

2008

# Due Process for the Global Crime Era: A Proposal

Song Richardson

*American University Washington College of Law, songrichardson@gmail.com*

Follow this and additional works at: [http://digitalcommons.wcl.american.edu/facsch\\_lawrev](http://digitalcommons.wcl.american.edu/facsch_lawrev)



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [International Law Commons](#)

---

## Recommended Citation

Richardson, L. Song. "Due Process for the Global Crime Age: A Proposal." *Cornell International Law Journal* 41, no. 2 (2008): 347-382.

This Article is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Articles in Law Reviews & Other Academic Journals by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

# Due Process for the Global Crime Age: A Proposal

L. Song Richardson†

Introduction .....	347
I. Evolution of MLATs .....	350
A. Informal Methods .....	351
B. Letters Rogatory .....	351
C. MLATs .....	352
II. The Prosecutor's Duty to Provide Defense Access to Evidence .....	356
A. The Unique Role of Prosecutors .....	356
B. The Court's "Access to Evidence" Jurisprudence.....	361
1. <i>The Materiality Requirement</i> .....	362
a. The Non-Disclosure Cases .....	362
b. The Interference Cases .....	364
c. Conclusion .....	365
2. <i>The Exclusivity Requirement</i> .....	366
3. <i>The Special Bad Faith Requirement</i> .....	369
4. <i>Guiding Principles</i> .....	371
III. The Proposed Transnational Framework .....	372
A. The Problem .....	372
B. The Framework .....	374
C. Application .....	374
1. <i>Materiality</i> .....	374
2. <i>Exclusivity</i> .....	375
3. <i>Bad Faith</i> .....	376
4. <i>Foreign Policy Implications</i> .....	377
5. <i>Advantages and Disadvantages</i> .....	379
Conclusion .....	381

## Introduction

*"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."*<sup>1</sup>

---

† Assistant Professor, DePaul University College of Law. J.D., The Yale Law School, 1993; B.A., Harvard College, 1988. Copyright © 2007 by L. Song Richardson. The author is grateful to Michele Goodwin, Cynthia Roseberry, and Emily Hughes for their invaluable comments when reviewing this article and to Zach Bowles for useful research assistance. Finally, the author thanks Dean Glen Weissenberger for providing the resources that made this article possible and the editors of the *Cornell International Law Journal* for their valuable assistance. Any errors are my own.

1. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The adjudication of transnational criminal cases in the United States raises troubling questions about the government's commitment to the venerable due process values of fairness and reliability. Consider this scenario: Mr. Smith is arrested and charged with assaulting a police officer in the United States. At trial, Mr. Smith intends to argue that he was acting in self-defense. All witnesses to the incident live in the United States and, therefore, are subject to the court's subpoena power. Mr. Smith subpoenas two eyewitnesses who testify that the officer started the fight. The prosecutor subpoenas one witness who testifies that Mr. Smith started the fight. At trial, the jury hears the testimony of all three witnesses before reaching a verdict. This scenario illustrates typical compulsory process in domestic criminal prosecutions in the United States.

Now consider an alternative scenario: Mr. Smith is arrested and charged with assaulting a police officer in the United States. At trial, he intends to argue that he acted in self-defense. This time, all of the eyewitnesses are Canadian citizens who return to Canada shortly after the incident. Because these witnesses are located outside the United States and are not U.S. citizens, they are not subject to the court's subpoena power.<sup>2</sup> This presents no problem for the prosecutor; she simply relies upon the Mutual Legal Assistance Treaty (MLAT) between the United States and Canada to compel the testimony of her witness. Mr. Smith, however, cannot use the MLAT because its language prevents defendants from employing it. When Mr. Smith asks the prosecutor to use the MLAT to compel the testimony of his witnesses, she refuses. At trial, the jury hears only the testimony of the prosecutor's witness before reaching a verdict. This example illustrates typical transnational compulsory process in the United States when an MLAT exists.<sup>3</sup>

Both scenarios involve the same facts, the same defendant, and the same witnesses. The only difference is that the first scenario is a domestic prosecution in which both parties have access to compulsory process and the second scenario is a transnational prosecution.<sup>4</sup> When an applicable MLAT exists, only the prosecutor has access to process. The disparity in access to process in transnational cases exists not by chance, but by design. The United States intentionally created this disparity when it negotiated the inclusion of language barring defendants' access to their compulsory process provisions in MLATs.<sup>5</sup>

Over forty years ago, in his seminal work on the criminal process in the United States, Herbert Packer described two models of criminal proce-

---

2. 28 U.S.C. § 1783 (2006) gives U.S. courts the power to issue a subpoena to U.S. residents or nationals living abroad, ordering the subject to appear, to produce documents, or both for proceedings in the United States.

3. ETHAN A. NADELMANN, *COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT* 352-54, 379-80 (1993).

4. The term "transnational" in this article refers to cases that are tried in the United States but which require evidence from a foreign locale.

5. See NADELMANN, *supra* note 3, at 381; Robert Neale Lyman, *Compulsory Process in a Globalized Era: Defendant Access to Mutual Legal Assistance Treaties*, 47 VA. J. INT'L L. 261, 288-89 (2006).

ture: the crime control model and the due process model.<sup>6</sup> As its name suggests, the crime control model posits that the most important function of the criminal justice system is to effectively suppress crime.<sup>7</sup> This model values efficiency in catching and prosecuting law-breakers.<sup>8</sup> The due process model, in contrast, focuses on the fallibility of the criminal process.<sup>9</sup> Its primary concerns are fairness and reliability, as opposed to efficiency.<sup>10</sup> Accordingly, the due process model focuses on limiting the power of the state vis-à-vis the individual.<sup>11</sup>

Balancing the norms of these two models of the criminal process is often challenging. The current doctrine in domestic criminal cases attempts to balance the fairness and legitimacy norms of the due process model against the competing norms of effective and efficient crime control of the crime control model.<sup>12</sup> Although vigorous debate exists over the appropriateness of the current balancing scheme,<sup>13</sup> its well-established and familiar principles provide defendants in purely domestic cases with rights of access to important evidence necessary to lend legitimacy to the criminal process.

No such balance exists in the increasingly common transnational criminal case tried in U.S. courts.<sup>14</sup> In the global crime era, purely domestic cases are no longer the norm; instead, necessary evidence often is located in foreign jurisdictions. In these transnational cases, the unbalanced MLATs demonstrate that crime control norms usurp the values of due process, resulting in a transnational criminal process that inadequately protects fairness and legitimacy norms.

Concern about transnational prosecutions is not new. Prior critiques, however, stop short of creating a framework that will create consistent compulsory process rights in U.S. prosecutions, whether transnational or domestic.<sup>15</sup> This failure may be due, in part, to the fact that transnational adjudications raise foreign policy concerns that complicate the application of traditional domestic due process principles.

This article proposes a transnational due process model that minimizes foreign policy concerns by preserving the efficacy of MLATs. The model primarily focuses on the duties that the U.S. Constitution imposes on prosecutors. It conceives a role for prosecutors in transnational cases that is faithful to their responsibility to act both as "truth" seekers and law

---

6. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 1-6 (1964).

7. *Id.* at 9.

8. *Id.* at 10.

9. *Id.* at 14-15.

10. *Id.* at 15-16.

11. *Id.* at 16.

12. *Id.* at 5-6.

13. See *infra* Part II.

14. See Lyman, *supra* note 5, at 262.

15. See, e.g., MICHAEL ABBELL & BRUNO A. RISTAU, OBTAINING EVIDENCE 84-90 (1997); Lyman, *supra* note 5, at 262; Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?*, 39 Hous. L. Rev. 307 (2002).

enforcers, and introduces fairness and legitimacy into the transnational criminal process.

This article proceeds in four parts. Part I explores the current transnational criminal process, focusing on its evidentiary method. It charts the evolution of MLATs as an important solution to the inadequate foreign evidence-gathering mechanisms that exist in their absence. For purposes of crime control, MLATs are effective, efficient, and indispensable tools for resolving global crime. Scrutinizing MLATs through the lens of due process, however, demonstrates that their evidence-gathering mechanisms are flawed. The current operation of MLATs reveals the ascendancy of the crime control model, as well as the relative absence of due process norms, in transnational criminal cases.

Part II takes a step back and explores the fundamental principles of the domestic due process model governing the duties of prosecutors. Subpart A examines prosecutors' constitutionally mandated dual role in the criminal justice system as aggressive advocates and as "ministers of justice." Subpart B then analyzes the U.S. Supreme Court's "access to evidence" jurisprudence. These cases demonstrate how the Court balances the competing values of crime control and due process in purely domestic criminal cases in order to ensure defense access to important evidence.

Building upon the domestic framework, Part III proposes a transnational criminal process framework that incorporates due process norms. By focusing on the role of the prosecutor, the proposed approach brings fairness and legitimacy to transnational criminal adjudications while concomitantly maintaining effective means of crime control. This Part then applies the framework to determine how it would resolve the flawed evidentiary method that MLATs currently impose. It ends by identifying some of the benefits and limitations of the proposal, including potential foreign policy concerns. Finally, this article concludes by suggesting that courts adopt the framework in order to ensure that existing MLATs operate in a manner that provides for the effective prosecution of transnational law-breakers while protecting fundamental due process principles.

## I. Evolution of MLATs

Prior to the advent of MLATs, parties that needed foreign evidence had two options: (1) informal methods, such as cooperation and unilateral actions and (2) letters rogatory, a more formal diplomatic process.<sup>16</sup> Although MLATs provide prosecutors with an alternative means to obtain foreign evidence, these two options remain the only means available for defendants to request such evidence. Prosecutors still use these options to request foreign evidence when an MLAT does not exist.<sup>17</sup> Subparts A and B will discuss these options. Subpart C then explains the development and role of MLATs.

---

16. NADELMANN, *supra* note 3, at 318.

17. Lyman, *supra* note 5, at 272-78.

### A. Informal Methods

One informal method that American law enforcement officials use to gather evidence is cooperation with their foreign counterparts. By developing close working relationships, law enforcement officials can conduct investigations and obtain evidence below the radar of high-level government officials. When cooperation is not possible, however, the United States often resorts to unilateral actions to obtain evidence needed to prosecute. For example, one popular technique designed to pressure uncooperative nations to succumb to U.S. law enforcement demands is to serve subpoenas on foreign companies operating in the United States for records held by their foreign branches.<sup>18</sup> If the corporation fails to respond, the U.S. court that issued the subpoena will then hold the corporation in civil contempt until it produces the requested records.<sup>19</sup> Another form of unilateral action is the "*Ghidoni* waiver" in which U.S. courts order the target of a grand jury investigation to sign a consent form waiving any bank secrecy privilege.<sup>20</sup> Finally, in extreme cases, U.S. officials have resorted to bribing foreign officials<sup>21</sup> and abducting foreign nationals.<sup>22</sup> Rather than promoting international cooperation, these unilateral acts predictably lead to international friction.<sup>23</sup>

Defendants also have informal methods for obtaining foreign evidence, but these options are limited because they cannot form cooperative arrangements with foreign law enforcement or take advantage of diplomatic pressures that can facilitate informal cooperation. Essentially, defendants can obtain their own records from foreign institutions, hire private investigators if they have sufficient funds, or resort to bribery or other corrupt means. For both parties, these informal mechanisms for gathering evidence fall short of ensuring access to important evidence located outside the United States.

### B. Letters Rogatory

The primary formal method that defendants and prosecutors use to obtain evidence in the absence of an MLAT is the discretionary diplomatic process called letters rogatory.<sup>24</sup> In the rogatory procedure, parties seeking foreign evidence ask domestic courts to send a diplomatic request for evidence to a foreign tribunal.<sup>25</sup> The foreign tribunal is under no obliga-

---

18. NADELMANN, *supra* note 3, at 316.

19. See, e.g., *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982).

20. See *United States v. Ghidoni*, 732 F.2d 814 (11th Cir. 1984); NADELMANN, *supra* note 3, at 363-64.

21. NADELMANN, *supra* note 3, at 325 n.19.

22. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

23. See, e.g., NADELMANN, *supra* note 3, at 359-60. For example, international tensions arose between the United States and the United Kingdom when prosecutors began serving subpoenas upon local branches of multinational corporations. See *id.* In order to relieve the tension, the Justice Department ordered that all subpoenas to institutions in the United States for records located abroad be cleared through the department. *Id.*

24. 28 U.S.C. § 1781 (2006).

