

Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma

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*The good coin of discovery gains in value when it is fairly exchanged
at the appropriate procedural hours.†*

*No person . . . shall be compelled in any criminal case to be a witness
against himself . . . ‡*

WHEN ABLE MINDS CROSS swords over hard questions it is good for the growth of the law. This happened in *Jones v. Superior Court*.¹

On October 30, 1961, the day set for his trial on a charge of rape, Jones filed a motion for continuance and an affidavit alleging that he was and for a long time had been impotent. He claimed that he needed time to gather evidence including medical reports showing injuries suffered in 1953 and 1954 that had rendered him impotent. The motion was granted. Four days later the district attorney filed a motion for discovery, requesting Jones and his attorney to make available to the prosecution: (1) the names and addresses of all physicians subpoenaed to testify on behalf of Jones with respect to the injuries bearing on the claimed impotency; (2) the names and addresses of all physicians who had treated Jones prior to the trial; (3) all medical reports pertaining to his physical condition relating to the injuries and the claimed impotency; and (4) all X-rays of Jones taken immediately following the injuries.

The trial court over Jones's objection granted the discovery motion. The district court of appeal issued a writ of prohibition restraining its enforcement. Justice Traynor, writing for the California Supreme Court, in part upheld the discovery order, but limited its operative scope to "the names of the witnesses . . . [Jones] intends to call and any reports and X-rays he intends to introduce in evidence in support of his particular affirmative defense of impotence."² Justices Peters³ and Dooling⁴ dissented from the court's holding insofar as it upheld the specified discovery.

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† Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 248 (1964).

‡ U.S. CONST., amend. V; CAL. CONST. art I, § 13.

¹ 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962), discussed in Comment, 51 CALIF. L. REV. 135 (1963).

² 58 Cal. 2d at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882.

³ 58 Cal. 2d at 62, 372 P.2d at 922, 22 Cal. Rptr. at 882.

⁴ 58 Cal. 2d at 68, 372 P.2d at 926, 22 Cal. Rptr. at 886.

California had led all American jurisdictions, if not the Anglo-American world, in the development of criminal discovery for the defendant.⁵ As Chief Justice Traynor himself puts it: "There is . . . great variation in the local development of pretrial discovery in criminal cases. One can generalize, however, that many state courts follow discovery procedures akin to those in the federal courts, which are in the main restrictive. One can also generalize that though the trend is toward liberalizing discovery, few states have moved so far in this direction as California."⁶ The California movement had indeed been swift and far on behalf of the defendant. What would happen when the prosecution demanded its *quid pro quo*?⁷

One thing could have been predicted: The pen of Roger Traynor, which had done so much to develop criminal discovery for the defendant,⁸ would not shirk from its share when the hard question came. Another thing could have been guaranteed: However he emerged from his confrontation with one of the sharpest dilemmas of this legal age, his opinion would be finely spun and closely knit. It would bespeak a mind that can indulge a nagging skepticism about "established" things, and even reexamine "old friends"⁹ in good cheer and humor, because it has not lost its trust in reason. I think; therefore, I hope.

⁵ Louisell, *Criminal Discovery: Dilemma Real or Apparent?* 49 CALIF. L. REV. 56, 59, 74 (1961), reprinted in substance in LOUISELL, *MODERN CALIFORNIA DISCOVERY* ch. 13 (1963) [hereinafter referred to as *DILEMMA*]. Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921, 923 (1961).

⁶ Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 229 (1964); see also Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U.L. REV. 749 (1964).

⁷ Prior to *Jones* the only real discovery for the prosecution had been under the alibi statutes or those requiring an advance plea of insanity. *DILEMMA* at 61 n.13; Recent Developments, 15 STAN. L. REV. 700 n.4 (1963). It has been suggested that certain federal decisions, holding that FED. R. CRIM. P. 17(c), which provides for subpoenas *duces tecum* prior to trial, is available in a proper case to the government as well as to the defendant, constitute allowance of criminal discovery for the prosecution. Annot., 96 A.L.R.2d 1224, 1227 (1964). The cases cited are *United States v. Gross*, 24 F.R.D. 138 (S.D.N.Y. 1959); *United States v. Eli Lilly & Co.*, 24 F.R.D. 285 (D.N.J. 1959); *United States v. Woodner*, 28 F.R.D. 22 (S.D.N.Y. 1961). But see *DILEMMA* at 72: "Although as noted rule 17(c) on its face provides that the court may direct that subpoenaed items be produced prior to the trial, there is cogent authority that this was intended not at all for discovery purposes but only to facilitate the trial of complicated cases by obviating the delay that would ensue if many documents were presented for counsel's consideration at the trial for the first time. Even when construed to be a discovery measure, rule 17(c)'s operative scope has often been a very narrow one . . ."

