phones associated with the other carrier.[51]

Considering this breadth, it is unsurprising that the wiretaps uncovered substantial evidence of criminal activity, including evidence that eventually led to the convictions of the plaintiffs in *Whitaker v. Garcetti*. But despite the fact that the wiretaps were repeatedly extended, they uncovered no criminal activity on the part of any of the putatively targeted parties.[52] Although none of the putative targets were prosecuted, several of the people who *were* prosecuted as a result of the wiretaps were not informed about the wiretaps' existence until long after they had been convicted, and none of them were informed about any

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investigation. Such differences are not relevant to the independent source or inevitable discovery doctrines, neither of which depends on how much information is transferred. *See infra* Part III.B.2.b-c. And handing off less information may serve to attenuate the subsequent investigation from the initial one to some degree, but it is nonetheless difficult to argue that every hand off is sufficiently attenuated to purge the taint of an initial investigation that may have been unlawful. *Id.*

46. 291 F. Supp. 2d 1132.
47. *Id.* at 1136.
48. *Id.*
49. *Id.* at 1137 (omission in original).
50. *Id.* at 1136-37.
51. *Id.*
52. *Id.* at 1137, 1143 n.22.

connection between the wiretaps and their prosecutions.[53]

One can assume the LAPD officers legitimately believed when they submitted these wiretap applications that the principals and employees of the wireless carriers, who were the purported targets of the wiretaps, were involved in criminal activity that the wiretaps would reveal, and intended to build a prosecution against them. Even so, the multiple extensions and the eventual lack of prosecution of those targets raises an inference that the wiretaps were maintained at least in part to enable investigation and prosecution of people like the plaintiffs in *Whitaker v. Garcetti* who were not named in the wiretaps and whose conversations the police otherwise never established a legal basis to intercept.

At best, the hand off creates an incentive for police to design covert investigations that have some legitimate basis as broadly as possible in the hopes of fortuitously gaining access to private details about the lives and actions of unnamed parties. At worst, the hand off becomes an investigative tool that police can use to deliberately leverage evidence about one suspect into covert and legally unjustified investigation of another. That is, the police may seek approval for wiretaps or other covert investigative techniques against a declared target when their real intent is either to gather information on a particular third-party associate of that target for whom they otherwise lack the basis to carry out an intrusive investigation, or to cast a broad investigative net like the one in *Whitaker* that is likely to uncover some criminal activity by snooping into many people's private lives, even if the police do not have a particular target in mind or a particular basis to suspect criminal activity. And none of this assumes a "crooked cop"—if honest police truly believe that a hand off creates "independent probable cause," it takes only a very small ethical leap to seek a wiretap against a party for whom you have a legal basis to do so when your only motivation is to uncover information about an associated party on whom you lack the authority to spy or to conduct a general search into the private communications of that party's associates, hoping to uncover evidence of criminal activity.

Ultimately, these risks must be balanced against the manifest public interest in enabling law enforcement authorities to avoid the dilemma of choosing one prosecution at the expense of another.

III. THE HAND-OFF PROCEDURE UNDER CURRENT LAW

The previous Part argues that the hand off poses serious risks to privacy, much like the silver platter doctrine did. My purpose in this Part is twofold. First, I want to build a legal framework for the procedure by explaining how it interacts with current law. I do this by reviewing legal challenges that litigants have actually brought or might bring against the procedure. I conclude

53. *Id.* at 1138; Whitaker v. Garcetti, 486 F.3d 572, 577 (9th Cir. 2007).

(contrary to the judgment of the only court to directly address the merits of the hand-off procedure)[54] that the hand off is *not* per se illegal, but that *some* hand offs violate the federal wiretap statute. Second, as I explain how the procedure interacts with existing law, I also want to demonstrate how policies underlying each of the doctrines I review interact with the hand off. In this regard, I argue that even though many hand offs are not forbidden by current law, there is ample reason to conclude that the unconstrained hand-off procedure offends the social values expressed in the Fourth Amendment, the exclusionary rule, and the federal wiretap statute.

This Part is structured around two possible legal problems in the hand off. The first is the possible illegality in the prior search. The Fourth Amendment restricts pre-hand-off searches just like it governs any other search. If police overstep the bounds of their authority during a pre-hand-off search, they may violate the Fourth Amendment rights of the party or parties ultimately prosecuted after the hand off. And there is special reason to believe that pre-hand-off searches may violate the Fourth Amendment because they usually involve police claiming to be focused on a certain target and using the fruits of their investigation to prosecute a different target. There are innocent and even admirable explanations for such shifts in focus, but there is also a distinct risk that the investigation into the putative target is a mere pretext for discovering private information about the hand-off defendant while avoiding judicial scrutiny of the investigators' probable cause and tactics.

The second problem arises from the state's failure to disclose the existence of the prior search either to the court or to the defendant during a post-hand-off prosecution. If there is no illegality in the prior search, and if that prior search is fully disclosed, there is no problem. But regardless of whether a given prior search happens to be lawful, concealing it from defendants and courts may be improper because concealment evades the adversarial process, denying a hand-off defendant the ability to fully evaluate and challenge the investigation against him, and denying society the concomitant benefit it receives when it enables individuals to enforce limits on the government's power through the courts. The bulk of my analysis addresses this second problem—in particular, I discuss how the concealment of pre-hand-off searches is affected by (1) the substantive guarantees of the Fourth Amendment, (2) the exclusionary rule, (3) the federal wiretap statute, and (4) the Due Process Clause.

A. *The Legality of the Pre-Hand-Off Search*

As I have tried to demonstrate, the hand off creates an opportunity and incentive for police to design searches with the deliberate but tacit purpose of snooping broadly on private activity that they might otherwise be unable to reach (and which they perhaps *ought* to be unable to reach). In order to take

54. *Whitaker*, 291 F. Supp. 2d at 1146-47.

advantage of the hand off in this way, police need to write affidavits in support of search warrants and/or wiretaps that omit to fully describe the people they hope to overhear and the criminal activity they hope to uncover. Only by omitting someone from the affidavits can police avoid the *automatic* disclosure obligations in the search warrant return and receipt rules and the applicable wiretap statutes' notice requirements.[55] Some litigants have argued that even if a pre-hand-off search would otherwise be legal, an omission of this kind would cause the search to violate the Fourth Amendment rights of a hand-off defendant by rendering the affidavit "false or misleading."[56] This was essentially the allegation made by the plaintiffs in *Whitaker*, who accused the LAPD of seeking wiretaps against wireless communications carriers as a mere pretext to eavesdrop on customers.[57]

But even though *actual falsehoods* in search affidavits trigger the exclusionary rule, this is not a very exacting standard. In an analogous situation, the Supreme Court has made it clear that police who expect to find particular incriminating evidence in a search and yet omit to describe it in their search warrant affidavit can still lawfully seize that evidence if they find it in "plain view" during an otherwise lawful search.[58] Just as the plain view doctrine does not require "inadvertence," it is likely that a pre-hand-off search would not offend the Fourth Amendment just because underlying affidavits establishing the right of the police to conduct the search did not describe *all* of the evidence they hoped to acquire.

Nonetheless, there is an important difference between the plain view doctrine and the pre-hand-off search. The Supreme Court made it clear in *Horton v. California* that the reason there is no inadvertence requirement for seizure of evidence in plain view is that such a seizure does not expand a search's infringement on its subject's privacy—so long as the search is cabined by the terms of the warrant, its subject cannot complain that her privacy has been unreasonably violated, no matter what is seized.[59] By contrast, if a pre-hand-off search is ostensibly directed at one subject but intended to enable snooping on the private details of another subject's life then there arguably *is* an expansion of the search's infringement on privacy. Unlike a plain-view seizure occurring while a legally justified search is in process,[60] the availability

55. 18 U.S.C. § 2518(8) (2006) (providing the federal wiretap notice requirement); FED. R. CRIM. P. 41(f)(1)(C) (providing the search warrant receipt).