25. NADELMANN, *supra* note 3, at 318.

tion to honor the request.<sup>26</sup> If a foreign court chooses to respond, the requested evidence often arrives long after the trial is complete.<sup>27</sup> Even if the evidence arrives promptly, it frequently does not comply with domestic rules of evidence.<sup>28</sup> Accordingly, parties utilizing letters rogatory must simply cross their fingers and hope that the foreign nation will provide the evidence in a timely fashion and in an admissible form. Historically, the absence of a reliable evidence-gathering mechanism often stymied prosecutorial efforts,<sup>29</sup> making it not unusual for the U.S. government to simply forgo transnational prosecutions. As the global crime problem worsened, prosecutors worked hard to develop a solution.<sup>30</sup> MLATs were the answer.<sup>31</sup>

### C. MLATs

MLATs are bilateral treaties that obligate each signatory to transmit evidence located within its borders to the other signatory state.<sup>32</sup> They address the many shortcomings of the letters rogatory process. First, when a proper request is made, the signatories must provide the requested evidence unless an explicit provision of the treaty permits denial.<sup>33</sup> Second, requests are made and received through designated "central authorities"

26. See ABBELL & RISTAU, *supra* note 15, at 87.

27. It is not uncommon for evidence to arrive six months or more after a request is made. See S. COMM. ON FOREIGN RELATIONS, MUTUAL LEGAL ASSISTANCE TREATY CONCERNING THE CAYMAN ISLANDS, S. EXEC. REP. NO. 101-8, at 166 (1st Sess. 1989) [hereinafter CAYMAN ISLANDS REPORT] (statement of Robert L. Pisani, Executive Director of International Legal Defense Counsel).

28. NADELMANN, *supra* note 3, at 319.

29. See *id.* at 345-75 (discussing the numerous reasons for negotiating the treaties, including the difficulty of obtaining evidence necessary for prosecutions). In a letter to the Senate Foreign Relations Committee, J. Edward Fox, Assistant Secretary for Legislative Affairs, wrote, "The treaties are very important to U.S. law enforcement interests, especially in obtaining convictions against international narcotics traffickers, terrorists, and other international criminals." CAYMAN ISLANDS REPORT, *supra* note 27, at 217.

30. See NADELMANN, *supra* note 3, at 317.

31. The United States negotiated MLATs to address the growing global crime problem. An official from the Department of Justice explained:

[T]he negotiation and implementation of effective mutual legal assistance treaties and executive agreements is a very important aspect of our effort to investigate and prosecute serious crime. As this Committee knows all too well, we have in recent years seen the internationalization of serious crimes such as narcotics trafficking, money laundering, terrorism, and large scale fraud.

CAYMAN ISLANDS REPORT, *supra* note 27, at 94 (statement of Mark M. Richard, Deputy Assistant Att'y Gen., Criminal Division, Department of Justice).

32. NADELMANN, *supra* note 3, at 315.

33. See, e.g., S. COMM. ON FOREIGN RELATIONS, TREATY WITH AUSTRIA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS, S. EXEC. REP. NO. 104-24, at 4 (2d Sess. 1996) [hereinafter AUSTRIA REPORT] ("Mutual legal assistance treaties generally impose reciprocal obligations on parties to cooperate both in the investigation and the prosecution of crime."). Explicit provisions permitting denial are usually set forth in Article III of the treaties. See, e.g., *id.* at 4, 15. For example, a nation can refuse to respond to a request if the request appears to involve military or political offenses not recognized under the criminal laws of the requested state. *Id.* at 5, 15.

from each country.<sup>34</sup> The central authority for the United States is the Office of International Affairs, which is housed within the Department of Justice.<sup>35</sup> As central authorities work together to facilitate evidentiary requests, countries become more familiar with their differing legal systems and as a result, the procedure becomes more efficient.<sup>36</sup> In addition, the signatories must provide evidence in a form admissible in the requesting nation's courts.<sup>37</sup> In sum, MLATs facilitate transnational prosecutions by creating a mandatory, reliable, and efficient means to obtain foreign evidence in a timely fashion and in an admissible form.<sup>38</sup> They create a compulsory transnational process for prosecutors similar to domestic subpoenas.<sup>39</sup>

---

34. The central authority for the United States is the Attorney General or his or her designee. *Id.* at 14.

35. The Attorney General designated the Office of International Affairs, located in the Criminal Division of the Department of Justice, as the central authority for the United States. 28 C.F.R. § 0.64-1 (2007). Every federal prosecutor's office in the country has an "international security coordinator" who is responsible for handling requests to or from foreign nations. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-90.050 (2004).

36. David Stoelting et al., *U.S. Multilateral Enforcement of International Criminal Law*, 36 INT'L LAW. 569, 571 (2002).

37. Procedures are set forth in the treaty to ensure that the evidence provided will be in an admissible form. See, e.g., AUSTRIA REPORT, *supra* note 33, at 22 (setting forth procedures to ensure that business records are authenticated in a manner acceptable in U.S. courts).

38. Deputy Assistant Attorney General Mark M. Richard stated:

It has been increasingly common that significant evidence in major criminal cases will be found abroad. Obtaining such evidence, particularly in a form that will be admissible in our courts, has not been an easy matter. The purpose of our MLAT's is to provide a reliable and efficient means of obtaining this evidence.

CAYMAN ISLANDS REPORT, *supra* note 27, at 61 (statement of Mark M. Richard, Deputy Assistant Att'y Gen., Criminal Division, Department of Justice).

39. Although the government argues that MLATs do not provide the government with transnational compulsory process and, therefore, "there is nothing that the defense is being denied," AUSTRIA REPORT, *supra* note 33, at 10-11, this statement is disingenuous at best. It contradicts testimony of executive branch officials before the Senate Foreign Relations Committee. For example, Deputy Assistant Attorney General Mark M. Richard stated that "an MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases." CAYMAN ISLANDS REPORT, *supra* note 27, at 95 (statement of Mark M. Richard, Deputy Assistant Att'y Gen., Criminal Division, Department of Justice) (emphasis added). MLATs obligate assistance by compelling the testimony of witnesses needed by a foreign jurisdiction. The country receiving the request can either ask the witness to travel voluntarily or compel the witness to submit to a deposition. See, e.g., AUSTRIA REPORT, *supra* note 33, at 21. When a witness is in custody, the treaties provide for the transfer of that witness if the witness consents and the central authorities of both nations consent. *Id.* at 25. The treaties also compel the witness to appear with any requested documents. *Id.* at 26. For example, Article 8 of the US-Austria MLAT obligates the requested state to compel persons to appear and testify or produce evidence requested by the requesting state. Treaty with Austria on Mutual Legal Assistance in Criminal Matters, U.S.-Austria, Feb. 23, 1995, S. TREATY DOC. NO. 104-21 (1995). Judicial authorities of both contracting parties have the power to compel testimony or documents from individuals or companies in connection with both domestic and foreign proceedings. AUSTRIA REPORT, *supra* note 33, at 21. A similar provision in the United States-Mexico MLAT states, in Article 7:



The United States completed its first MLAT with Switzerland in 1973.<sup>40</sup> State, Justice, and Treasury Department officials were part of the U.S. negotiating team.<sup>41</sup> The negotiations were delicate and politically sensitive, in part because MLATs require accommodation of different legal systems, customs, and cultures.<sup>42</sup> Decisions had to be made regarding how to deal with the fact that nations criminalize different acts, have different legal traditions (civil versus common law), use different evidence-gathering mechanisms, and understand appropriate law enforcement behavior differently.<sup>43</sup> MLATs had to overcome these obstacles. The negotiation of the Swiss MLAT taught U.S. negotiators important lessons that helped them craft future MLATs more efficiently. Importantly, from an international relations perspective, MLATs are important because they demonstrate the United States' willingness to work cooperatively with other nations to reduce global crime.<sup>44</sup>

In the first federal prosecution utilizing the Swiss MLAT,<sup>45</sup> the defendant blindsided prosecutors when he asked them to use the treaty to obtain evidence for him from Switzerland. The trial judge, finding no language in the treaty barring such use, ordered the Department of Justice to use the MLAT to obtain the evidence.<sup>46</sup> After this experience, the government had to choose whether to continue to negotiate MLATs that also allow defendants to gather foreign evidence or to ensure that future treaties would only benefit prosecutors. The government chose the latter course: MLATs now commonly contain language limiting their use to the government's exclusive benefit.<sup>47</sup> For example, the Canadian MLAT provides that it does not

---

A person in the requested State whose testimony is requested shall be compelled by subpoena, if necessary, by the competent authority of the requested Party to appear and testify or produce documents, records, and objects in the requested State to the same extent as in criminal investigations or proceedings in that State.

Mutual Legal Assistance Cooperation Treaty, U.S.-Mex., Dec. 9, 1987, S. TREATY DOC. NO. 100-13 (1988). In the absence of an MLAT, the parties are left to hope that they can obtain the deposition of a foreign witness through the discretionary and unreliable letters rogatory process, or that they can convince the witness to voluntarily travel to the foreign locale where his or her testimony is needed.

40. See Treaty for Mutual Assistance in Criminal Matters, U.S.-Switz., May 25, 1973, 27 U.S.T. 2019.

41. NADELMANN, *supra* note 3, at 324.

42. *Id.* at 10 (describing harmonization as a concept that incorporates three processes: the "regularization of relations among law enforcement officials of different states, [the] accommodation among systems that retain their essential differences, and [the] homogenization of systems toward a common norm").

43. See *id.* at 347. For example, techniques commonly used in the United States such as wire-tapping and undercover operations are either forbidden or strictly constrained by other countries. *Id.* at 7, 209, 225-35, 239-46. Many civil law countries require the prosecution of anyone known to have committed a crime. *Id.* at 216. This "legality principle" prevents law enforcement from turning individuals into informants. *Id.* at 216, 218-19.

44. See *id.* at 472.

45. See, e.g., ABBELL & RISTAU, *supra* note 15, at §12-2-1(2) n.10.

46. *Id.*

47. The Canadian and Mexican MLATs provide that they "do not give rise to a right on the part of a private party to obtain . . . any evidence." See Treaty Between the United

"give rise to a right on the part of a private party to obtain . . . any evidence."<sup>48</sup> Similarly, the Thai MLAT provides that it is not intended to provide assistance to private parties,<sup>49</sup> and the Italian MLAT states that the treaty is intended "solely" for mutual assistance between the government or law enforcement authorities of the contracting parties.<sup>50</sup> Though each treaty uses different language, the United States clearly intended these instruments to eliminate defendants' access to compulsory transnational process.<sup>51</sup> Currently, a defendant who requires foreign evidence must rely solely on the discretionary, inefficient, and unpredictable letters rogatory process.<sup>52</sup>

From the standpoint of creating an effective tool to prosecute crimes, the government's choice to exclude defendants from MLATs makes sense. After all, criminal prosecutions are easier and more efficient when only the government can compel evidence. Thus, MLATs are salutary when effective crime control is most highly valued. Nonetheless, the imbalance in evidence-gathering tools raises serious and troubling questions about the fairness, reliability, and legitimacy of the transnational criminal process.<sup>53</sup>

---

States and Canada on Mutual Legal Assistance in Criminal Matters, U.S.-Can., Mar. 18, 1985, 24 I.L.M. 1092; Mutual Legal Assistance Cooperation Treaty, U.S.-Mex., Dec. 9, 1987, S. TREATY DOC. NO. 100-13 (1988). The treaty with the Netherlands is the exception. See Treaty Between the United States and the Netherlands on Mutual Assistance in Criminal Matters, With Exchange of Notes, U.S.-Neth., June 12, 1981, T.I.A.S. No. 10,734 ("A request to the Kingdom of the Netherlands for the production of documents from private persons shall comply with this Article.").

48. Treaty Between the United States and Canada on Mutual Legal Assistance in Criminal Matters, U.S.-Can., Mar. 18, 1985, 24 I.L.M. 1092.