⁸ For example, Justice Traynor wrote for the court in *People v. Riser*, 47 Cal. 2d 566, 305 P.2d 1 (1956); *People v. Carter*, 48 Cal. 2d 737, 312 P.2d 665 (1957); *People v. McShann*, 50 Cal. 2d 802, 330 P.2d 33 (1958); *Priestly v. Superior Court*, 50 Cal. 2d 812, 330 P.2d 39 (1958). I recall no case where the court ordered discovery for the defendant in which Chief Justice Traynor did not concur in the decision. See also his discovery articles cited in note 6 *supra*.

⁹ Cf. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 1 (1955).

Closely knit indeed is the Traynor opinion for the court in *Jones v. Superior Court*. First, we are reminded that discovery is designed to ascertain the truth, in criminal as well as civil cases.¹⁰ Next, that just as the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, absent some governmental requirement of confidentiality, the defendant has no valid interest in denying the prosecution access to comparable light, *absent* the privilege against self-incrimination or other privilege provided by law.¹¹ Since criminal discovery for the defendant is not the product of constitutional compulsion but of the court's orderly development of rules of procedure, it is legitimate and desirable to develop a two-way rather than just a one-way street.¹²

The principle against self-incrimination, however, is not absent; it is ever present, even more so today since *Malloy v. Hogan*¹³ "nationalized" it than when Justice Traynor wrote *Jones*. Traynor faced the problem squarely.¹⁴ He candidly admitted that the prosecution was seeking the benefit of Jones's knowledge of the existence of possible witnesses, reports, and X-rays for the purpose of preparing its case against him. How could this be reconciled with the rule that a defendant in a criminal case may not be compelled to testify, or to produce private documents in his possession? Unlike an ordinary witness, a defendant need make no showing that the answer or document sought may be incriminating; the very fact that the prosecution seeks it, establishes that in its view it may be incriminating. The heart of Justice Traynor's reconciliation is in these words:

The identity of the defense witnesses and the existence of any reports or X-rays the defense offers in evidence will necessarily be revealed at the trial. The witnesses will be subject to cross examination, and the reports and X-rays subject to study and challenge. Learning the identity of the defense witnesses and of such reports and X-rays in advance merely enables the prosecution to perform its function at the trial more effectively.¹⁵

¹⁰ 58 Cal. 2d at 58, 372 P.2d at 920, 22 Cal. Rptr. at 880.

¹¹ *Id.* at 59, 372 P.2d at 920, 22 Cal. Rptr. at 880.

¹² *Id.* at 59-60, 372 P.2d at 921, 22 Cal. Rptr. at 881.

¹³ 378 U.S. 1 (1964). See also *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964). These cases are discussed in Comment, 12 U.C.L.A.L. Rev. 561 (1965).

¹⁴ 58 Cal. 2d at 61, 372 P.2d at 921, 22 Cal. Rptr. at 881. Before doing so, however, he was careful to heed an important additional problem—that insofar as the prosecution sought reports made or to be made by physicians to whom Jones "was sent by his attorney for examination, as distinguished from advice and treatment," 58 Cal. 2d at 61, 372 P.2d at 921-22, 22 Cal. Rptr. at 881-82, it would violate the attorney-client privilege. Such reports would be communications from a client to his attorney through the physicians. This principle Justice Traynor had himself carefully delineated for the court in the well-known "Catton" case, *City & County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26, 25 A.L.R.2d 1418 (1951); see LOUISELL, *MODERN CALIFORNIA DISCOVERY* § 10.08 (1963).