56. It is well settled that a recklessly or intentionally false or misleading affidavit offered in support of a search warrant violates the Fourth Amendment, and entitles the subject of the search to suppress evidence derived from it. *See, e.g.*, United States v. Leon, 468 U.S. 897, 923 (1984); Franks v. Delaware, 438 U.S. 154, 155-56 (1978).

57. 291 F. Supp. 2d at 1142-43.

58. Horton v. California, 496 U.S. 128, 141-42 (1990).

59. *Id.*

60. *See id.* ("[T]he seizure of an object in plain view does not involve an intrusion on privacy. If the interest in privacy has been invaded, the violation must have occurred before the object came into plain view and there is no need for an inadvertence limitation on

of the hand off threatens to change the scope and focus of the search itself.

Even if a court were to recognize this distinction and conclude that the Fourth Amendment carries an inadvertence requirement that would bar investigators from intentionally bootstrapping a search of one party into a search of another,[61] it still would not follow that *every* hand off would violate the Fourth Amendment. In *Man Nei Lui*, for example, there is nothing in the publicly filed papers to suggest that the police who obtained the wiretap on Eric Zi Ping Lei that led to the arrests of Man Nei Lui and Man Ning Tao did so knowing about or expecting to discover evidence about that particular crime, and yet misled the court about their intentions. But it is at least plausible that the wiretap applications in *Whitaker v. Garcetti* were deliberately pretextual in this way—that the investigators had no real suspicion that the wireless carriers in that case were themselves engaged in crime and that their intention all along was to eavesdrop on customers whose conversations they otherwise had no legal right to intercept. This is especially so in light of the multiple applications for extensions of the *Whitaker* wiretaps, most or perhaps all of which presumably occurred after considerable evidence of criminal activity not identified in the application had already been obtained through the wiretaps. And because broad, arguably pretextual searches like the ones in *Whitaker* bring obvious benefits to police engaged in the competitive process of ferreting out crime, there is good reason to believe that such searches will become more common if the hand off is allowed to continue shielding them from any judicial or adversarial scrutiny.

To sum up, notwithstanding the distinction between the omitted material in the warrants that support pre-hand-off searches and the omitted material in the warrants that lead to "plain view" seizures, cases like *Man Nei Lui* make it clear that the hand off does not *necessarily* involve a Fourth Amendment violation in the pre-hand-off search.[62] Nonetheless, cases like *Whitaker*

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seizures to condemn it.").

61. Notwithstanding the verdict in *Whitaker*, it seems unlikely that a court would walk down this path. For one thing, it is hard to imagine the question being squarely presented, and for another, this would seem to require an analysis of the subjective motivations of the investigators—something the Supreme Court has clearly disfavored in Fourth Amendment cases. *See, e.g.*, *Leon*, 468 U.S. at 922 n.23.

62. In addition, the subject of a pre-hand-off search who eventually becomes a criminal defendant will have standing to challenge that search in some but not all hand-off cases. As a general matter, a hand-off defendant's right to challenge evidence derived from an illegality in the prior search depends on whether that defendant had a Fourth Amendment interest at stake in the prior search. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 143 (1978) ("[The] capacity to claim protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." (citing Katz v. United States, 389 U.S. 347, 353 (1967))).

Sometimes this will not be the case. Imagine for example a prior search involving a wiretap on a drug kingpin's cellular phone. The kingpin is overheard discussing with one of his captains an impending drug deal in which a low-ranking member of the organization is to

demonstrate that the hand off *does* pose a threat to privacy, and it is likely that some of the pre-hand-off searches that it is used to conceal are illegal.

B. *The Legality of Concealing the Pre-Hand-Off Search from Defendants and Courts*

Quite apart from the question of whether the pre-hand-off search violates the Fourth Amendment, litigants have argued that concealment itself is illegal, regardless of the nature of the pre-hand-off search. Four possible sources for a disclosure obligation on police and prosecutors are the Fourth Amendment, the exclusionary rule, statutes (such as Title III) that may govern the prior investigation, and the Due Process Clause. In this Part, I argue that none of these doctrines categorically prohibit concealing pre-hand-off searches, but also that the policies underlying each of them support a disclosure obligation that looks in some ways like the exclusionary rule itself—not constitutionally required, but prophylactically applied to protect the Constitution and the values

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drive a car containing illicit substances to a certain location. If police handed off some portion of this information to another unit, and that unit conducted a subsequent investigation (perhaps based on a "wall stop") in which illicit substances were actually found in the car driven by the low-ranking drug runner, that drug runner would not have standing to challenge the legality of the wiretap. *See* 18 U.S.C. § 2510(11) (2006). It should be noted that although he would not have a Fourth Amendment claim, the low-level drug runner could claim to be an "aggrieved person" under Title III if he could show that he was "a person against whom the interception was directed," even if he were not a party to the intercepted conversation. *Id.*

But even though *some* hand-off defendants will have had no privacy interest at stake in the prior investigation, a great many others *will* have had a privacy interest at stake. In *Whitaker v. Garcetti*, for example, all of the civil plaintiffs had actually been overheard on wiretaps that did not name them, and all but one of them were hand-off defendants. 486 F.3d 572, 576-77 (9th Cir. 2007). The other was an attorney who was never charged with a crime and therefore never became a criminal defendant after the hand off. *Id.* All of these individuals certainly had a Fourth Amendment privacy interest in their own telephone conversations—indeed, the Supreme Court has expressly recognized a protected interest in private conversations. In *Katz v. United States*, for example, the challenged evidence derived from a conversation the defendant had in a phone booth in a public place. 389 U.S. at 352. The Court explained that even one who uses a public phone "is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world," *id.*, and therefore concluded that "the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements . . . ." *Id.* at 353.

Of course, this interest yields to a lawfully authorized wiretap directed at one speaker's interlocutor, even if the police have no independent justification to eavesdrop on the speaker herself. Title III obliges police to "minimize the interception of communications not otherwise subject to interception," 18 U.S.C. § 2518(5), but police are otherwise entitled to intercept conversations between named parties and unnamed third parties that are pertinent to the specific criminal activity they are investigating and to disclose these pertinent intercepted conversations in court. But if a wiretap is constitutionally defective, any overheard or targeted party may challenge evidence derived therefrom. *See Katz*, 389 U.S. at 353. In addition, Title III expressly gives any overheard party standing as an "aggrieved party" under the statute, just as any overheard party would have standing under the Fourth Amendment. 18 U.S.C. § 2510(11) (2006).

it represents. In addition, I argue that disclosure is required by existing statutory law for some hand offs where the pre-hand-off search is a wiretap governed by Title III.