49. Treaty with Thailand on Mutual Assistance in Criminal Matters, U.S.-Thail., Mar. 19, 1986, S. TREATY DOC. NO. 100-18 (1986).

50. Treaty Between the United States and the Italian Republic on Mutual Legal Assistance in Criminal Matters, U.S.-Italy, Nov. 9, 1982, S. TREATY DOC. NO. 98-25 (1983).

51. Arguably, the prosecution can still request defense evidence because the language literally restricts the ability of private parties to directly utilize the treaty. However, prosecutors interpret the restrictive language as barring the central authority from requesting evidence on behalf of defendants. For example, the former director of the Office of International Affairs, Criminal Division, Department of Justice testified, "It was the conception in the very beginning that these kinds of law enforcement tools would be limited to the parties, the governments, the law enforcement authorities of each." CAYMAN ISLANDS REPORT, *supra* note 27, at 176 (statement of Philip T. White, Adams, McCullough & Beard, Former Director of the Office of International Affairs, Criminal Division, Department of Justice).

52. On its website discussing the use of MLATs, the State Department expresses the view that defendants must still utilize the letters rogatory process. See U.S. Dep't of State, Mutual Legal Assistance (MLAT) and Other Agreements, [http://www.travel.state.gov/law/info/judicial/judicial\\_690.html](http://www.travel.state.gov/law/info/judicial/judicial_690.html) (last visited May 19, 2008).

53. When prosecutors utilize MLATs for their own benefit but exclude the defense, this virtually ensures the conviction of an innocent person because the jury will reach its verdict without the benefit of all of the evidence. A 1993 study found that a major factor leading to the conviction of individuals later found to be factually innocent was "prosecutorial zeal and bad faith." Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 317 (1996) (citing Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283, 285-86 (1988)).

As MLATs proliferate<sup>54</sup> and the number of transnational prosecutions grows, we must carefully consider whether the global crime problem justifies the diminution of due process norms. On the one hand, effective crime control requires giving the state the freedom and discretion to enforce the law without allowing concerns over individual rights to paralyze it. On the other hand, history demonstrates that unfettered state police power often leads to abuse.<sup>55</sup>

The question of how to appropriately balance the competing norms of crime control and individual rights is not unique to transnational criminal cases. This question dominates much of domestic criminal process jurisprudence, especially in relation to the role of the prosecutor.<sup>56</sup> The prosecutor's unique role in the criminal justice system reflects the tension between the crime control and due process models. Prosecutors must balance their constitutionally mandated dual roles as aggressive advocates, whose primary goal is to win convictions, and quasi-judicial officers, whose primary concern is to ensure that the criminal process is fair and legitimate.<sup>57</sup>

## II. The Prosecutor's Duty to Provide Defense Access to Evidence

### A. The Unique Role of Prosecutors

Prosecutors have a well-established and constitutionally-mandated dual role in criminal cases. First, they are law enforcers; they must prosecute criminals aggressively due to the constitutional imperative to "take care" that the laws are "faithfully executed."<sup>58</sup> In addition, the U.S. Constitution requires prosecutors to temper their adversarial zeal and protect the fairness and reliability of the criminal process.<sup>59</sup>

54. Currently, the United States has signed sixty-one MLATs. See U.S. Dep't of State, *supra* note 52.

55. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 44 (2005) (discussing Sir Walter Raleigh's trial in 1603 before the Privy Council in which he was not permitted to confront the witness against him before being sentenced to death).

56. See Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 226-28 (2000).

57. See Kevin C. McMunigal, *Are Prosecutorial Ethical Standards Different?*, 68 FORDHAM L. REV. 1453, 1472 (2000) (noting prosecutors' dual role as advocate and minister of justice); Richard Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 695 (1987) (arguing that prosecutors have a duty of fairness).

58. U.S. CONST. art. II, § 3. For a cogent discussion of the executive's role in enforcing the law, see Gerald V. Bradley, *Law Enforcement and the Separation of Powers*, 30 ARIZ. L. REV. 801, 803, 855-85 (1988).

59. As advocates, prosecutors, however, are not immune from the pressure and desire to win. Many prosecutors' offices create incentives to win convictions. "[B]ecause [a federal prosecutor's] success is measured by her conviction rate, she may be tempted to ignore the rights of defendants, victims, or the community in order to obtain pleas or guilty verdicts." Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 58-59 (1991). This focus often translates into prosecutors attempting to circumvent their minister of justice imperative. See, e.g., Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 351 (2001) (hereinafter Gershman, *The Prosecutor's Duty to Truth*) ("A prosecutorial cul-

Because they represent the sovereign, prosecutors have complex constitutional and ethical obligations.<sup>60</sup> Generally, defense lawyers are not required to disclose evidence favorable to the prosecution's case or to inform the government of their client's guilt.<sup>61</sup> The U.S. Constitution<sup>62</sup> and the ethical rules only obligate defense attorneys to vigorously advocate their client's cause.<sup>63</sup> In contrast, prosecutors are duty-bound to refrain from allowing their role as advocates to eclipse their obligation to ensure fair proceedings.<sup>64</sup> They are quasi-judicial officers who must ensure that

---

ture that advocates winning and maintains won-loss statistics not only discourages a critical examination of truth but encourages misconduct as well."); Bennett L. Gershman, *Why Prosecutors Misbehave*, 22 CRIM. L. BULL. 131, 133 (1986) ("Prosecutorial misconduct occurs so often because it works."); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2129 (2000) (discussing how prosecutors operate under strong incentives to seek the death penalty); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 388-89 (2001) (discussing the difficulties prosecutors face in resisting institutional pressures).

60. See, e.g., *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) ("The concept that the government alone must honor constitutional dictates, however, is a fundamental tenet of our legal order, not an obstacle to be circumvented. This is particularly so in the context of criminal trials, where we have held the prosecution to uniquely high standards of conduct."). Prosecutors have higher obligations. See, e.g., Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 792 (2000) ("It has long been the view in American law that the prosecutor's paramount duty is to serve justice, rather than to secure a conviction in a given case."); Gershman, *The Prosecutor's Duty to Truth*, *supra* note 59, at 337; Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 636 (1999); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1697 (2000); Zacharias, *supra* note 59, at 103-09; Zacharias & Green, *supra* note 56, at 226-28.

61. See, e.g., Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer*, 64 MICH. L. REV. 1469, 1475 (1998) (noting that in certain circumstances, defense lawyers must argue their client's perjured testimony); Gerald B. Lefcourt, *Responsibilities of a Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 59, 60 (1996) (detailing the sometimes difficult duty of defending clients zealously).

62. U.S. CONST. amend. VI; see also *Strickland v. Washington*, 466 U.S. 668, 706 (1984) (holding that the Sixth Amendment requires effective assistance of counsel).

63. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, 4-1.2 (3d ed. 1993) (the function of defense counsel "is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation"); *id.* 4-4.1 (defense counsel's "duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty"); MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. [1] (2007) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); *id.* R. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.")

64. This duty is often difficult because the adversarial system tends to foster a "win at all costs" mentality. For a comprehensive discussion of this mentality and culture, see Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J.

trials lead to reliable outcomes that are worthy of public confidence.<sup>65</sup> Hence, they are often referred to as “ministers of justice,”<sup>66</sup> reflecting their special role seeking truth and justice in adversarial criminal trials.<sup>67</sup> This duty to truth is “the ultimate statement of [the government’s] responsibility to provide a fair trial under the Due Process Clause . . . .”<sup>68</sup> The oft-quoted passage by former U.S. Supreme Court Justice Sutherland describes the prosecutor’s unique dual role well:

---

CRIM. L. 197, 208–11 (1988); Smith, *supra* note 59, 388–89 (discussing institutional pressures on prosecutors to win at all costs); Catherine Ferguson-Gilbert, Comment, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283 (2001). Former prosecutors say that those in office are “driven to win by a complex blend of factors, including appeasing the family of a victim, earning accolades of fellow prosecutors, and ‘getting the bad guy.’” Felice F. Guerrieri, *Law & Order: Redefining the Relationship Between Prosecutors and Police*, 25 S. ILL. U. L.J. 353, 376 (2001). However, the ethical rules are clear when it comes to access to evidence. See AM. BAR ASS’N, *supra* note 63, 3-3.11(a) (“A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused”); MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (2007) (“The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense[.]”). In fact, these model rules and standards require more of the prosecution than the Due Process Clause. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding that due process “requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.”).

65. See, e.g., *United States v. Nixon*, 418 U.S. 683, 707 (1974) (noting that a prosecutor’s “primary constitutional duty” is “to do justice in criminal prosecutions”); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1980) (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”).

66. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. [1] (2007) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); see also AM. BAR ASS’N, *supra* note 63, 3-3.13 cmt. (the prosecutor must “strive not for ‘courtroom victories’ . . . but for results that best serve the overall interests of justice.”); *id.* 3-1.2(c) (“The duty of the prosecutor is to seek justice, not merely to convict;” the prosecutor is obligated “to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public.”); Lisa Kurcias, *Prosecutor’s Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1209–13 (2000) (arguing that prosecutors are held to a higher standard than ordinary attorneys because they represent the sovereign and society as a whole); McMunigal, *supra* note 57, at 1472 (arguing that the prosecutor’s dual role as advocate and minister of justice strikes a different balance between cooperative and adversarial stances); Rosen, *supra* note 57, at 695 (arguing that prosecutors have a duty of fairness).

67. See, e.g., *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997) (holding that a prosecutor, “as the agent of the people and the State, has the unique duty to ensure fundamentally fair trials by seeking not only to convict, but also to vindicate the truth and to administer justice”); see also *Donnelly v. DeChristoforo*, 416 U.S. 637, 648–49 (1974) (Douglas, J., dissenting) (arguing that the function of the prosecutor is “not to tack as many skins of victims as possible to the wall” but is to “give those accused of crime a fair trial”); Gershman, *The Prosecutor’s Duty to Truth*, *supra* note 59, at 313.

68. *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring); see also *United States v. Bagley*, 473 U.S. 667, 696 (1985) (noting that the duty of truth is the “essence of due process”).

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . [H]e may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>69</sup>

One of the earliest cases recognizing the prosecutor's duty to truth is *Mooney v. Holohan*.<sup>70</sup> In *Mooney*, the prosecutor deceived the court and the jury by deliberately using perjured testimony and then withholding evidence that would have impeached that testimony in order to obtain a conviction.<sup>71</sup> His acts created a sham trial that violated due process.<sup>72</sup> Although neither party should deliberately mislead the court through the knowing use of perjured testimony, the prosecutor's actions in this instance were particularly troubling because of his constitutional obligation to pursue justice.

Prosecutors' duty to fairness not only requires them to refrain from acts that undermine the trial process but also imposes affirmative obligations. Prosecutors must comb through not only their own files,<sup>73</sup> but also those of their entire office,<sup>74</sup> the police department,<sup>75</sup> and often non-law enforcement agencies<sup>76</sup> for evidence favorable to the defense—evidence that could affect the jury's verdict.<sup>77</sup> If prosecutors discover such evidence, they must disclose it whether or not the defense specifically requests it.<sup>78</sup>

Due process requires these acts because prosecutors cannot be "architect[s] of a proceeding that does not comport with standards of justice."<sup>79</sup>

69. *Berger v. United States*, 295 U.S. 78, 88 (1935).

70. 294 U.S. 103 (1935).

71. *Id.* at 110.

72. *Id.* at 112–13 (criticizing the prosecution for "contriv[ing] a conviction through the pretense of a trial"). Later cases also reiterate this principle. See, e.g., *Napue v. Illinois*, 360 U.S. 264 (1959) (holding that the prosecutor violated due process by failing to correct false testimony); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 317 U.S. 213 (1942).

73. See *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963).

74. See *Giglio v. United States*, 405 U.S. 150 (1972). In *Giglio v. United States*, the prosecutor's failure to disclose impeachment evidence of a key prosecution witness violated due process. *Id.* at 154.

75. See *Kyles v. Whitley*, 514 U.S. 419, 435, 437 (1995) (holding that due process requires the prosecutor to learn of any favorable evidence known to "others acting on the government's behalf in the case, including the police").

76. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (holding that the defendant was entitled to *in camera* review of confidential child abuse records for material evidence).

77. See *infra* Part II.B.1 discussing the materiality standard.

78. In *United States v. Agurs*, the Court wrote, "[F]airness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.'" 427 U.S. 97, 110–11 (1976) (footnote omitted).

79. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (quoting from an inscription on the walls of the Department of Justice).

They must ensure that all material facts are aired in the courtroom.<sup>80</sup> They mislead the fact-finder when they suppress evidence favorable to the defense as much as when they allow perjured testimony to go uncorrected.<sup>81</sup> In sum, they have a constitutionally mandated duty to ensure that trials result in verdicts worthy of public confidence.<sup>82</sup>

The prosecution's dual role in the criminal justice system embodies the combined values of the crime control and due process models of criminal procedure. As law enforcers, prosecutors should vigorously and zealously prosecute law breakers, using every tool in their arsenal to obtain a conviction. As quasi-judicial officers, they must temper that adversarial posture in order to protect fairness and justice.<sup>83</sup> Striking the appropriate balance between these competing norms is often difficult.<sup>84</sup> Subpart B below analyzes the U.S. Supreme Court's "access to evidence" jurispru-

---

80. See *Kyles*, 514 U.S. at 439.

81. See *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959).

82. "Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result . . . . This is as it should be. Such disclosure will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . .'" *Kyles*, 514 U.S. at 439 (citing *Berger v. U.S.*, 295 U.S. 78, 88 (1935)).

83. It is often difficult for prosecutors to live up to the high standards of conduct required of them. In fact, prosecutors are often rewarded, or at least not punished, when their misconduct results in a conviction. See, e.g., Ken Armstrong & Maurice Possley, *Trial and Error: How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 10, 1999, at C1 (recording 381 reversed murder convictions in which prosecutors failed to disclose exculpatory evidence or knowingly presented false evidence); see also ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69 (1995) (discussing reasons for lack of professional discipline of prosecutors); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523-24 (1981); Frank Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 749-50 (2001) (discussing reasons for lack of professional discipline of prosecutors).

84. There is extensive scholarly debate over how prosecutors can successfully navigate this tricky terrain. Commentators convincingly argue that the vague, protean nature of the "minister of justice" imperative fails to adequately guide prosecutors in the performance of their manifold responsibilities. See Green, *supra* note 60, at 608 (explaining that the duty to do justice was never precisely defined and that "[t]he concept [is] protean as well as vague"). There is no consensus as to the obligations that ethical rules impose upon prosecutors. See, e.g., Gershman, *The Prosecutor's Duty to Truth*, *supra* note 59, at 337 (suggesting the prosecutor has "a duty to make an independent evaluation of the credibility of his witnesses, the reliability of forensic evidence, and the truth of the defendant's guilt"); Green, *supra* note 60, at 635-36 (stating that prosecutors have "a heightened duty to ensure the fairness of the outcome of a criminal proceeding from a substantive perspective—to ensure both that innocent people are not punished and that the guilty are not punished with undue harshness"); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1697 (2000) ("Neutrality . . . puts the prosecutor in the position of advocate for all the people—including the person against whom the evidence has been accumulating").

dence,<sup>85</sup> which demonstrates how the Court balances crime control and due process values in domestic criminal cases.

## B. The Court's "Access to Evidence" Jurisprudence

Legal authorities often describe criminal trials as "a search for truth"<sup>86</sup> achieved through "vigorous adversarial testing of guilt and innocence."<sup>87</sup> In order to perform this truth-seeking function, both the prosecution and the defense need to be able to develop all the relevant facts to present them to the fact finder.<sup>88</sup> However, prosecutors' relationships with law enforcement agencies often give them early, comprehensive access to evidence from an investigation. Therefore, they have the opportunity to affect the reliability of the trial process by hindering defense access to necessary evidence.<sup>89</sup>

Over the course of several decades, the Supreme Court developed "what might loosely be called the area of constitutionally guaranteed

85. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (using the phrase to describe cases in which the Court requires the prosecution to protect a defendant's access to evidence).

86. Craig M. Bradley & Joseph L. Hoffmann, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1271 (1996) ("We must remember that criminal trials serve more than one purpose. The first and most obvious purpose of criminal trials is to 'search for truth' . . . . Much of what we do before, during and even after criminal trials is quite appropriately designed to further this 'search for truth.'") (citing JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949)); Marvin E. Frankel, *The Search for Truth: An Unmpired View*, 123 U. PA. L. REV. 1031 (1975); see also *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence . . . .") (citing *United States v. Nobles*, 422 U.S. 225, 230 (1975)); Gershman, *The Prosecutor's Duty to Truth*, *supra* note 59, at 315 n.27 ("The search for truth is generally regarded as the touchstone for the adversary system.") (citing *Delaware*, 475 U.S. at 681); Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 118 n.1 (1987) ("Most adversary system critiques assume that truth-finding is the purpose of the adversary system and challenge it from that point of view."); Thomas L. Steffen, *Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 4 UTAH L. REV. 799, 804 (1988) ("Simply stated, truth is the sine qua non of justice. If justice is to have meaning beyond that of a hollow shibboleth, it must reflect a wise and fair application of truth.").

87. *Bradshaw v. Stumpf*, 545 U.S. 175, 191 (2005) (Thomas, J., concurring); see also *United States v. Nixon*, 418 U.S. 683, 709 (1974); *Williams v. Florida*, 399 U.S. 78, 82 (1970); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

88. *Nixon*, 418 U.S. at 709 ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.").

89. Gershman, *The Prosecutor's Duty to Truth*, *supra* note 59, at 329 ("Because of the prosecutor's control of the evidence, he has the ability to thwart a defendant's ability to learn about favorable witnesses, or to locate and call such witnesses once they are known."); see also Ellen Podgor, *Criminal Discovery of Jenks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 703 (1999).



access to evidence.”<sup>90</sup> These cases represent the Court’s attempt to strike the appropriate balance between crime control and due process, between allowing prosecutors to maintain their role as zealous advocates while giving substance to their duty to “seek justice” by requiring that they provide defendants with access to evidence where two pre-requisites exist.<sup>91</sup> First, the evidence must be material to the defendant’s case.<sup>92</sup> Second, the prosecution must have exclusive access to, custody of, or control over the evidence.<sup>93</sup> These two prerequisites give substance to the prosecution’s duty to ensure fair trials and to aggressively prosecute alleged criminals.

### 1. The Materiality Requirement

The appropriate balance between prosecutors’ duties to advocate aggressively and to aid defendants is a tricky matter. The Court resolved this dilemma by limiting the situations in which prosecutors must subordinate their law enforcement duty to their duty to administer justice.<sup>94</sup> Prosecutors must provide defendants with access to evidence only when that evidence is “material” to the case.<sup>95</sup> The materiality requirement is set forth in two lines of cases: (1) the non-disclosure cases, where prosecutors fail to disclose favorable evidence, and (2) the interference cases, where prosecutors actively interfere with defense access to evidence.

#### a. The Non-Disclosure Cases

The Court first articulated the materiality requirement in *Brady v. Maryland*,<sup>96</sup> the seminal case addressing prosecutors’ obligations to disclose evidence favorable to defendants. Brady was convicted of murder and sentenced to death.<sup>97</sup> Although he did not deny his involvement in the crime, he asserted that his accomplice, Boblit, actually strangled the victim.<sup>98</sup> Prior to trial, Brady asked the prosecution to provide him with all of Boblit’s prior statements.<sup>99</sup> However, the prosecutor withheld Boblit’s confession to the actual homicide.<sup>100</sup> The Court held that the prosecutor’s failure to disclose the statement violated due process because the statement was material.<sup>101</sup>

After introducing the concept of materiality in *Brady*, the Court did not define the term until twenty years later in *United States v. Bagley*.<sup>102</sup>

---

90. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

91. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (reiterating that defendants must have a “meaningful opportunity” to defend themselves) (citing *Crane v. Kentucky*, 476 U.S. 683, 689–90 (1986)).

92. *Valenzuela-Bernal*, 458 U.S. at 867–68.

93. *Id.*

94. *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963).

95. *Id.* at 87.

96. *Id.* at 86–88.

97. *Id.* at 84.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 87.

102. 473 U.S. 667, 682 (1985).

However, the standard explicitly set forth in *Bagley* was inherent in the Court's interim decisions. For example, nine years after *Brady*, the Court explained that due process is not violated simply because undisclosed evidence might have been helpful to the defense.<sup>103</sup> Rather, a new trial is only required if the evidence could "in any reasonable likelihood have affected the judgment of the jury."<sup>104</sup> Four years later, the Court found that "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."<sup>105</sup> Finally, in *Bagley*, the Court explicitly defined what it had only hinted at before, holding that evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."<sup>106</sup> The Court further defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."<sup>107</sup>

*Kyles v. Whitley*,<sup>108</sup> decided years after these articulations of the materiality requirement, represents the Court's most comprehensive explanation of the standard. After *Kyles* was sentenced to death, he discovered numerous items of evidence that the prosecutor failed to disclose, including contradictory statements made by a police informant and by eyewitnesses.<sup>109</sup> On appeal, the lower courts concluded that the undisclosed evidence was not material and affirmed the conviction and sentence.<sup>110</sup> The Supreme Court reversed, concluding that the lower courts had misapplied the materiality standard.<sup>111</sup> The standard, the Court explained, is neither a preponderance of the evidence nor a sufficiency of the evidence test.<sup>112</sup> The Court reasoned that these standards are too onerous and speculative.<sup>113</sup> Rather, the Court emphasized that the "touchstone" of the materiality requirement is the "reasonable probability" language.<sup>114</sup> The correct question is whether the undisclosed, favorable evidence could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."<sup>115</sup> The proper inquiry focuses on whether the defendant received a verdict worthy of confidence *in the absence* of the undisclosed evidence.<sup>116</sup>

Answering this question requires courts to consider the cumulative effect of all undisclosed evidence.<sup>117</sup> Of course, courts must first evaluate

---

103. *United States v. Giglio*, 405 U.S. 150, 154 (1972).

104. *Id.* (citations omitted).

105. *United States v. Agurs*, 427 U.S. 97, 104 (1976).

106. 473 U.S. at 682.

107. *Id.*

108. 514 U.S. 419, 434 (1995).

109. *Id.* at 428-29.

110. *Id.* at 431-32.

111. *Id.* at 435-36, 440-41.

112. *Id.* at 434.

113. *Id.* at 434-35.

114. *Id.* at 434.

115. *Id.* at 435.

116. *Id.* at 434.

117. *Id.* at 436 & n.10.

each piece of omitted evidence individually to determine its "tendency and force"<sup>118</sup> before weighing the cumulative effect of the undisclosed information.<sup>119</sup> The Court's careful parsing of the materiality standard was more than an exercise in semantics. When the Court applied the proper standard in *Kyles*, it reversed the conviction concluding that "'fairness' cannot be stretched to the point of calling [Kyles' trial] a fair trial."<sup>120</sup>

## b. The Interference Cases

In addition to cases in which the prosecution failed to disclose evidence, the materiality standard also applies to cases in which prosecutors actively interfere with defense access to evidence. In *United States v. Valenzuela-Bernal*,<sup>121</sup> the decisive case addressing the issue of prosecutorial interference, the defendant was charged with transporting undocumented aliens within the United States.<sup>122</sup> He was arrested with three Mexican citizens who were hiding in his car.<sup>123</sup> Shortly after the arrest, the prosecutor interviewed all three passengers and determined that none of them possessed information helpful to the defense.<sup>124</sup> One was detained in the United States to provide evidence against Mr. Valenzuela-Bernal,<sup>125</sup> but the other two were deported to Mexico. Mr. Valenzuela-Bernal moved to dismiss the indictment, arguing that the government violated due process when it used its sovereign powers to place potential witnesses beyond the court's subpoena power before giving him an opportunity for an interview.<sup>126</sup>

The Court acknowledged the prosecutor's duty to provide defendants with access to potential witnesses because access is necessary to give the defendant the opportunity to determine whether favorable testimony exists.<sup>127</sup> However, the Court affirmed Valenzuela-Bernal's conviction, because the government's duty is triggered "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier

---

118. *Id.*

119. *Id.* Evidence can be material when considered collectively, even if a single piece considered alone would not be material. *Id.* at 437.