¹⁵ 58 Cal. 2d at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882.

He invoked the analogy of the alibi statutes,¹⁶ pointing out that a number of states have laws permitting or requiring discovery in criminal cases of the identity of witnesses who are to be called to testify for a defendant in connection with an alibi defense. Although California has no such statute, its Penal Code does contain the somewhat analogous requirement of advance notice of the defense of insanity.¹⁷ Thus Justice Traynor came to his conclusion: "The prosecution . . . is entitled to discover the names of the witnesses [Jones] intends to call and any reports and X-rays he intends to introduce in evidence in support of his particular affirmative defense of impotence."¹⁸

The dissent of Justice Peters is direct, sharp and cogent. The guarantees against self-incrimination, he argues, are fundamental, unlimited and absolute; the accused has the right to stand mute, protected against even comment on his silence, until the prosecution has made out a *prima facie* case against him at the trial.

Until today, in California, a defendant could weigh his proposed defense against the prosecution's case, and not make up his mind until he heard the strength or weakness of the case against him whether he would rely on a straight not guilty defense or urge an "affirmative" defense. Now he must make that decision before the state's presentation. If the majority opinion were sound, it would mean logically that the prosecution could serve interrogatories upon defendant demanding to know whether or not he intends to rely on an "affirmative" defense, what it is, and what evidence he has to support it. I am not willing to see fundamental constitutional rights emasculated in this fashion.¹⁹

¹⁶ See DILEMMA at 61 n.13.

¹⁷ CAL. PEN. CODE § 1016. See Louisell and Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CALIF. L. REV. 805 (1961). So far the California legislature has rejected an alibi statute. Comment, 76 HARV. L. REV. 838, 841 (1963).

¹⁸ 58 Cal. 2d at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882. Cf. Peters, J., dissenting: "In fact, any defense other than to attempt to refute the prosecution's witnesses, is an 'affirmative' defense." 58 Cal. 2d at 66, 372 P.2d at 925, 22 Cal. Rptr. at 885.

I must admit regret of the necessity, if such it was, to invoke the concept "affirmative defense." It seems unfortunate to have in this area of the law a concept potentially as indefinite as "affirmative defense" often has been in civil cases. See LOUISELL & HAZARD, PLEADING AND PROCEDURE: STATE AND FEDERAL 247 (1962). The federal rule makers, after specifying for civil cases nineteen "affirmative defenses," felt it necessary to add "and any other matter constituting an avoidance or affirmative defense." FED. R. CIV. P. 8(c). In Recent Developments, 15 STAN. L. REV. 700, 706 (1963), a discussion of *Jones*, it is said: "An affirmative defense is usually defined as a defense which the defendant might offer even if the allegations against him are admitted. But Jones's evidence in regard to impotence rebuts the prosecutor's *prima facie* case."

¹⁹ 59 Cal. 2d at 66, 372 P.2d at 925, 22 Cal. Rptr. at 885. California, unlike the majority, permits comment by court and counsel on the defendant's failure to explain or deny. CAL. CONST. art I, § 13; CAL. PEN. CODE §§ 1093(6), 1323; *Adamson v. California*, 332 U.S. 46 (1947); WITKIN, CALIFORNIA EVIDENCE § 458 (1958); MCCORMICK, EVIDENCE 332 (1954). Is *Adamson* overruled by *Malloy v. Hogan*, 378 U.S. 1 (1964)? Many assume the

Yes, it is good for the law when judicial giants grapple with hard issues. The values of the adversary system do not end at the Bar.

What happened in *Jones* after the supreme court enforced, in part, the trial court's discovery order? On this the appellate books are silent. The district attorney, however, has written that after the discovery order: "[T]he matter was tried on the defendant's plea of not guilty, he was found guilty as charged, granted probation, part of the terms of which were a sentence in the county jail of six months, which he has of course served. We found the discovery order was useful to us, in that it helped us to be better prepared for the issues of the trial."²⁰

Perhaps the dilemma of *Criminal Discovery v. No Self-Incrimination* can be avoided, or at least evaded, by speaking in terms of a "preclusion" rather than a "discovery" order. Perhaps the order granted may be viewed as one to produce the specified items under threat that admission of those items would be precluded at the trial if not produced. But does such phraseology facilitate, or frustrate, analysis? Does it expose and dissect, or bury the problem?²¹ Justice Traynor took no refuge in such an escape hatch, nor shall this commentator. We must do better with this dilemma than relegate it to the hopeless category of which the classic illustration is: "What happens when an irresistible force meets an immovable object?" A child to whom I once posed that conundrum smartly replied, "The force makes a hole through the object." We want no mere holes.