1. *The Fourth Amendment*

The most basic protection in the Fourth Amendment is the right to be free from unreasonable searches and seizures by the government. Is this right violated when the fact of a covert pre-hand-off search is concealed from a post-hand-off criminal defendant? The district court in *Whitaker* answered this question in the affirmative. The *Whitaker* court concluded that "[i]f a criminal defendant has a constitutional right to challenge the integrity of an affidavit and the legal validity of the resulting warrant upon a showing of proper cause . . . then he must also have a constitutional right to know that an affidavit was submitted in the first place."[63] According to the *Whitaker* court, the Supreme Court's holding in *Franks v. Delaware* logically required an implied right to know about a pre-hand-off search.[64]

Although I disagree with the court in *Whitaker* in this regard, there is some basis for an analogy between the implied right that *Franks* reads into the Fourth Amendment and the implied right that *Whitaker* sought to read in. *Franks* holds that a defendant in a criminal proceeding has a right to challenge not only the sufficiency but also the integrity of an affidavit that was the basis for a search warrant that ultimately yielded incriminating evidence.[65] The *Franks* Court relied on the Fourth Amendment's Warrant Clause, which provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."[66] According to the *Franks* Court, the Warrant Clause's probable cause requirement "would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile."[67] The Court therefore read into the Fourth Amendment a right to a hearing to challenge the *integrity* of an affidavit under certain circumstances, concluding that such a hearing was necessary to enable private individuals to enforce the Warrant Clause against the government. In other words, whereas the government had argued that once a magistrate has passed on the integrity of an affidavit a litigant should be restricted to challenging the *sufficiency* of probable cause on the affidavit's face, the *Franks* Court agreed with the criminal defendants that, at least in some situations, a litigant should also be able to challenge the *integrity* of the statements in the affidavit.

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63. Whitaker v. Garcetti, 291 F. Supp. 2d 1132, 1148 (C.D. Cal. 2003).
64. *Id.* (citing Franks v. Delaware, 438 U.S. 154, 171 (1978)).
65. 438 U.S. at 171-72.
66. U.S. CONST. amend. IV.
67. 438 U.S. at 168.

A right to challenge the integrity of statements in an affidavit supporting a search warrant is analogous to a right to be informed that a search occurred insofar as both serve to prevent the government from avoiding meaningful judicial scrutiny of its investigations. The *Franks* Court was concerned that a government willing to lie could manufacture probable cause and then rely on a magistrate's imprimatur to avoid further scrutiny. The analogous concern with a hand off is that a government able to conduct searches covertly can rely on the fact that the search will never come to a court's attention. In either case, there is no meaningful review of whether there was in fact a legal basis for the search.

The district court in *Whitaker* therefore concluded, relying on *Franks*, that concealing a pre-hand-off search from a hand-off defendant violates the Fourth Amendment.[68] Just as the Warrant Clause's guarantee that warrants must be based on probable cause would be meaningless if a defendant had no opportunity to challenge the integrity of the underlying affidavits, the argument goes, both the Warrant Clause and the right to be free from unreasonable searches and seizures would be meaningless if pre-hand-off investigations that actually lead to incriminating evidence could be concealed from hand-off defendants and therefore insulated from challenge. That is, the *Whitaker* court concluded that hand-off defendants suffer a double Fourth Amendment violation when a pre-hand-off search is concealed from them because (1) the concealment leaves them unable to protect their right to be subject to warrants only when based on sufficient probable cause supported by statements that the affiants reasonably believed to be true, and (2) the concealment also leaves them unable to protect their right to be free from unreasonable searches.

It is of course true that a hand-off defendant who never learns that a pre-hand-off search occurred will have no opportunity to test the validity of that search in court. But the court in *Whitaker* reaches too far when it concludes on this basis that the Fourth Amendment requires the government to inform hand-off defendants that a pre-hand-off search occurred. First, the implied disclosure right, the subject of debate in *Whitaker* and in this Note, is easily distinguishable from the right to a hearing in *Franks*. A hand-off defendant who can proffer evidence that an affidavit made in support of a pre-hand-off search was recklessly or knowingly false (for example, because it named its target as a mere pretext for police investigation of the hand-off defendant) would be entitled under *Franks* to a hearing in which she could challenge that affidavit and ultimately move to suppress evidence derived from the wiretap that the affidavit supported. But *Franks* has little to say about whether police, having conducted a covert pre-hand-off search, are required to disclose the original source of information that led to a subsequent search and ultimately to a post-hand-off prosecution whenever that original source was itself a search governed by the Fourth Amendment, regardless of whether it was actually

68. 291 F. Supp. 2d at 1148.

lawful or not.

Not only did *Whitaker* reach far beyond *Franks*, but in addition the right that it sought to create would have faced serious administrability problems. By concluding that disclosure is constitutionally required, the *Whitaker* court seems to rest on nothing more than a blanket requirement that *any* substantive individual right carries with it an implied obligation on the part of the government to disclose any conduct that might have violated that right; this breathtakingly broad proposition cannot be the right result. First, if a disclosure right were constitutionally implied from the substantive right, it would be difficult to discern a principled way to impose any reasonable limit to the required disclosure.[69] The *Whitaker* court had in mind a particular pre-hand-off wiretap, but its principle and reasoning would seem to require disclosure of any part of the long course of investigation that might potentially implicate Fourth Amendment rights, so as to enable the defendant to scour that conduct for possible Fourth Amendment violations. Nor is there reason to think that the logic employed by the *Whitaker* court should be restricted to the Fourth Amendment context. Applying the same reasoning to the Fourteenth Amendment, would the government be obliged, for example, to analyze its "covert" employment practices (such as personnel evaluations that are not fully disclosed to employees) in order to look for actions that potentially violate the Equal Protection Clause, and then disclose those actions to all the affected employees? And who is to judge what conduct might potentially violate a constitutional right? On what standard? At what cost?[70]

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69. Although any disclosure obligation, including the ones that I propose in Part IV, will face line-drawing problems, those problems are less acute if the obligation is not constitutionally required. A legislature has wide latitude to impose (and adjust) appropriate common-sense constraints when crafting a policy-based solution to a practical problem. By contrast, if a court concludes that a right is implied by the Constitution, the bounds of the right should also be reasonably derived from the same source.

70. One might argue that *Brady v. Maryland* reads a blanket disclosure obligation of at least a superficially similar kind into the Due Process Clauses of the Fifth and Fourteenth Amendments in the criminal law context by requiring the government to disclose any exculpatory information in its possession to a criminal defendant, but that rule rests on concerns that are special to the criminal context, namely the value judgment that we ought to go to extraordinary lengths to avoid convicting the innocent. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."); *see also infra* Part III.B.4 (discussing due process as a possible source for a disclosure obligation). Those concerns do not apply to questions about Fourth Amendment violations or to constitutional torts generally, to which guilt or innocence is immaterial. Even though the concealment question generally arises in a criminal context, during a post-hand-off prosecution, at its heart it involves the possibility of a constitutional tort. Because the legality of the pre-hand-off search has nothing to do with the guilt or innocence of the post-hand-off defendant, why should a disclosure right be triggered by the Constitution when the defendant is prosecuted for a crime? And if *Whitaker*'s constitutional disclosure right is not triggered by the criminal prosecution, then how is it different from a disclosure obligation in the context of any other constitutional tort, or any tort at all for that matter?

Although I argue (contrary to the district court in *Whitaker*) that the Fourth Amendment does *not* carry a blanket disclosure rule requiring the government to inform criminal defendants about any part of their investigation that might have been tortious, I do not mean to argue that it would be wise policy to continue to allow hand offs with no disclosure requirement whatsoever. As the *Whitaker* court rightly noted, and as I have argued, the hand off *does* threaten the privacy right contained in the Fourth Amendment even if it does not necessarily involve a violation of that right in every instance. Just as courts have made clear that using evidence derived from a search that violated the Fourth Amendment in a criminal prosecution does not itself constitute a Fourth Amendment violation,[71] and yet courts continue to enforce the exclusionary rule as a deterrent to future Fourth Amendment violations, it is reasonable to conclude that the hand off and its unchecked concealment create an unnecessary risk of Fourth Amendment violations, and therefore, we ought to impose some sort of disclosure rule prophylactically.