120. As the *Kyles* Court wrote:

[C]onfidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid. This is not the "massive" case envisioned by the dissent, it is a significantly weaker case than the one heard by the first jury, which could not even reach a verdict.

*Id.* at 454 (citations omitted).

121. 458 U.S. 858 (1982).

122. *Id.* at 861.

123. *Id.* at 860-61.

124. *Id.* at 861.

125. *Id.*

126. *Id.* Mr. Valenzuela-Bernal also raised an identical Sixth Amendment compulsory process claim. *Id.*

127. *Id.* at 867.

of fact.”<sup>128</sup> Mr. Valenzuela-Bernal’s failure to demonstrate materiality was fatal to his claim.<sup>129</sup>

### c. Conclusion

The burden of demonstrating materiality rests with the defendant.<sup>130</sup> In the failure to disclose cases, such as *Brady*, courts usually make the materiality determination after the trial’s completion because that is when the undisclosed evidence typically comes to light.<sup>131</sup> In the interference cases, such as *Valenzuela-Bernal*, courts make the determination prior to trial.<sup>132</sup> In such situations, the defendant must make a “plausible showing” that the evidence is material.<sup>133</sup>

The materiality trigger protects important due process and crime control norms. First, it safeguards the integrity of the criminal process by ensuring that defendants are able to obtain and present material evidence, thus instilling confidence that the fact-finder had the evidence necessary to reach a reliable verdict.<sup>134</sup> Second, the materiality requirement allows prosecutors to maintain their adversarial posture.<sup>135</sup> The “access to evidence” cases do not create a constitutional right to discovery.<sup>136</sup> Prosecutors need not open all of their files and provide all of their evidence to defendants.<sup>137</sup> Rather, prosecutors can act as aggressive advocates and

128. *Id.* at 874.

129. *See id.* at 861.

130. *See id.* at 872. In *Valenzuela-Bernal*, for example, the Court explained that the defendant must make a “plausible showing” that the testimony of the deported witnesses would have been material. *Id.* at 873.

131. *See generally* *Brady v. Maryland*, 373 U.S. 83 (1963) (holding, subsequent to petitioner’s initial conviction, that statements made by petitioner’s companion indicating that he and not the petitioner committed the actual homicide were material to petitioner’s case).

132. *See Valenzuela-Bernal*, 458 U.S. at 858 (explaining that the federal district court determined materiality in response to a motion to dismiss before respondent’s conviction).

133. *Id.* at 873.

134. *See* *United States v. Agurs*, 427 U.S. 97, 112 (1976) (“The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt.”).

135. *See, e.g.,* Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1134–36 (1982) (discussing *Brady* and the sporting theory of criminal justice).

136. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59–60 (1987) (“A defendant’s right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth’s files.”); *Weathersford v. Bursey*, 429 U.S. 545, 559 (1977) (“There is no general constitutional right to discovery in criminal cases and *Brady* did not create one.”); *Agurs*, 427 U.S. at 106 (“[T]here is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor.”).

137. *See* *United States v. Bagley*, 473 U.S. 667, 675 (1985). In *Bagley*, the Court reiterated:

[T]he *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.

keep non-material evidence to themselves.<sup>138</sup> Nevertheless, prosecutors bear the responsibility for an error in judgment as to whether evidence is material.<sup>139</sup> This provides incentives for prosecutors to err on the side of disclosure and access.<sup>140</sup> Resting this burden on prosecutors' shoulders is appropriate because it "justif[ies] trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"<sup>141</sup>

## 2. The Exclusivity Requirement

The second requirement that triggers the prosecutor's duty to provide defense access to evidence is exclusivity. Exclusivity is present when the prosecutor has exclusive access to, custody of, or control over material evidence.<sup>142</sup> This requirement accords "special significance to the prosecu[tion's] obligation to serve the cause of justice" by compelling the prosecution to provide defendants with access to evidence when those defendants have no other means to obtain it.<sup>143</sup>

For purposes of determining whether exclusivity exists, the government is often treated as a single entity. For example, even if a prosecutor does not have personal knowledge of evidence that should be disclosed, the prosecutor is deemed to have exclusive access to the evidence when another prosecutor was aware of it<sup>144</sup> or when another institution considered an "arm" of the prosecution held it.<sup>145</sup> For these purposes, police

---

*Id.* at 675 (citations omitted); *see also* *Moore v. Illinois*, 408 U.S. 786, 795 (1972) (stating that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case"); *Giles v. Maryland*, 386 U.S. 66, 117 (1967) (Harlan, J., dissenting) (stating that an interpretation of *Brady* to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice.").

138. *See Bagley*, 473 U.S. at 675 (stating that the *Brady* rule, by not requiring complete disclosure, preserves the adversarial system that is essential to discovering truth).

139. *See Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (stressing that although the materiality standard allows prosecutors some discretion, it also imposes on them the responsibility to gauge what evidence is material).

140. *See id.* *But see* Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 711-15 (2006) (arguing that the materiality standard is unworkable and easily circumvented by prosecutors).

141. *Kyles*, 514 U.S. at 439 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

142. *See Giles*, 386 U.S. at 100.

143. *United States v. Agurs*, 427 U.S. 97, 111 (1976).

144. *See, e.g., United States v. Bagley*, 473 U.S. 667, 692 (1995) (holding that prosecutor's lack of awareness of a contract between the Bureau of Alcohol Tobacco and Firearms and prosecution's two key witnesses was irrelevant to the determination of a due process violation). In *Giglio v. United States*, the Court found a due process violation because the government failed to disclose promises of leniency that had been made by a prior prosecutor to witnesses and of which the current prosecutor was unaware. 405 U.S. 150 (1972). When one spokesperson for the government makes a promise to a witness or third party, the courts will impute awareness of that promise to other government representatives. *See id.* at 154. According to the Court, whether the nondisclosure results from negligence or purposeful conduct, the prosecutor's office, as the spokesman for the government, is responsible. *Id.*

145. The Court's due process jurisprudence treats the government as a single entity if it can be considered the "arm" of the prosecution. *Kyles*, 514 U.S. 419. In *Kyles*, the

agencies and even some non-law enforcement agencies may be “arms” of the prosecution.<sup>146</sup>

This exclusivity requirement develops out of the non-disclosure cases and the interference cases. In *Brady*, a non-disclosure case, the prosecution had exclusive access to Boblit’s confession.<sup>147</sup> The defendant could not have discovered the confession prior to trial even through the exercise of reasonable diligence.<sup>148</sup> The prosecution’s sole custody of this material evidence triggered its duty to disclose it.<sup>149</sup> Similarly, in *Bagley*, the prosecutor failed to disclose that two of its key witnesses had testified in return for promises of reward.<sup>150</sup> Instead, the prosecutor provided evidence that the witnesses were not testifying pursuant to any “threats or rewards, or promises of reward.”<sup>151</sup> After his trial and conviction, Bagley filed a Freedom of Information Act request.<sup>152</sup> In response, he received contracts between the government and the two witnesses that demonstrated that the government had promised the witnesses payment and that the witnesses expected to receive compensation for their testimony in Bagley’s trial.<sup>153</sup> The defendant could not have obtained these contracts prior to trial, because the prosecution did not file them until after his conviction.<sup>154</sup> The court held that because the prosecutor had exclusive access to this material evidence,<sup>155</sup> he may have violated due process by failing to disclose it.<sup>156</sup>

---

prosecutor was responsible for information the police knew but did not disclose to him because he “ha[d] a duty to learn of any favorable evidence known to the others acting on the government’s behalf in this case, including the police.” *Id.* at 437. Similarly, in another case, a district court held the prosecutor responsible for an Immigration and Naturalization Service (INS) agent’s deportation of potential material witnesses. *United States v. Nebraska Beef, Ltd.*, 194 F. Supp. 2d 949 (D. Neb. 2002). The failure of the INS to become aware of favorable evidence constituted a due process violation because only the government had access to the witnesses prior to deportation. *Id.* at 950.

146. *See infra* notes 175, 236.

147. *Brady v. Maryland*, 373 U.S. 83, 84 (1963).

148. *Brady v. State*, 174 A.2d 167, 169 (Md. 1961). The confession was introduced at Boblit’s trial, which occurred after Brady’s trial. *Id.* Brady only learned of Boblit’s confession after his conviction and sentence of death. *Brady*, 373 U.S. at 84.

149. *See Brady*, 373 U.S. at 86–87.

150. *See United States v. Bagley*, 473 U.S. 667, 669–70 (1985). Prior to trial, the defense requested disclosure of any “deals, promises or inducements” made to the witnesses in exchange for their testimony. *Id.* at 670.

151. *Id.* The government provided defendants with signed affidavits to that effect. *Id.*

152. *Id.* at 671.

153. *See id.* at 671–73.

154. *See id.* at 672.

155. *See supra* notes 144–46 and accompanying text.

156. *See Bagley*, 473 U.S. at 678–84. For further discussion regarding materiality and due process violations relating to the withholding of evidence, see *Banks v. Dretke*, 540 U.S. 668 (2004) (holding that because suppression of evidence by the prosecution may have prejudiced the petitioner at trial, petitioner was not precluded from presenting a *Brady* violation at the federal level merely because he failed to do so in state court); *Kyles v. Whitley*, 514 U.S. 419 (1995) (holding that because it was reasonably probable that suppressed evidence would have affected the trial, the prosecutor’s withholding of that evidence constituted a *Brady* violation); *Boyde v. California*, 494 U.S. 370 (1990) (holding that no due process violation existed because it was not a reasonable likelihood that the jurors would misunderstand the jury instructions, as petitioner argued); *Moore v. Illinois*, 408 U.S. 786 (1978) (holding that the prosecution’s suppression of witness

The Court found exclusive access even though the assistant attorney general who prosecuted the respondent stipulated that he was unaware that the contracts existed and, thus, was unable to turn them over prior to trial.<sup>157</sup>

In interference cases such as *Valenzuela-Bernal*, exclusivity again triggers the prosecutor's duty to provide defendants with access to evidence. When the potential witnesses are foreign nationals, exclusivity attaches because the government can deport them before providing defendants with the opportunity for an interview. In *United States v. Mendez-Rodriguez*,<sup>158</sup> for example, the defendant was charged with crimes related to smuggling Mexican citizens into the United States.<sup>159</sup> The undocumented Mexican citizens were held in government custody,<sup>160</sup> but the government deported them before Mendez-Rodriguez was even aware that they had been in custody.<sup>161</sup> Mendez-Rodriguez moved to dismiss the indictment,<sup>162</sup> arguing that the government violates due process when it places potential witnesses beyond the reach of the court's subpoena power.<sup>163</sup> The Court agreed.<sup>164</sup> The government's sole control over the potential witnesses triggered its duty to provide defense access to these individuals.<sup>165</sup>

Similarly, in *United States v. Hernandez*,<sup>166</sup> an alien witnessed a fight between the defendant and a border patrol agent.<sup>167</sup> The government knew that the witness likely possessed information favorable to the defendant,<sup>168</sup> yet proceeded to deport the witness.<sup>169</sup> The court held that the government violated due process because it had sole access to this potentially favorable defense witness, but deported her without giving any notice to the defendant, thereby depriving him of the opportunity to interview her.<sup>170</sup>

Generally, prosecutors do not have exclusive access to evidence as long as defendants can obtain the evidence through the exercise of reasonable diligence.<sup>171</sup> The exclusivity requirement thus preserves the adver-

---

statement misidentifying defendant was not a violation of the *Brady* rule); *Giglio v. United States*, 405 U.S. 150 (1972) (holding that the prosecutor's failure to disclose that he had promised witnesses that they would not be prosecuted if they testified would violate due process if it would have affected the jury with any reasonable likelihood).

157. *Bagley*, 473 U.S. at 672 n.4.

158. 450 F.2d 1 (9th Cir. 1971).

159. *Id.* at 1.

160. *Id.* at 3.

161. *Id.* at 2.

162. *Id.* at 3.

163. *Id.* at 5.