It seems that if discovery orders for the prosecution ultimately survive fifth amendment assaults, candor will compel us to recognize that except as they are based upon waiver of the principle against self-incrimi-

answer is "Yes," reasoning that to make the fifth amendment's privilege against self-incrimination operable against the states, is also to make the federal rule against comment so operable. A possible escape from this conclusion would be that the federal no-comment rule is adequately based on 18 U.S.C. § 3481 (1958): "In trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him." (This conclusion is supported by Justice Traynor's opinion in *People v. Modesto*, 62 A.C. 452, 398 P.2d 753, 42 Cal. Rptr. 417 (1965), written after this article was submitted.)

²⁰ Letter From Harold A. Berliner, District Attorney, County of Nevada, to Professor Louisell, Jan. 7, 1965.

²¹ Cf. *Boyd v. United States*, 116 U.S. 616 (1886), holding that to make the non-production of private papers a confession of the allegations which the district attorney claims they will prove, is equivalent to a compulsory production of them. "It is our opinion . . . that a compulsory production of a man's private papers to establish a criminal charge against him . . . is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be. . . ." 116 U.S. at 622. See Recent Developments, 15 STAN. L. REV. 700, 702 (1963). *Quaere*, is the fact that papers would be procurable under a search warrant issued on a showing of probable cause enough to establish inapplicability of the fifth amendment and hence discoverability under a court order directed to defendant? See notes 27-29 *infra* and accompanying text.

nation,²² they constitute an additional qualification of that principle—at least as it is conceived of today in its furthest reaches by its most confident defenders. By “additional” I mean in addition to encroachments already established,²³ e.g., immunity statutes; laws requiring an automobile driver to stop and identify himself after an accident; statutes requiring the keeping of prescribed records; decisions allowing the dismissal of government employees who refuse to answer questions put during an investigation; allowance of comment in a number of jurisdictions, including California, on defendant’s invocation of the privilege; and statutes requiring an advance specification of defenses, such as the alibi laws and California’s requirement of notice of the insanity defense.

Why this ambivalence, this schizophrenia about the fifth amendment? If the principle against self-incrimination is so solid, valuable, and significant, why so many accepted encroachments? If the fifth amendment is such an old and good friend, why do we depart its company so readily? Is it primarily fear that so often severs our loyalty to this principle, as we stand relatively alone in liberty’s narrow beam amidst an enshrouding and enlarging darkness? Or is it the perhaps ultimate predicament of the human conscience—to be plagued simultaneously in life’s vital concerns by two competing, and maybe equally valid, principles?

There is, on the one hand, the supportive rationale for the rule against self-incrimination, the true justification—whatever it may be. I speak now not of its historic value; it has indeed been a good friend. I speak of present circumstances. We no longer have the rack and screw, at least not as officially acknowledged legitimate instruments. We have instead due process, elaborated notions against coerced confessions, careful articulation of and devotion to the requirement of proof beyond a reasonable doubt. Is not the real old friend—protection against brutality whether physical or psychological—now in the garb of fundamental fairness? Is it not an artifice to drape it also in the mantle of compelled abstention from the most rational inquiry available, questions to the suspect himself? To the innuendoes implicit in such queries as these, I long thought that the best answer lay in the realities of an accusatorial as opposed

²² See DILEMMA at 90; Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921, 927-28 (1961). The 1964 proposed amendments to FED. R. CRIM. P. would add the following as Rule 16(c): “Discovery by the Government. If the court grants relief sought by the defendant under this rule, it may condition its order by requiring that the defendant permit the government to inspect, copy or photograph statements, scientific or medical reports, books, paper, documents or tangible objects, which the defendant intends to introduce at the trial and which are within his possession, custody or control.” (Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, March 1964.)