I sketch out how we might approach this prophylaxis in Part IV, after discussing three other areas of law that touch upon secret hand offs but do not expressly forbid them.

2. *The exclusionary rule*

Just as the hand off threatens the privacy values underlying the Fourth Amendment even though it is not necessarily barred by the Fourth Amendment, it also undermines the policies that support the remedy of exclusion that courts use to deter violations of the Fourth Amendment. In this Subpart, I argue that the exclusionary rule *may* bar evidence that was illegally obtained in a pre-hand-off search from being introduced in a post-hand-off prosecution by addressing the rule's major exceptions in turn and showing that none of them regularly or automatically renders a subsequent investigation free of the "taint" of an initial investigation that violated the Fourth Amendment. I therefore conclude that, although the exclusionary rule does not itself create an explicit disclosure obligation, the policies that underlie it (and more generally the willingness to erect prophylactic rules to protect constitutional liberties) support creating a disclosure rule of some kind because the hand off gives law enforcement a way to circumvent the exclusionary rule, which undermines its deterrent purpose.

a. *The attenuation doctrine*

The attenuation doctrine provides an exception to the exclusionary rule for cases in which the connection between the illegal search or seizure and the subsequent discovery of the challenged evidence has "become so attenuated as

71. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 362 (1998).

to dissipate the taint."[72] The controlling question is: "[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[73] Several courts use a factor test to determine whether proffered evidence is sufficiently attenuated from an illegal search to purge the taint, considering: (1) the time elapsed between illegality and acquisition of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of official misconduct.[74] All three of these factors vary across hand offs except that every hand off includes the intervening circumstance of the deliberate hand off itself.

Taking the hand-off procedure in the light most favorable to law enforcement authorities, the doctrine of attenuation might be used to suggest that the hand off *automatically* establishes sufficient attenuation because (1) the evidence from the potentially unconstitutional initial investigation is at least partially withheld from the subsequent investigators, who might be told only where and perhaps when to investigate, and/or because (2) the subsequent investigators observe the intervening and independent acts of their targets and move in only after those independent actions give them sufficient probable cause for a search or an arrest. It would be possible for the attenuation doctrine to solve the question of whether evidence from the subsequent investigation should *ever* be suppressed because of an illegality in the prior search, obviating the need to view the concealment inherent in the process as harmful, *only if* these two factors either together or separately rendered the subsequent investigation "attenuated" in every case. But this seems implausible.

The first is insufficient because, no matter what the subsequent investigators are told, the procedure is controlled by police and employed with the specific intention of "rediscovering" information that is already known or at least suggested by the initial investigation. Contrast this with the situation in the well known case of *Wong Sun*, where an incriminating statement was sufficiently "attenuated" from an earlier illegal arrest because the defendant, in the interim, had left police custody and then voluntarily submitted to further questioning.[75] Although a defendant or third party's independent actions may create the necessary attenuation, there is no reason to think that police should be able to take evidence that would be excludable before a hand off and cleanse it of constitutional taint by coaxing another officer to rediscover it. Of course, it is possible that a given piece of evidence obtained after an illegal search may be attenuated from that search—this could occur in any number of ways.[76] My point is not that *all* evidence derived from *any* illegal pre-hand-off search is

72. Nardone v. United States, 308 U.S. 338, 341 (1939).
73. Wong Sun v. United States, 371 U.S. 471, 488 (1963).
74. *See, e.g.*, United States v. Johnson, 383 F.3d 538, 544 (7th Cir. 2004).
75. 371 U.S. at 491.
76. *See, e.g., id.*

necessarily tainted; it is that handing off a tip to another cop does not make a resulting piece of evidence *more attenuated* from a prior illegality, let alone *sufficiently* attenuated to guarantee its admissibility over a hypothetical motion to suppress.

Similarly, the fact that every hand off relies on investigation by a separate police unit to establish so-called independent probable cause is unlikely to establish the requisite attenuation in *all* hand-off cases. It may do so in some cases—if the hand-off tip is sufficiently vague and the subsequent investigation sufficiently extensive, a court might well deem evidence obtained by the subsequent investigators "attenuated" from any illegality in the prior search. But this is not a panacea for law enforcement. First, there is no reason to think that this attenuation obtains in every hand-off case. In *Man Nei Lui*, for example, the local police were not only told which car to stop, and when, but were probably also told what to search for.[77] Their intervening identification of a broken taillight cannot conceivably "attenuate" the evidence they found in that car from the federal wiretap that lead them to it. The causal line is both direct and short.

Second, determining whether or not a given piece of evidence falls under the attenuation exception on these grounds would require judicial scrutiny of information that proponents of the hand off want to conceal, namely the content of the "tip" that was handed off. Granted, the less information handed off, the weaker the causal connection between the prior search and evidence discovered by the subsequent investigators. But as we have seen, it is perfectly plausible that this connection will be very tight. Therefore, it would be improper for police to suggest that the hand off creates the requisite attenuation in a particular case and then avoid the factual determination necessary to confirm this claim by refusing to disclose the content of the tip, or the existence of the prior search, either to courts or to hand-off defendants.

b. *The independent source doctrine*

Under the independent source doctrine, otherwise tainted information may be admissible "[i]f knowledge of [the information] is [also] gained from an independent source."[78] Although police and prosecutors treat the procedure as establishing "independent probable cause" because only a tip is handed off and the subsequent investigators must gather their own cause for any further search

77. Feb. 13 Motion, *supra* note 9, at 7-8 ("Agent Robinson therefore developed the strategy that law enforcement officers would follow Tao after it was believed that Tao had received cocaine from Eric Lei and he would request that a marked police car from a local police department conduct a pretextual stop on Tao's vehicle, identify its occupants, and *search the vehicle for the cocaine* that agents would then believe would be present inside the vehicle." (emphasis added)).

78. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

or seizure,[79] the doctrine cannot sustain this argument because a post-hand-off search is not sufficiently independent to qualify.

The Supreme Court explored the degree of separateness required for a different search to be "independent" in *Murray v. United States*.[80] In *Murray*, the police had sufficient probable cause to obtain a warrant but made an unlawful entry into a place under investigation. The police found contraband during the unlawful search but, instead of seizing it immediately, they left the place of the search, obtained a warrant, re-entered, and seized the contraband. When a motion to suppress the contraband came before the Supreme Court, the majority remanded for further fact finding, holding that the independent source doctrine would allow the admission of evidence obtained in the subsequent lawful search despite the prior illegality only if it were shown that the police decision to seek the warrant *had not been "prompted"* by what was learned during the earlier unlawful entry.[81] *Murray* makes it clear that the independent source doctrine cannot be used to argue that the subsequent investigation is independent after a hand off because the crux of the hand-off procedure is that the subsequent investigation *is* prompted by what is learned in the prior search.

c. *The inevitable discovery doctrine*

The third major exception to the "poisonous fruits" doctrine bears only brief mention. This doctrine of inevitable discovery was announced in *Nix v. Williams*,[82] which provides that the fruits doctrine does not bar admission of evidence derived from a constitutional violation if such evidence would "inevitably" have been discovered from lawful investigatory activities. To prevail on this exception, the prosecution must "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means," which generally requires that an independent investigation was already underway that would have uncovered the information through routine investigatory practices.[83] This doctrine cannot apply in the hand-off scenario because the subsequent investigation is a result of the prior one, by definition.[84]

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79. *See, e.g.*, WALLENTINE, *supra* note 3.

80. 487 U.S. 533 (1988).