164. *Id.*

165. The Court held that the fundamental fairness required by due process mandated that the prosecution not frustrate a defendant's ability to prepare for trial. *Id.*

166. 347 F. Supp. 2d 375 (S.D. Tex. 2004).

167. *Id.* at 384.

168. *Id.*

169. *Id.* at 386.

170. *Id.*

171. For examples of failures to exercise reasonable diligence in non-disclosure cases, see *United States v. Perez*, 473 F.3d 1147, 1150 (11th Cir. 2006) (no *Brady* violation

serial system by requiring each party to conduct its own fact-finding.<sup>172</sup> The prosecution must provide access only when defendants cannot obtain material evidence through the exercise of reasonable diligence, because the prosecution's access in such cases is truly exclusive.<sup>173</sup> In contrast, when both parties have access to the same evidence, each can appropriately maintain its adversarial posture, choosing not to aid the other.<sup>174</sup>

### 3. The Special Bad Faith Requirement

The underlying purpose for protecting access to evidence is not to punish prosecutorial "misdeeds"<sup>175</sup> but to ensure that trials are fair and

---

when defendant could obtain evidence through exercise of reasonable diligence); *United States v. O'Hara*, 301 F.3d 563 (7th Cir. 2002) (no *Brady* violation if evidence is otherwise available to the defendant through the exercise of reasonable diligence); *Kutzner v. Cockrell*, 303 F.3d 333 (5th Cir. 2002) (no *Brady* violation when defendant could obtain evidence through exercise of reasonable diligence); *United States v. Zackson*, 6 F.3d 911, 918 (2d Cir. 1993) ("Evidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.") (citing *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982)); *United States v. Todd*, 920 F.2d 399, 405 (6th Cir. 1990) (no *Brady* violation when "defendant was aware of the essential facts that would enable him to take advantage of the exculpatory evidence."); *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) (When "a defendant has enough information to be able to ascertain the supposed *Brady* material on his own, there is no suppression by the government.") (citations omitted); *United States v. Hicks*, 848 F.2d 1, 4 (1st Cir. 1988) (no *Brady* violation because defense had access to the evidence); *DeBerry v. Wolff*, 513 F.2d 1336, 1341 (8th Cir. 1975) (no *Brady* violation if evidence is otherwise available to the defendant through the exercise of reasonable diligence); *United States v. Ringwalt*, 213 F. Supp. 2d 499, 517 (E.D. Pa. 2002) (prosecution did not suppress evidence when the defense already knew of the existence of the evidence). In most of these disclosure cases, the defendant, however, had no knowledge of the existence of the exculpatory evidence and, thus, no way of attempting to obtain it. See, e.g., *United States v. Agurs*, 427 U.S. 97, 106 (1976) ("In many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel."); *Hernandez*, 347 F. Supp. 2d at 386. For examples in the interference cases, see *United States v. Favela-Favela*, 41 Fed. App'x 185, 194 (10th Cir. 2002) (defendant waived his right of access by declining to interview potential witnesses prior to deportation); *United States v. Avila-Dominguez*, 610 F.2d 1266, 1269 (5th Cir. 1980) (defendant could have sought a postponement of deportation if he determined that he had insufficient time to interview deportable witnesses); *United States v. Lujan-Castro*, 602 F.2d 877, 878 (9th Cir. 1979) (defendant waived his right to retain deportable witnesses in the country).

172. *United States v. Bagley*, 473 U.S. 667, 675 (1985) (duty to provide access "is not [meant] to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.").

173. Only some courts require that the defendant exercise reasonable diligence. See *supra* note 171.

174. Prosecutors "are under no duty to report *sua sponte* to the defendant all that they learn about the case and about their witnesses." *Agurs*, 427 U.S. at 109 (citing *In re Imbler*, 60 Cal. 2d 554, 569 (1963)).

175. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); see also *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.") (citing RESTATEMENT (SECOND) OF AGENCY § 272 (1958); AM. BAR ASS'N, *supra* note 63, § 11-2.1(d)). "To the extent this places a burden on the large prosecution offices, procedures and regulations can be



legitimate.<sup>176</sup> This distinction is important because the good or bad faith of the prosecutor is usually irrelevant to the fairness of the trial.<sup>177</sup> Whether acting in good or bad faith, the prosecutor's failure to provide access deprives the jury of evidence that could affect its verdict,<sup>178</sup> resulting in "a corruption of the truth-seeking function of the trial process."<sup>179</sup>

Nonetheless, there are rare instances when the prosecutor's motive may be important. Motive may matter in cases where the government is faced with conflicting sovereign obligations, such as when the government is acting in its sovereign capacity to "take care that the laws be faithfully executed"<sup>180</sup> by prosecuting criminals and is also performing another sovereign function, such as regulating immigration. When the government faces conflicting duties, its conduct should not be "judged by standards which might be appropriate if the Government's only responsibility were to prosecute criminal offenses."<sup>181</sup>

*Valenzuela-Bernal*, in which the government juggled two sovereign roles, provides an example of this conflict.<sup>182</sup> On the one hand, the government had to faithfully carry out the laws by investigating and prosecuting criminals.<sup>183</sup> This role required the government to provide defendants with access to material evidence.<sup>184</sup> On the other hand, the government also had to regulate immigration by promptly deporting illegal aliens.<sup>185</sup> When the government must satisfy two sovereign obligations that may be

---

established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Id.* at 154 (citations omitted).

176. As the *Brady* Court so eloquently wrote: "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. 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." 373 U.S. at 87; see also *Agurs*, 427 U.S. at 107 ("We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution.").

177. The Court affirmed this principle in *Agurs*, in which the Court wrote, "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." 427 U.S. at 110. The *Agurs* Court noted that a prosecutor is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Id.* at 111 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

178. *Id.* at 110.

179. *Id.* at 104. In *Napue v. Illinois*, the prosecution failed to correct testimony it knew to be false. 360 U.S. 264, 265 (1959). This action violated due process because the result was a "tainted conviction." *Id.* at 269. The prosecutor's failure to act deprived the jury of the ability to evaluate all of the facts, not just the version that the prosecution presented. See *id.* at 270. The good or bad faith of the prosecutor "matter[ed] little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." *Id.*

180. U.S. CONST. art. II, § 3.

181. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 866 (1982).

182. See *id.* at 864.

183. See *id.* at 863.

184. See *id.* at 867.

185. *Id.* at 864. The Constitution delegates the regulation of immigration to Congress. *Id.*

in conflict,<sup>186</sup> its motive for interfering with defendants' access to evidence may be relevant.<sup>187</sup> In sum, when the government is acting solely in the role of advocate, its good or bad faith in failing to disclose material evidence is irrelevant, but when it must balance potentially conflicting sovereign obligations, the defendant may be required to demonstrate that the government's interference with his or her access to material evidence was done in bad faith.<sup>188</sup>

#### 4. Guiding Principles

The U.S. Supreme Court's "access to evidence" jurisprudence demonstrates how the domestic compulsory process model balances important

---

186. See *id.* The dissent disagreed with the majority's characterization of these demands as in conflict. *Id.* at 880 (Brennan, J., dissenting).

187. In *Valenzuela-Bernal*, the Court stated:

[T]he responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. The mere fact that the Government deports such witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense.

*Id.* at 872-73; see also *Arizona v. Youngblood*, 488 U.S. 51 (1988); *California v. Trombetta*, 467 U.S. 479 (1984). Some lower courts have interpreted this language to mean that defendants must demonstrate bad faith. See, e.g., *United States v. Smith*, 136 Fed. App'x. 55 (9th Cir. 2005) (defendant failed to show either bad faith or materiality); *United States v. Chaparro-Alcantara*, 226 F.3d 616 (7th Cir. 2000) (government did not act in bad faith); *United States v. Nebraska Beef, Ltd.*, 194 F. Supp. 2d 949, 957 (D. Neb. 2002) ("While not explicitly required by *Valenzuela-Bernal*, some circuits have required that defendants also prove that the government's removal action was a result of 'bad faith.'").

Examples of bad faith that produce a due process violation include the government's deportation of potential witnesses that either departs from normal procedure or that is done to gain an unfair tactical advantage. *United States v. Pena-Gutierrez*, 222 F.3d 1080, 1085 (9th Cir. 2000); see also *United States v. Smith*, 136 Fed. App'x. 55, 58 (9th Cir. 2005); *United States v. Ramirez-Cubillas*, 223 F. Supp. 2d 1049, 1057 (D. Neb. 2002). This type of action implicitly demonstrates some awareness of the favorable nature of the testimony.

188. See *Youngblood*, 488 U.S. 51. Commentators have critiqued this "bad faith" standard, arguing that it creates an insurmountable barrier for defendants attempting to establish a due process violation. See, e.g., Elizabeth A. Bawden, *Here Today, Gone Tomorrow—Three Common Mistakes Courts Make When Police Lose or Destroy Evidence with Apparent Exculpatory Value*, 48 CLEV. ST. L. REV. 335, 349 (2000); Keith A. Findley, *New Laws Reflect the Power and Potential of DNA*, 75 WIS. LAW., May 2002, at 20, 20; Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1246 (2005); Matthew H. Lembke, *The Role of Police Culpability in Leon and Youngblood*, 76 VA. L. REV. 1213, 1237-41 (1990); Lucy S. McGough, *Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interviews of Child Victims*, 65 LAW & CONTEMP. PROBS. 179, 197-99 (2002). Some state courts have rejected the Supreme Court's bad faith requirement. Lembke, *supra*, at 1241; see also Daniel R. Dinger, *Should Lost Evidence Mean a Lost Chance to Prosecute?: State Rejections of the United States Supreme Court Decision in Arizona v. Youngblood*, 27 AM. J. CRIM. L. 329, 353 (2000) (describing Tennessee's reasoning for its rejection of the bad faith test).

crime control and due process norms by creating a prosecutorial duty to provide defendants with access to material evidence over which prosecutors have exclusive power, custody, or control. The materiality and exclusivity requirements demonstrate the Court's attempt to appropriately balance the prosecutor's quasi-judicial and adversarial roles in domestic cases.

### III. The Proposed Transnational Framework

#### A. The Problem

Defendants are unable to compel retrieval of evidence from foreign jurisdictions using MLATs.<sup>189</sup> As a result, accused individuals needing foreign evidence are at the mercy of prosecutors.<sup>190</sup> Although prosecutors could request defense evidence from foreign locales, they do not feel compelled to do so.<sup>191</sup> Instead, they assert that they can decide on a case-by-case basis whether to do so voluntarily,<sup>192</sup> even in the face of a court order. It is their position that a "court . . . lack[s] the power or authority to compel the Government to make a request for the benefit of the defense over the objection of the prosecution."<sup>193</sup> Ultimately, the government's position is

---

189. See *supra* Part I.

190. *Id.* Defendants' access to material evidence should not be held hostage by the good graces of the prosecution. Prosecutors are not immune from the pressures of trial and the desire to win that comes along with it. After all, prosecutors are advocates. In hotly contested cases, for example, it is more likely that the prosecution will determine that a defense request for evidence is without merit. In some cases, prosecutors have hidden physical evidence and buried statements inconsistent with their theory of guilt. See Ferguson-Gilbert, *supra* note 64, at 299. In one case, for example, the prosecution failed to disclose a statement from an eyewitness (the victim's brother) saying that the killers were white, when the prosecution was prosecuting a black man for the crime. *Id.* at 297. If some prosecutors will go this far in their zeal to win, there can be no question that other prosecutors will decide not to use an MLAT on behalf of a defendant in order to place themselves at an advantage during the trial. It is in hotly contested cases, where the defense's ability to rebut the prosecution's case with its own evidence could make the difference between conviction and acquittal, that the prosecution will most likely refuse to voluntarily utilize an MLAT on behalf of the defense. For example, defendants can not rely upon prosecutors to disclose material exculpatory evidence of their own volition, see, e.g., Brady v. Maryland, 373 U.S. 83 (1963), or to disclose witness perjury, see, e.g., Mooney v. Holohan, 294 U.S. 103 (1935).