81. *Id.* at 542 (emphasis added).

82. 467 U.S. 431 (1984).

83. *Murray*, 487 U.S. at 539 ("We held [in *Nix*], however, that [otherwise tainted] evidence . . . was nonetheless admissible because a search had been under way which would have discovered the [evidence], had it not been called off because of the discovery produced by the unlawfully obtained statements."); *Nix*, 467 U.S. at 444.

84. It is possible to imagine a scenario in which the hand off turned out to be unnecessary because the subsequent investigators, or some other law enforcement unit, knew about the suspected criminal activity through means independent of the initial investigation. But it seems safe to assume that in most cases where police choose to employ the hand off it is not superfluous in this way.

To summarize, because none of the exceptions to the exclusionary rule is regularly or automatically triggered by the hand off, and because it is impossible to determine in any particular case whether an exception ought to apply unless the existence and nature of the prior search is disclosed in some way, all of the policies that underlie the exclusionary rule also support an obligation for prosecutors and police to disclose the existence of the prior search to criminal defendants, or at least to courts, so that evidence that is tainted by an illegality in the pre-hand-off search can be excluded when a post-hand-off prosecution occurs. My point here is not that disclosure is required by law (or equivalently that concealment is unlawful) but rather that the policies underlying the exclusionary rule add additional weight to the need to craft a policy response to the hand off that will enable society to capture the procedure's benefits while limiting its risks.

3. *Title III: the federal wiretap statute*

In this Subpart, I examine the federal wiretap statute as an independent grounds for imposing a disclosure obligation on police and prosecutors, because some hand offs will fall under the federal statute or one of its state equivalents. I conclude that the federal wiretap statute both compels disclosure of pre-hand-off investigations in some situations and embodies a legislative policy that supports the introduction of a qualified disclosure obligation along the lines of the proposals I sketch out in Part IV.

Congress drastically overhauled the law of electronic surveillance when it enacted the federal wiretap statute as Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[85] Title III generally made electronic surveillance illegal, and also outlawed disclosure of information obtained through electronic surveillance.[86] It then created exceptions that allowed law enforcement to conduct eavesdropping,[87] and to disclose information obtained through eavesdropping to courts[88] and to other law enforcement agents,[89] but only under stringent restrictions designed to prevent unreasonable invasions of privacy.

Two provisions of Title III suggest that Congress may have intended to require the disclosure that the hand off avoids, in at least some situations. The first is section 2517, which governs the disclosure in court of information obtained through electronic surveillance.[90] In particular, section 2517(5) provides that law enforcement officers who overhear evidence "relating to

85. *See* Pub. L. No. 90-351, tit. III, 82 Stat. 197, 211-25 (codified as amended at 18 U.S.C. §§ 2510-2519 (2006)).

86. 18 U.S.C. § 2511.

87. *Id.* § 2516.

88. *Id.* § 2517(3).

89. *Id.* § 2517(1) .

90. *Id.* § 2517.

offenses other than those specified in the order of authorization or approval" may use that evidence in their normal police work.[91] However, the same subsection also provides that they may only testify in court as to the contents of evidence relating to other crimes upon application to and approval by a judge who finds that the evidence was "otherwise intercepted in accordance with the provisions of this chapter."[92]

On the one hand, the hand-off procedure is at least arguably in compliance with the letter of this law. The officer who intercepts evidence of other crimes is entitled to disclose it to other law enforcement officers in a hand off, and the post-hand-off prosecution never requires either the original or the subsequent investigator to testify about the content of the intercepted communications in court, which they would not be allowed to do without a judge's say-so. But on the other hand, section 2517(5) demonstrates that Congress anticipated that police would occasionally overhear evidence of crimes other than those specified in the application when conducting electronic surveillance, and set forth a specific procedure for the use of that information in court, a procedure which the hand off deliberately avoids.

Just like the Supreme Court's conclusion in *Nardone v. United States*, that "[t]o forbid the direct use of [the fruits of illegal searches] but to put no curb on their full indirect use would only invite the very methods [banned by the Act],"[93] forbidding one officer from testifying in court to certain as-yet-unapproved contents of a wiretap intercept but allowing another to do the equivalent (after rediscovering the information post-hand off) would frustrate the intent of Congress and create the very risk it tried to avoid with this provision.

Second, Title III's notice provision supports a disclosure obligation of some kind in the hand-off situation. Title III's notice provision requires the judge who receives an application for a wiretap to serve notice of, among other things, "the fact that . . . wire, oral, or electronic communications were or were not intercepted" to "the persons named in the order or the application, *and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice . . . .*"[94]

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91. 18 U.S.C. § 2517(5) reads in its entirety:

> When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section [i.e., disclosed to other officers and used in police work]. Such contents and any evidence derived therefrom may be used under subsection (3) of this section [i.e., disclosed in court by the recipient] when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

92. *Id.*

93. 308 U.S. 338, 340 (1939).

94. 18 U.S.C. § 2518(8)(d) (2006) (emphasis added).

On its face, this provision does not necessarily guarantee notice to hand-off defendants. A judge who is never informed that the hand-off defendant is being prosecuted on the basis of evidence that grew out of the wiretap may see no reason to determine that notice to that person is necessary "in the interest of justice." And to the extent that the hand off may be deliberately used to enable police to obtain wiretaps directed at criminal activity into which they otherwise lack any legal foundation for invasive investigation, it is a simple matter to avoid naming certain targets and to give the authorizing judge no reason to think that broad notice is necessary. In *Whitaker*, for example, recall that the underlying wiretaps putatively targeted two wireless communications companies,[95] but after several extensions the two wiretaps ultimately enabled police to overhear tens of thousands of conversations.[96] Several prosecutions resulted, but the putative targets of the wiretap were never charged with any crime.[97] The sheer numbers in that case, although perhaps atypical, demonstrate the opportunity to carry out hand-off prosecutions after wiretaps without notifying defendants, despite Title III's notice requirements.

Nonetheless, the Supreme Court has sensibly read Title III's notice provision to impose some obligation on police to provide a court the information it needs to exercise its discretion under the notice requirement. In *United States v. Donovan*, several defendants had been overheard in a wiretap and had not received notice under Title III.[98] These defendants moved to suppress evidence derived from the wiretap, arguing in part that police are obliged to inform a judge of the identities of unnamed but overheard individuals whose identities are clear from the wiretap. The police had failed to do so, and the government argued that Title III imposes on the police no obligation of disclosure to courts besides the statute's explicit requirements that the wiretap application itself be sufficiently particularized. The Supreme Court denied the motion to suppress,[99] but agreed with the criminal defendants that Title III obliges police to inform a court, at a minimum, of "the particular categories into which fall all the individuals whose conversations have been intercepted."[100]

It is not completely clear how far the "category" requirement goes, but the Court described certain minimum parameters. In particular, it noted that the then-current policy of the Department of Justice to inform the judge of the identity of any person "as to whom there is any reasonable possibility of indictment" was *insufficient* to meet the notice obligation that Title III imposes on the police.[101] This is presumably because the Department of Justice's policy

95. Whitaker v. Garcetti, 291 F. Supp. 2d 1132, 1136-37 (C.D. Cal. 2003).
96. *Id.*
97. *See* Whitaker v. Garcetti, 486 F.3d 572, 575-76 (9th Cir. 2007).
98. 429 U.S. 413, 420 (1977).
99. *Id.* at 438.
100. *Id.* at 430-31 (quoting United States v. Chun, 503 F.2d 533, 540 (9th Cir. 1974)).
101. *Id.* at 431-32.

failed to enable judges to exercise the discretion they are given by the statute with respect to parties whom the Department of Justice chose not to flag as likely to be indicted, and therefore gave the Department of Justice a measure of sole discretion that the statute did not intend.

Donovan's reading of Title III would therefore seem to require the investigators in a prior wiretap search to inform the issuing judge of the identity of individuals who become the targets of a hand off. When police hand off information about a suspected crime, they presumably believe that the individual suspected of wrongdoing is reasonably likely to be indicted (even though the indictment may come at the hands of a different authority). If this is true, then even the narrowest reasonable reading of *Donovan*'s holding would require police acting under Title III to notify courts of the identity of subjects of post-hand-off prosecutions where the pre-hand-off investigation involved a wiretap.

Donovan's conclusion followed in part from the Court's recognition of Congress's purpose in giving judges discretion with regard to notifying unnamed parties who are overheard on wiretaps. The legislative history indicates that the discretion was not designed to make covert searches easier for police, but rather to protect the privacy interests of individuals who might be subject to electronic surveillance. Congress was concerned that notifying unnamed parties automatically could unnecessarily harm the privacy of named parties who are the declared targets of wiretaps. Congress was concerned, for example, about a scenario in which

> A, a businessman, talks with his customers, and the latter are served with papers showing that A is being bugged . . . . [T]he damage to confidence in A and to A's reputation in general may damage A unjustly. In this case it would seem that the customers should not be served with the inventory.[102]

By contrast, when police use the hand off to avoid disclosing a person's identity to the court that issued a wiretap order, and consequently to avoid disclosing the existence of the wiretap to a hand-off defendant, their purpose is not privacy protection but preserving the secrecy of an ongoing covert investigation (or, more cynically, avoiding judicial scrutiny of an overbroad initial investigation).

To sum up, at least when a hand off emerges from a wiretap governed by the federal statute, these two provisions arguably impose an obligation on police and prosecutors to inform *a court* when they hand off information derived from a wiretap in order to support further investigation and likely indictment by another police unit, and to get a court's approval before using evidence derived from a wiretap to prosecute crimes other than those specifically identified in the wiretap application. It would then be in the court's discretion to inform the hand-off defendant about the existence of the wiretap, and to allow prosecution derived from the wiretap to proceed.

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102. *Id.* at 430 n.20 (alteration in original) (quoting 114 CONG. REC. 14,476 (1968)).

4. *Due process*

As a final matter, some litigants have argued that the hand off violates a post-hand-off defendant's rights under the Due Process Clause, but these arguments are largely misplaced.[103] The touchstone of procedural due process is the requirement that any judicial proceeding exhibit "fundamental fairness."[104] Although the hand off raises privacy concerns, and certainly *could* be used to manipulate the fairness of a post-hand-off criminal prosecution so as to "violate[] those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' and which define 'the community's sense of fair play and decency,'"[105] there is no apparent reason to think that concealment of a pre-hand-off search *categorically* renders post-hand-off prosecutions fundamentally unfair.

Of course, if concealment of a pre-hand-off search *also* involves concealment of exculpatory material then there will be a violation of due process under *Brady v. Maryland*.[106] But the violation will exist in the concealment of the exculpatory material, not the concealment of the fact that a pre-hand-off search existed. Even if the pre-hand-off search were clearly unlawful, evidence that it had occurred would not be "exculpatory" in the sense of tending to refute the defendant's guilt or innocence, or even desert of punishment, because the only conduct it calls into question is the conduct of the police. It might be considered "material . . . to . . . punishment,"[107] but only insofar as it could affect whether a defendant would be convicted and subject to punishment at all, because it might enable a defendant to suppress evidence and avoid conviction in the first place—and this is not what "material to punishment" appears to mean when read in context of *Brady*'s facts.[108]

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103. *But cf.* Whitaker v. Garcetti, 291 F. Supp. 2d 1132, 1149 n.36 (C.D. Cal. 2003) (concluding that the fact that a prior covert investigation occurred "might qualify as exculpatory evidence under *Brady* if the search itself is illegal and the evidence therein derived is deemed fruit of the poisonous tree").

104. *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 432-34 (1986).

105. Dowling v. United States, 493 U.S. 342, 353 (1990) (citation omitted) (quoting Rochin v. California, 342 U.S. 165, 173 (1952)); *see also Rochin*, 342 U.S. at 173 (holding under the Due Process Clause that "convictions cannot be brought about by methods that offend 'a sense of justice'" (quoting Brown v. Mississippi, 297 U.S. 278, 285-86 (1936)); *id.* ("Coerced confessions [violate due process because they] offend the community's sense of fair play and decency.").

106. 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . . .").

107. *Id.*

108. In *Brady*, the suppressed statement was deemed material to punishment because it tended to suggest that Brady's coconspirator (and not Brady himself) had done the actual killing. 373 U.S. at 84. There was no question that Brady was guilty of the crime of which he had been convicted whether or not he did the actual killing, but the Court affirmed a lower court's decision to remand only on the punishment issue, agreeing with the lower court that the jury might have imposed a different punishment if Brady had been able to bring the

Similarly, it would be difficult to characterize concealment of the fact that a pre-hand-off search occurred as prosecutorial misconduct in violation of due process. The criminal defendants attempted this sort of claim in *Man Nei Lui*, arguing that nondisclosure of the prior investigation during the state proceedings against them amounted to prosecutorial misconduct in violation of their Fifth and Sixth Amendment rights.[109] The government responded that there was nothing *exculpatory* about either the existence of a pre-hand-off search or the evidence obtained in that federal wiretap linking the defendants to narcotics crimes, so nondisclosure of that evidence could neither have harmed the defendants nor interfered with the fairness of the criminal proceedings against them, whether or not the previously undisclosed search that elicited the evidence was unconstitutional.[110] The defendants' motion to dismiss was ultimately denied, although it is not clear whether it was denied because the court concluded that nondisclosure caused no due process problem as a matter of law, or because any problem it may have caused in this case was rendered moot when the state charges were dismissed and the prior search was disclosed.

Parenthetically, although it seems too far of a stretch to find that the Due Process Clause prohibits concealment of pre-hand-off searches from post-hand-off defendants, at least one district court has issued local rules that appear to bring the existence of a prior search under the umbrella of *Brady* material (if you accept the foregoing analysis suggesting that the hand off does *not* render evidence obtained in the subsequent investigation "independent" of the prior search for purposes of the exclusionary rule). The Local Rules of the United

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suppressed statement as a means of separating himself from the actual killing. *Id.* at 85. By contrast, facts that establish the existence of a pre-hand-off search, even a clearly unlawful one, do not cast doubt on a criminal defendant's desert of punishment any more than they cast doubt on his actual guilt or innocence, because they do not involve the defendant's actions at all.

Similarly, the mere existence of a prior search does not fall within *Brady* under the materiality standard adopted in *United States v. Bagley*, 473 U.S. 667 (1985). *Bagley* held that evidence is material under *Brady* and its progeny "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682 (Blackmun, J., concurring). In *Bagley*, however, the evidence at issue would have enabled the defendant to impeach government witnesses against him, and therefore it bore on proof of the defendant's own conduct (albeit indirectly). *Id.* at 670-72 (majority opinion). The legal justification for a pre-hand-off search, by contrast, does not bear on the conduct of the defendant at all. In fact, such a broad reading of *Bagley* is foreclosed by *Brady* itself, which recognized that a jury might conceivably have reached a different outcome on the question of guilt if the suppressed statement had been raised in the guilt phase of defendant's trial, but nonetheless refused to remand on the question of guilt because it explicitly rejected the "sporting theory of justice" that would have required disclosure of entire prosecution files to ensure that everything that "might" affect the outcome of a trial would be handed over. *Brady*, 373 U.S. at 90-91; *see also* Moore v. Illinois, 408 U.S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.").