191. CAYMAN ISLANDS REPORT, *supra* note 27, at 273. According to an executive official, "Nothing in the proposed treaties would preclude the Department of Justice from making MLAT requests on behalf of prosecutors who wish to pursue claims raised by the defense. . . . [I]t would not be accurate to describe this process as making a request on behalf of a criminal defendant." *Id.*

192. They have done just that. For example, in *United States v. Des Marteau*, 162 F.R.D. 364, 366-67 (M.D. Fla. 1995), the prosecutors expressed their willingness to use the MLAT with Canada to facilitate a deposition.

193. *Consular Conventions, Extradition Treaties, and Treaties Relating to Mutual Legal Assistance in Criminal Matters (MLAT): Hearing Before S. Foreign Relations Comm.*, 102d Cong. 40 (1992) (statement of Alan Kreczko, Deputy Legal Adviser, Department of State). In the face of a court order, the government will "evaluate such a prospective order, reserving its rights to oppose issuance or appeal issuance, and, if it lost such an appeal, to weigh the consequences of non-compliance." CAYMAN ISLANDS REPORT, *supra* note 27, at 273; see also ABBELL & RISTAU, *supra* note 15, at 28 n.13 ("The Department of

that

it is not "improper" for MLATs to provide assistance for prosecutors and investigators, not defense counsel, any more than it would be improper for the FBI to conduct investigations for prosecutors and not for defendants. The Government has the job of assembling evidence to prove guilt beyond a reasonable doubt, so it must have the tools to do so. The defense does not have the same job, and therefore does not require the same tools.<sup>194</sup>

The government's position reflects its misunderstanding of the prosecutor's constitutionally mandated dual role in criminal trials. Although the government must prove guilt beyond a reasonable doubt, it nonetheless has a corresponding duty to ensure that criminal processes operate fairly. When the government has exclusive access to and control over material evidence, its constitutional duty to ensure fairness requires it to provide defendants with access to such evidence.<sup>195</sup> Viewed in light of the Supreme Court's domestic compulsory process framework, the current adjudication of transnational criminal cases fails to adequately balance crime control and due process norms. The government's position, while consistent with its role as law enforcer, runs counter to its due process obligation to promote accuracy and fairness. Although the government views a request for defense evidence as being discretionary,<sup>196</sup> it is not.

The problem of unequal access to foreign evidence requires a solution if transnational criminal trials in the United States are to comport with due process standards of fairness and reliability. These requirements of due process are not simply aspirational; they are fundamental to maintaining public confidence and integrity in the criminal justice system.

This Part proposes a transnational compulsory process framework that builds upon the domestic process approach. Like the domestic approach, the proposed framework balances the crime control and due process norms. The framework accords "special significance"<sup>197</sup> to the gov-

---

Justice, however, has continued to maintain that the restrictive language in the more recent mutual assistance treaties in criminal matters gives it veto power over whether the United States will make a court-ordered treaty request on behalf of a defendant.").

194. AUSTRIA REPORT, *supra* note 33, at 10.

195. See *supra* Part II.B.

196. The government incorrectly views a request for defense evidence under an MLAT as being discretionary because it is on behalf of a defendant. Such a request is mandatory, however, not because it is on behalf of a defendant but rather because it is on behalf of the government. The prosecutor's duty as a representative of the sovereign requires him or her to obtain evidence that furthers the search for truth:

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Robert H. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940).

197. *United States v. Agurs*, 427 U.S. 97, 111 (1976).

ernment's duty to ensure fair trials by requiring prosecutors to obtain material defense evidence from foreign nations utilizing the MLAT. The proposed model will protect the adversarial system yet preserve the legitimacy of and public confidence in the outcomes of transnational criminal cases.

## B. The Framework

The following rules should govern situations in which defendants require foreign evidence:

*When the government has exclusive access to, custody of or control over material defense evidence, it must provide defendants with access to it. Evidence is material if there is a reasonable probability that it can affect the judgment of the trier of fact.*<sup>198</sup> A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.<sup>199</sup>

*Defendants must make a "plausible showing"<sup>200</sup> that the requested evidence is material before the government will be required to provide access. Defendants are not required to demonstrate bad faith.*

This framework balances important criminal process norms. First, vigorous prosecutorial advocacy is appropriate and desirable under the framework. The framework preserves this aspect of the crime control model by importing the materiality and exclusivity requirements from the domestic compulsory process framework. Second, the foreign evidence-gathering framework safeguards the legitimacy of the criminal process. Under it, existing MLATs remain intact, but their use will be expanded to allow both prosecutors and defendants to present material evidence to the fact-finder. By ensuring that parties are able to present all material evidence, the public can have confidence in the reliability of the system's outcomes.

## C. Application

Applying the framework to transnational criminal cases demonstrates that when prosecutors have exclusive access to material evidence that the defendant requests, they must utilize existing MLATs to obtain that evidence.

### 1. Materiality

First, defendants must make a plausible showing that the foreign evidence they require is material. Courts are very familiar with the materiality standard: evidence is material if there can be no confidence that the decisionmaker would reach a reliable verdict in the absence of the admissible evidence.<sup>201</sup> In making this determination, courts must evaluate the

---

198. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873-74 (1982).

199. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); see also *United States v. Bagley*, 473 U.S. 667, 682 (1985).

200. *Valenzuela-Bernal*, 458 U.S. at 867.

201. See *supra* Part II.B.1; see also *Strickland*, 466 U.S. at 694.

cumulative effect of the requested evidence.<sup>202</sup> Of course, a defendant may be unable to articulate precisely what information a requested document contains or exactly what a foreign witness will say if the defendant has neither seen the document nor interviewed the witness. Courts should take this into account when determining whether the defendant has made a plausible showing of materiality. It should be sufficient for the defendant to postulate the events to which the witness might testify and to demonstrate how those events relate to the crime charged.

There is precedent for this relaxed materiality standard. In *Valenzuela-Bernal*, the Court recognized that defendants may have difficulty making a "plausible showing of materiality"<sup>203</sup> without the opportunity to interview witnesses prior to their deportation.<sup>204</sup> The Court acknowledged that it would be impossible for a defendant "to make any avowal of *how* a witness may testify" when the government's conduct places evidence beyond the defendant's reach.<sup>205</sup> "[A] defendant cannot be expected to render a detailed description" of the "lost" evidence.<sup>206</sup> Instead, the defendant can demonstrate materiality by setting forth "the events to which a witness might testify, and the relevance of those events to the crime charged . . . ." <sup>207</sup>

## 2. *Exclusivity*

Second, upon finding materiality, the court must determine whether the defendant can obtain the evidence through the exercise of reasonable diligence without government aid. Defendants usually cannot obtain material foreign evidence through the exercise of reasonable diligence, because the only means available to them, the letters rogatory procedure, is simply too unreliable.<sup>208</sup> There is no guarantee that the procedure will result in the provision of evidence, that the evidence will arrive in time for the trial, or that it will be admissible.<sup>209</sup> Given the realities of the letters rogatory

---

202. See *supra* notes 117-120 and accompanying text.

203. 458 U.S. at 871.

204. *Id.* at 870.

205. *Id.* at 870-73.

206. *Id.* at 873.

207. *Id.* at 871; see also *United States v. Steele*, 685 F.2d 793 (3d Cir. 1982). In *Steele*, the defense argued that the trial court abused its discretion in allowing the government to take deposition testimony of witnesses located in Bermuda for use at trial because the government had not established materiality. *Steele*, 685 F.2d at 798. In finding that the required showing of materiality had been met, the Third Circuit wrote:

[U]nder the extremely unusual circumstances of this case it could not insist on the usual showing of materiality. In the ordinary case, where the witnesses reside in the United States, the witness who will be unavailable for trial will be available sometime prior to the deposition so that the parties will know with reasonable certainty the materiality of the proposed testimony. We believe that the district court appropriately accepted the reduced showing of materiality to avoid denying important evidence to all the parties, including the appellants, the court, and the jury.

*Id.* at 809.

208. See *supra* Part I.B.

209. See *supra* Part I.B.

process, courts should not require defendants to utilize that procedure in order to prove that they have exercised reasonable diligence. When defendants can obtain foreign evidence through the exercise of reasonable diligence, however, they must do so.<sup>210</sup> For example, if the defendant can access his own bank records from a foreign country, then he should not complain that the government did not request the evidence for him by way of an MLAT.

Third, the court must determine whether the prosecution has exclusive access to the requested evidence. This standard is met automatically whenever an MLAT exists, because only the government has the power to request evidence under the treaty, with which the foreign state must comply.<sup>211</sup> The only exception to this general rule is when the treaty explicitly prohibits provision of the type of information requested or when the defendant can obtain the evidence through the exercise of reasonable diligence.

### 3. *Bad Faith*

Finally, a defendant should not be required to demonstrate bad faith on the part of the government. In other words, defendants should not have to demonstrate that the government is at fault for their inability to access foreign evidence. An exception should be made only when the government faces conflicting sovereign obligations.<sup>212</sup> In the run-of-the-mill transnational criminal case, however, the government, by prosecuting alleged law-breakers, is simply "tak[ing] care" that the laws are "faithfully executed." In such cases, due process does not require defendants to demonstrate bad faith.<sup>213</sup>

Even if the framework requires a showing of bad faith, the defense can easily meet that standard. Federal prosecutors continue to play a central role in the negotiation of MLATs.<sup>214</sup> The government negotiated MLATs specifically because prosecutors could not otherwise reliably obtain foreign evidence.<sup>215</sup> At first, the government did not exclude defendants from operation of such treaties.<sup>216</sup> After a defendant successfully obtained foreign evidence utilizing an MLAT, however, the government negotiated language in the treaties preventing defense access.<sup>217</sup> This intentional

---

210. Thus, the prosecutors were partly correct when they testified that defendants "frequently ha[ve] far greater access to evidence abroad than does the Government, since it is [the defendants who] chose to utilize foreign institutions in the first place." AUSTRIA REPORT, *supra* note 33, at 10-11. This assertion only makes sense if one assumes that the defendant is guilty or if innocent, that the defendant did not destroy evidence of innocence that he or she may have had in his or her possession or control at one point. Otherwise, the defendant faces the same difficulties in gathering foreign evidence that propelled the government to negotiate MLATs for itself.

211. See *supra* Part I.C.

212. See *supra* Part II.B.3.

213. U.S. CONST. art. II, § 3.

214. See NADELMANN, *supra* note 3, at 324.

215. See *id.* at 321-24.

216. See *supra* notes 40-47 and accompanying text.

217. See NADELMANN, *supra* note 3, at 380-81.

creation of the disparity in access to process should be sufficient to demonstrate bad faith.

Defendants' exclusion from the benefits of MLATs appears calculated to give the government a tactical advantage at trial. First, the government has never asserted that any treaty partner required the exclusion. Instead, an executive official admitted that "there was no discussion of how our treaty partners would react to receiving MLAT requests by or on behalf of criminal defendants" among the negotiators.<sup>218</sup> Second, in testimony before the Senate during the advice and consent process, the government admitted that it intended MLATs to provide benefits solely for the government.<sup>219</sup> Third, drafters added the restrictive language to the treaty only after a defendant successfully requested evidence pursuant to an MLAT that did not contain the exclusionary language.<sup>220</sup> When the government takes action solely to gain a tactical advantage at trial, bad faith is presumed.<sup>221</sup>

#### 4. Foreign Policy Implications

MLATs are indispensable tools for gathering evidence in transnational adjudications. Hence, the goal of the proposed framework is to maintain their efficacy while simultaneously balancing due process and crime control norms. However, this framework will compromise crime control norms if foreign nations that are parties to MLATs with the United States do not respond favorably to requests by the U.S. central authority for evidence that is material to the defense. Courts will likely dismiss such a criminal case for lack of evidence, allowing a potentially guilty defendant to go free. Additionally, this situation would force the government to consider renegotiating all existing MLATs to explicitly protect compulsion parity, a daunting task with serious foreign policy implications. Thus, it is necessary to determine the likelihood that foreign nations will respond favorably to requests for material defense evidence. This requires a brief summary of the differences between common law and civil law criminal justice systems.