109. May 29 Motion, *supra* note 15, at 2.

110. June 14 Motion, *supra* note 12, at 7-8.

States District Court for the District of Massachusetts defines *Brady* material to include "[i]nformation that would cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief and that could be subject to a motion to suppress or exclude, which would, if allowed, be appealable under 18 U.S.C. § 3731."[111] Nonetheless, the District of Massachusetts's local rule is in the minority, and is best understood as a prophylactic like the exclusionary rule rather than a constitutional mandate.[112] Just as Massachusetts deems it good policy to require information that might affect the admissibility of material evidence to be disclosed, we may still ask whether the values underlying the Due Process Clause (as well as the Fourth Amendment and the exclusionary rule that seeks to protect it) are best served by a policy that requires disclosure of pre-hand-off searches in some situations, even if nondisclosure is not itself a violation of the Constitution. If so, then the Due Process Clause provides further support for regulation of the kind proposed in the next Part.

IV. SOME ELEMENTS OF A POSSIBLE SOLUTION: TOWARD REQUIRING DISCLOSURE OF PRE-HAND-OFF SEARCHES

Contrary to the conclusion of the only court to directly address the merits of the hand-off procedure, concealment of a pre-hand-off search from a post-hand-off criminal defendant does not violate the Constitution in and of itself. Nonetheless, it may violate statutory law in certain circumstances (where the pre-hand-off search involves a wiretap), and it undermines the exclusionary rule by creating a path for otherwise-excludable evidence to be introduced in post-hand-off prosecutions, which is especially problematic because there is reason to believe that pre-hand-off searches may regularly violate the Constitution, even if they do not always do so. Because of the special risks that concealment of pre-hand-off searches creates to the values of privacy reflected in the Fourth Amendment, the exclusionary rule, and the federal wiretap statute, it makes sense to impose some kind of disclosure obligation.

But as we consider possible policy responses to the hand-off procedure, it is important to keep in mind that, notwithstanding the risks it creates, the hand off also serves an important public interest by enabling law enforcement authorities to pursue midstream prosecutions without ruining long-term

111. LR, D. MASS 116.2(B)(1)(b). An order suppressing or excluding evidence is appealable under 18 U.S.C. § 3731 if "the evidence is a substantial proof of a fact material in the proceeding." For a survey of state and federal local rules and orders defining *Brady* material, see LAURAL L. HOOPER ET AL., FED. JUDICIAL CTR., TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES (2004), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/BradyMat.pdf/$file/BradyMat.pdf.

112. Indeed, the fact that local rules vary in regard to guidelines for compliance with *Brady* is compelling evidence in itself that these guidelines are not considered constitutionally required.

investigations. Thus any policy response should be crafted to enable hand offs like the one in *Man Nei Lui*, in which there was no reason to believe that the wiretap was a mere pretext to enable the government to spy on people whose conduct it otherwise lacked a legal basis to investigate, and which resulted in the interdiction of a significant amount of illegal drugs while enabling a much larger investigation to proceed.[113] However, the fact that *Man Nei Lui* appears to have been an exemplary use of the procedure does not remove the concern that the procedure will also be used in questionable and possibly unconstitutional ways, as it likely was in *Whitaker*, where wiretaps were repeatedly extended, resulting in the interception of dozens of thousands of telephone conversations,[114] and ultimately leading to several post-hand-off prosecutions, none of which involved the putative targets of the wiretaps.[115] The facts of *Whitaker* raise the inference that the wiretaps at issue were a pretext to allow the police to eavesdrop on the people they ultimately prosecuted, or (perhaps even more troublingly) that they functioned as a general warrant allowing police to rummage through the personal conversations of so many people that it was sure to uncover some criminal activity.

A blanket disclosure-to-defendants rule would eviscerate the valuable public purpose that the hand off serves because it would make it impossible to bring midstream prosecutions that arise from legitimate wiretaps without making the existence of pre-hand-off searches a matter of public record. Accordingly, the tools I sketch out in this Part are designed to support a limited obligation of disclosure *to courts* that is intended to allow concealment of pre-hand-off searches *from defendants* when legitimate investigatory circumstances justify it, and to disclose pre-hand-off searches to post-hand-off defendants in all other cases. These sketches are not intended to be complete or comprehensive, but rather to begin a dialogue on how courts and/or legislatures ought to address both the benefits and the risks of the hand-off procedure.

A. *Title III-Style Statutory Notice Requirement*

One possible solution would be to introduce a qualified disclosure obligation that applies to all hand offs and is similar to the notice and disclosure rules under Title III discussed above. To address the specific problems that hand off prosecutions raise, this new provision could be written to apply whenever information obtained in a pre-hand-off investigation that required a search warrant or wiretap leads to an actual prosecution. It could place a burden on the police to (1) notify the court that authorized a wiretap or search warrant whenever it leads to a prosecution, and (2) notify the court in which the

113. *See generally* Feb. 13 Motion, *supra* note 9, at 1-9 (summarizing the facts in *Man Nei Lui*).

114. Whitaker v. Garcetti, 291 F. Supp. 2d 1132, 1136 (C.D. Cal. 2003).

115. *Id.* at 1137.

prosecution occurs that the evidence derived from the pre-hand-off search. Either court would then have discretion to inform the relevant defendant of the existence of the pre-hand-off search, unless the police could show cause that the pre-hand-off search ought to remain secret in order to support a legitimate ongoing investigation (and satisfy the judge that there had been no impropriety with respect to the defendant being prosecuted).

This kind of solution, relying on voluntary police compliance and judicial supervision, is an imperfect proxy for actual notice to a defendant and adversarial challenge to the pre-hand-off investigation, but it would make outright abuses of the hand-off procedure more difficult and it would likely reduce instances of nondisclosure in both number and duration, perhaps even enabling prompt pre-conviction disclosure as soon as the ongoing investigation is complete in some cases where disclosure might otherwise never occur. Of course, this solution would not satisfy the district court judge in *Whitaker*, because at least some defendants might still end up convicted without ever having a chance to scrutinize the complete basis on which they were prosecuted (leaving a hole in the deterrent effect that the exclusionary rule is supposed to have with respect to unlawful investigation). But once you conclude, contrary to the district court judge in *Whitaker*, that concealment is not itself unconstitutional, it is appropriate to craft a rule that accommodates both the public interest in enabling midstream prosecutions and the public interest in limiting the power of police to utilize questionable investigation techniques without ever having to undergo judicial scrutiny and to introduce evidence derived from those investigations in court.