Although the United States is a common law jurisdiction, many nations that are signatories to MLATs with the United States are civil law jurisdictions.<sup>222</sup> Both systems are designed to determine the "truth" in

---

218. CAYMAN ISLANDS REPORT, *supra* note 27, at 274.

219. See *supra* note 51.

220. See NADELMANN, *supra* note 3, at 380-81.

221. See, e.g., *United States v. Smith*, 136 Fed. App'x. 55 (9th Cir. 2005); *United States v. Ramirez-Cubillas*, 223 F. Supp. 2d 1049 (D. Neb. 2002).

222. In 2003, countries following the civil law system represented 33.8% of the world's jurisdictions while those following the common law system represented 28.24%. Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L L. 1, 2-3 (2003). Countries with civil law systems include Spain, Portugal, Germany, Italy, Belgium, France, and the Netherlands, as well as Latin American countries and Scandinavian countries. Mary C. Daly, *Legal Ethics: Some Thoughts on the Differences in Criminal Trials in the Civil and Common Law Legal Systems*, 2 J. INST. STUDY LEGAL ETHICS 65 (1999); Felicity Nagorcka et al., *Stranded Between Partisanship and the Truth? A Compara-*



criminal cases, but they utilize different processes to do so. In common law systems, two opposing parties investigate the facts and argue their side of the controversy to a neutral fact-finder.<sup>223</sup> In this adversarial system, the truth is expected to emerge from this clash of opponents.<sup>224</sup> Although the systems in civil law countries are by no means homogeneous, there is generally little distinction between defense evidence and prosecution evidence. Scholars frequently refer to civil law systems as “non-adversary” or “inquisitorial” systems, because a disinterested official, either the judge or the prosecutor, conducts the investigation.<sup>225</sup> Although it may be difficult to believe that a prosecutor has no stake in the outcome, in civil law systems the prosecutor is a civil servant who is isolated from political pressures.<sup>226</sup>

[In the civil tradition, the prosecutor] is not seen as a party but rather as another official or magistrate of the state whose role is to determine the truth. There is a sort of division of labor between the prosecutor and the judge: the first requests the investigation of facts, production of evidence, and the application of the law, while the second investigates, produces the evidence, and applies the law. But both are essentially the same: impartial officials of the state whose role is to investigate the truth . . . . There is no private investigator for the defense because there is only one official investigation, conducted by the judge, the prosecutor, and the police. If the defense wants certain evidence to be produced, it must request this evidence from the prosecutor or the judge.<sup>227</sup>

Whether a civil law jurisdiction utilizes the investigating judge or a prosecutor to conduct the pre-trial investigation, their responsibilities are to investigate and discover all of the relevant facts, regardless of whether those facts indicate innocence or guilt.<sup>228</sup> The defendant can suggest lines of investigation, and these government officials cannot refuse without stating reasons.<sup>229</sup> The state places the investigation in the hands of impartial

---

*tive Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice*, 29 MELB. U. L. REV. 448, 455, 456 (2005). The European Union follows the civil law system. *Id.*

223. Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 20 (2004).

224. Nagorcka et al., *supra* note 222, at 462 (“The adversarial system trusts the parties to properly and honestly present their side of the argument, and expects that the truth will emerge from robust presentation of each side’s case.”).

225. See, e.g., Gregory A. McClelland, *A Non-Adversary Approach to International Criminal Tribunals*, 26 SUFFOLK TRANSNAT'L L. REV. 1, 11–14 (2002); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1331–33 (1999); see also Micah S. Myers, Note, *Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations*, 25 MICH. J. INT'L L. 211, 249 (2003).

226. Pizzi, *supra* note 225, at 1331–33. Some scholars question whether judges in the civil law system really exercise control over the investigation. See generally, Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977).

227. Langer, *supra* note 223, at 24.

228. See Nagorcka et al., *supra* note 222, at 455–56; Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 146 (1996).

229. Strier, *supra* note 228, at 143–44.

government officials who it expects to discover the facts objectively.<sup>230</sup> One commentator describes the investigatory process of the civil tradition as follows: "[T]here is only one pre-trial investigation, the official one; at trial, there is no case for the prosecution or the defense, only the case of the court. . . ."<sup>231</sup>

These differences between common law and civil law jurisdictions explain why most signatories to MLATs with the United States will not balk at responding to evidentiary requests for material defense evidence. It is unlikely that these countries will look askance at the request because in their own systems, the distinction between "defense" and "prosecution" evidence does not exist as it does in the United States. As long as the evidence that the U.S. central authority requests is relevant and material to the investigation, foreign nations are unlikely to object.

### 5. *Advantages and Disadvantages*

This transnational due process framework offers many advantages. First, and most importantly, existing MLATs remain viable tools for gathering foreign evidence.<sup>232</sup> Under the proposed framework, defendants can reap the benefits of transnational compulsory process to obtain and present material evidence to the fact-finder. Thus, the model enhances the fairness and reliability of transnational criminal trials, instilling public confidence in the outcome. The model also facilitates effective crime control because it does not interfere with prosecutors' use of the MLATs for their own purposes. Second, the proposed approach imports due process principles that are well established and already employed in domestic cases. The courts' and the parties' intimate familiarity with the ideas that the framework proposes will ease application.<sup>233</sup>

The major potential limitation of the proposed framework is its use of the materiality standard, which some commentators have soundly criticized.<sup>234</sup> Perhaps it is appropriate to question the wisdom of importing this problematic standard into transnational due process jurisprudence. Given the willingness of courts to continue using the materiality standard in domestic doctrine, however, it is unlikely that courts will adopt a different standard in the transnational context. If and when the domestic framework changes, then similar changes should be made concomitantly to the transnational approach.

Courts will also have to grapple with the question of how to respond if a foreign nation refuses to provide defense evidence in response to a government request. Should this occur, the court will have to determine

---

230. Nagorcka et al., *supra* note 222, at 455, 462.

231. Langer, *supra* note 223, at 23 (citations omitted).

232. The disparity in access to process also raises Sixth Amendment Compulsory Process Clause concerns. See generally Lyman, *supra* note 5.

233. See *id.* (discussing the importance of resource allocation).

234. See, e.g., Scott E. Sundby, *Essay: Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 McGEORGE L. REV. 643 (2002) (critiquing *Brady* and the materiality standard).

whether dismissal is the appropriate remedy. Dismissal may be appropriate because the government is arguably at fault for creating treaties that preclude defense access and should bear the corresponding burden. Holding the government responsible for the foreign nation's refusal to provide material defense evidence is consistent with the principles underlying the Court's "access to evidence" jurisprudence.<sup>235</sup> The government should not benefit from its actions that place defendants' due process rights in peril. Because the government is treated as a single entity,<sup>236</sup> it is consistent with the domestic due process doctrine to give the defendant the benefit of this contingency. It does not matter that the individual prosecutor was not directly responsible for negotiating the exclusionary language; the fact that government action placed the evidence beyond the court's subpoena power is sufficient.

Fortunately, this is an unlikely scenario. First, as discussed above, civil law jurisdictions are unlikely to object.<sup>237</sup> Second, the treaties create mandatory obligations amongst the signatories to provide evidence in response to a proper request by a central authority. As long as the central authority makes the request, nations can deny assistance only if the basis for the denial is explicitly set forth in the treaty. For example, the treaties allow nations to deny requests that appear to involve military or political offenses that the criminal laws of the requested state do not recognize.<sup>238</sup> No MLAT provides a basis for refusing a proper central authority request simply because the requested evidence is material defense evidence.<sup>239</sup>

---

235. See *supra* Part II.B.

236. The court's due process jurisprudence treats the government as a single entity when it acts as the "arm" of the prosecution. For example, in *Kyles v. Whitley*, the Court held the prosecutor responsible for information that the police knew but did not disclose to the prosecution. 514 U.S. 419, 437-38 (1995). The prosecutor had exclusive access to the information because he "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Id.* The government's duty to ensure fair trials requires it to become aware of any exculpatory evidence that is under the government's control, even if an individual prosecutor is not aware of it. See, e.g., *United States v. Bagley*, 473 U.S. 667 (1985) (prosecutor's lack of awareness of contract between the Bureau of Alcohol Tobacco and Firearms and two key witnesses irrelevant to the determination of a due process violation); *Giglio v. United States*, 405 U.S. 150 (1972) (violation of due process because of the government's failure to disclose promises of leniency that had been made by a prior prosecutor and of which the current prosecutor was unaware); *United States v. Nebraska Beef, Ltd.*, 194 F. Supp. 2d 949 (D. Neb. 2002) (finding prosecutor responsible for INS agent's deportation of potential material witnesses and determining that the INS's failure to become aware of favorable evidence constituted a due process violation because only the government had access to the witnesses prior to deportation).

237. See *supra* Part III.C.4.

238. See, e.g., Organization of American States, Inter-American Convention on Mutual Assistance in Criminal Matters art. 9, May 23, 1992, S. TREATY DOC. NO. 105-25 (1997), O.A.S. T.S. No. 75 (allowing signatories to refuse assistance if the request relates to a political crime or harms security interests); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 476 cmts. f-g (1987) (noting that states "extradite military personnel only for common crimes, not for purely military offenses" and that the political offense exclusion "is contained in virtually all extradition treaties").

239. See, e.g., Organization of American States, *supra* note 238, art. 2 ("This convention does not authorize any state party to undertake, in the territory of another state

None of the treaties differentiate between evidence that the prosecution requires and that which the defendant requires. In fact, the United States has acknowledged that it "would expect the foreign government to treat the request [for favorable defense evidence] like any other MLAT request made by the United States."<sup>240</sup>

## Conclusion

Courts should adopt the transnational process framework that this article proposes in order to resolve the imbalance between crime control and due process norms that currently exists in transnational adjudications.<sup>241</sup> The framework effectively balances the state's interest in crime control with society's interest in ensuring that criminal trials are legitimate—that they are fair and will lead to reliable outcomes. It requires prosecutors to ensure defense access to foreign evidence that is material to guilt or punishment when an MLAT exists. Although the government has argued that using MLAT treaties to request defense evidence would deter nations from entering into such MLAT treaties,<sup>242</sup> the government need not negotiate these treaties at all. If it chooses to do so, however, the treaty cannot violate the Constitution.<sup>243</sup> A treaty that does not comply with due process principles can not exist.

The proposal brings due process norms into the transnational criminal process in a manner that is familiar to the courts and the parties. It allows MLATs to remain in force, while discouraging the negotiation of future MLATs that exclude defense access.<sup>244</sup> In sum, the framework cre-

---

party, the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the authorities of that other party by domestic law."). Domestic law governs the decision to request information through an MLAT; therefore, once a state actor invokes an MLAT, the foreign nation may not refuse to comply simply because the defendant will benefit from the request.

240. CAYMAN ISLANDS REPORT, *supra* note 27, at 274. There have also been situations where the prosecution has volunteered to utilize the MLAT to obtain defense evidence and the foreign nation has not complained. For example, in one case the Office of International Affairs indicated that it would be appropriate to utilize the U.S.-Canadian MLAT to take testimony of defense witnesses abroad, despite the existence of language barring private parties' use of the treaty. *United States v. Des Marteau*, 162 F.R.D. 364, 372 n.5 (M.D. Fla. 1995).

241. For a discussion of why courts are the appropriate institution for resolving the disparity in access to process in transnational criminal cases, see L. Song Richardson, *Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem*, 26 BERKELEY J. INT'L L. 62 (2008).

242. See, e.g., AUSTRIA REPORT, *supra* note 33, at 10. Ironically, at the time the government made this statement, one of the treaties it referenced, the treaty with Austria, expressly provided foreign defendants with the ability to obtain evidence from the United States. *Id.* at 14 ("The Austrian delegation indicated that under its legal system, courts are required to seek evidence to assist defense counsel as well as prosecutors. The Austrian Central Authority therefore will make such requests to the United States under the Treaty.").

243. See *Reid v. Covert*, 354 U.S. 1 (1957).

244. In fact, applying this framework will likely result in the negotiation of MLATs which explicitly require foreign nations to respond to a government request for material defense evidence. Negotiating explicit language into future MLATs will provide the gov-

ates compulsory process rights in transnational cases that are consistent with domestic protections, producing a transnational system that more adequately protects fairness and accuracy.

---

ernment with certainty that foreign nations will not balk at receiving a request for evidence that a defendant needs.