This kind of a disclose-to-the-court requirement would minimize the problems that nondisclosure creates not only by introducing judicial scrutiny, but because uncertainties in the timing and progress of criminal proceedings would make it difficult for police to design a prior investigation ex ante with confidence that they could keep it hidden throughout a future prosecution. At least in the federal wiretap context, their ability to do so would depend on judicial decisions extending the wiretap (under the stringent requirements of Title III) or finding good cause for nondisclosure to the defendant after a wiretap had ended, and the number of extensions or duration of concealment required would depend on the duration of the criminal proceedings, which can be both lengthy and unpredictable. Once a wiretap is complete, a judge duly informed that the wiretap had contributed to a midstream prosecution would presumably inform the hand-off defendant of that search's existence as a matter of course (absent a showing by police of exigent circumstances, such as a need to protect the identity of a confidential informant, that require an additional period of nondisclosure).[116]

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116. Indeed, on at least one occasion, a state government desiring to withhold information about a prior investigation but faced with direct questioning about it has sought *in camera* judicial review of relevant discovery requests, relying at least in part on claims of executive privilege. Press Release, *supra* note 26; *see also* CAL. EVID. CODE § 1040 (West

This solution will still face line drawing problems in determining when one investigation is sufficiently related to another to trigger the disclosure obligation. An inartfully constructed notice requirement could result in enormously inefficient disclosure requirements for prosecutors, detailing years of investigatory activity that arguably led in some way to the ultimate investigation in any given prosecution.[117]

A partial solution to these problems would be a simple time limit, establishing that the disclosure obligations do not apply to pre-hand-off searches that occurred some amount of time previously, perhaps five years, provided that the prosecution is not unduly delayed to avoid disclosure. In addition to this time limit, courts or legislators might add other per se limits as experience and knowledge about the hand-off procedure accumulates. Congress made a similar move just two years after Title III came into effect when it enacted a law to govern "litigation concerning sources of evidence."[118] This law addressed the problem of defendants seeking disclosure of any information about them obtained in a pre-Title III wiretap, even if the wiretap interceptions were not introduced into evidence against them, in order to support motions to suppress evidence that *was* introduced against them as the indirect product of the illegally obtained information. To prevent windfall benefits to these criminal defendants, Congress enacted 18 U.S.C. § 3504 to limit the government's disclosure obligations. Among other things, section 3504 determined that "no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act . . . if such event occurred *more than five years* after such allegedly unlawful act."[119] Congress set a five-year limit after making a factual finding that "when the allegedly unlawful act has occurred more than five years prior to the event in question, there is virtually no likelihood that the evidence offered to prove the event has been obtained by the exploitation of that allegedly unlawful act."[120] A five-year limit is likely to be somewhat over-inclusive because the passage of time does not necessarily erase the likelihood of exploitation, but such a limit has obvious benefits in terms of clarity and efficiency.

Finally, as compared to the ex ante permission-from-the-court solution proposed in the next Subpart, this ex post notice-to-the-court requirement

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2010) (defining California's "Privilege for Official Information"); *Whitaker*, 291 F. Supp. 2d at 1147 n.32. The executive privilege argument was firmly rejected by the trial court in *Whitaker*, and discovery was ordered to proceed. 291 F. Supp. 2d at 1147 n.32.

117. *Cf.* Moore v. Illinois, 408 U.S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.").

118. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. VII, pt. B, 84 Stat. 922, 935 (codified as amended at 18 U.S.C. § 3504 (2006)).

119. 18 U.S.C. § 3504(a)(3) (emphasis added).

120. Organized Crime Control Act of 1970 § 701, 84 Stat. at 935.

would enable police to conduct hand offs more quickly and efficiently, on very short notice, because they would not be required to apply for and obtain prior authorization between learning about suspected criminal activity and conducting a post-hand-off investigation. Moreover, because this disclosure obligation would be triggered by a post-hand-off prosecution, and not by the hand off itself, it might avoid unnecessary bureaucratic burdens involving hand offs that never result in prosecutions. In these cases, there is less reason to suspect that police have impermissibly invaded anyone's privacy, because they do not ultimately obtain a benefit (i.e., a prosecution/conviction) that might have motivated such an invasion. Put differently, the deterrent effect of the disclosure rule will not be diminished if judicial scrutiny is applied only to the cases in which the police seek a tangible benefit from the use of the procedure.

B. *Warrant-Like Prior Authorization Requirement*

Alternatively, law enforcement authorities could be required to obtain the permission of a magistrate prior to conducting a hand off. This magistrate would review the circumstances leading to the hand-off to ensure that the pre-hand-off investigation was not a pretext for investigating the proposed target of a post-hand-off investigation and to evaluate the need for maintaining the secrecy of the pre-hand-off investigation. This magistrate might also require periodic updates to ensure that the need for secrecy remained current and pressing, just as wiretaps must be regularly reapproved in order to stay active. Whenever the need for secrecy (either to protect the ongoing pre-hand-off investigation, or the pre-indictment post-hand-off investigation) lapsed, the authorizing magistrate would immediately inform the hand-off defendant of the existence of the pre-hand-off search and the hand off.

A warrant-like process would carry many of the same benefits and problems as the ex post notice-to-the-court requirement discussed above. It would enable midstream prosecutions like the one in *Man Nei Lui* without jeopardizing the larger ongoing investigation, and it would likely prevent abuses like the one in *Whitaker* by requiring a judge to separately pass on both the legitimacy of the hand off and the need for secrecy. Although it is possible that requiring prior authorization would hamper some investigations (imagine for example, under the facts of *Man Nei Lui*, that federal authorities overheard a conversation establishing that a car containing several kilograms of cocaine would be leaving a certain location immediately, giving them only minutes to arrange and conduct a wall stop), this problem could perhaps be circumvented by allowing for ex post authorization under exigent circumstances and within a short period of time, say twenty-four hours.[121]

121. The bounds of the exigency exception could draw from existing law regarding search warrants. *See, e.g.*, Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006) (collecting cases); Mincey v. Arizona, 437 U.S. 385, 393-94 (1978) ("[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the

In addition, line drawing might be less of a problem because a rule triggered by a hand off (instead of by a prosecution) will not face complex judgments about whether a subsequent prosecution grew out of a prior one. Instead, this obligation would be triggered whenever authorities conducting an ongoing covert investigation wish to pass information derived from that investigation to other authorities to pursue a possible midstream investigation and prosecution.

C. *Educating Defense Attorneys and Encouraging Active Questioning*

Finally, simply educating criminal defense attorneys about the procedure and encouraging them to ask police and prosecutors about prior investigations and hand offs as a matter of routine can address some portion of the threats to privacy and fairness that the hand off creates. Even if a disclosure obligation is not formally imposed, and even though police and prosecutors may not feel obliged by any of the legal provisions discussed above to volunteer information about a prior investigation to a hand-off defendant, they might well disclose it in response to direct questioning.[122] And if a given investigation is revealed upon questioning to be the product of a prior investigation, defendants would presumably be entitled to discovery on the prior investigation to support a possible motion to suppress.

CONCLUSION

The hand-off procedure poses a serious threat to privacy. Although the policy rationale advanced by law enforcement in support of the procedure, namely enabling midstream prosecutions during ongoing covert investigations, is obviously an important and valuable end for society to pursue, an unconstrained hand-off procedure gives police too much discretion because it enables them to unilaterally wall off entire swathes of investigatory activity not only from defendants but also from courts based on nothing more than a phone call from one cop to another.

Because the need for bringing midstream prosecutions is legitimate, an appropriate solution must balance that need against the public interest in protecting Fourth Amendment rights. Accordingly, I have sketched two tools that could be used to impose a qualified disclosure obligation, each of which seeks to get information to defendants themselves wherever practicable while enabling police to avoid full disclosure upon a showing of exigency to a judge. Although ex parte judicial scrutiny is a poor second-best to full adversarial

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situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." (quoting McDonald v. United States, 335 U.S. 451, 456 (1948))).

122. *Cf.* June 14 Motion, *supra* note 12, at 9.

scrutiny of police tactics, it would represent an enormous improvement over the current system, in which police with the hand off in their investigatory repertoire can theoretically conduct any kind of covert search they want to, secure in the knowledge that they can both use the information uncovered in criminal prosecutions (so long as it can be "rediscovered" by open and lawful means) and keep the investigation hidden from both courts and defendants indefinitely.