²³ The authorities for the statements in this paragraph are collected in Comment, 51 CALIF. L. REV. 135, 136 nn.12-26 (1963). See also notes 16 & 17 *supra*.

to inquisitorial system: that for our adversary system, the principle against self-incrimination is the logical fulfillment and best expression of the state's obligation to prove guilt to the highest degree known in practical human affairs.²⁴ Indeed, *Malloy v. Hogan*²⁵ now explicitly affirms this rationale: "[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay."²⁶

Now, however, that rationale seems not to answer the question but only to push the problem a step further back. At this juncture of the dilemma I am grateful to my colleague Riesenfeld who years ago reminded us of the rule stated in Gratian's celebrated *DECRETUM*: "*Non tibi dico, ut te prodas in publicum, neque apud alios accuses.*" (I don't tell you to incriminate yourself publicly or to accuse yourself before others.)²⁷ But even this explanation only rephrases the question: There is still the haunting *why not?*

It now seems to me, and I have remained more uncertain about this principle's contemporary value than about any other problem in evidence or constitutional law, that the best justification is simply this: It is essentially and inherently cruel to make a man an instrument of his own condemnation. The human tragedy having evinced as much cruelty as it has, any nurtured sentiment against sadism is indeed a welcome brake on human passion, a valued friend, not lightly to be discarded for newer ones.

This justification, however, confronts the clear fact that the rule against self-incrimination is psychologically and morally unacceptable as a general governing principle in human relations. As Sidney Hook ex-

²⁴ See Ratner, *Consequences of Exercising the Privilege against Self-Incrimination*, 24 U. CHI. L. REV. 472, 484 (1957).

²⁵ 378 U.S. 1 (1964)

²⁶ *Id.* at 7.

²⁷ GRATIAN, *DECRETUM*, 2d Part, Causa 33, Qu. 3 (de poenitentia) c. 87, 1 CORPUS JURIS CANONICI col. 1184 (Friedberg ed. 1879), quoted in Riesenfeld, *Law-Making and Legislative Precedent in American Legal History*, 33 MINN. L. REV. 103, 118 (1949). I am not certain, however, that the words there quoted from Chrysostomus, *Homiliae in Epistolam ad Hebraeos*, 31, 3 printed in 63 MIGNE, *PATROLOGIAE GRAECAE* 213, 216 (1860), sustain the meaning attributed to them, i.e., support for the principle against self-incrimination. The words are: "Non tibi dico ut ea tamquam pompam in publicum proferas, neque ut apud alios te accuses." (I don't tell you to display [your sin] before the public like a decoration, nor to accuse yourself in front of others.) Perhaps Chrysostomus was only warning against public proclamations of sin in a spirit of evangelistic excess. In fact, the quoted words follow an unfavorable comparison of Cain's attitude, which in substance was invocation of the privilege against self-incrimination ("Am I my brother's keeper?") with Adam's candid acknowledgement of guilt and consequential embarrassment. ("I heard thy voice in paradise and I was afraid, because I was naked, and I hid myself.") Still, it must be remembered that both Cain and Adam were talking to God, not a human official.

Did the words of Chrysostomus gradually acquire the flavor of an anti-self-incrimination meaning as the Inquisition caused men to seek protective devices?

presses it: "Let any sensible person ask himself whether he would hire a secretary, nurse, or even a baby sitter for his children, if she refused to reply to a question bearing upon the proper execution of her duties with a response equivalent to the privilege against self-incrimination."²⁸ From the lawyer's viewpoint, this case has been argued about as incisively as possible by Professor McNaughton²⁹—there is little to add.

There, to me, they are—the opposing desiderata, the starkly contrasting values: (1) That man, at least when he acts officially as government, must curb the instinct to cruelty, even if to do so he must maintain an artificial barrier against rational inquiry; (2) that man, intellectually feeble at best, should use all available instruments to find the truth provided they not be pernicious, and certainly should not eschew the most efficient one, namely, orderly and fair inquiry of the most knowledgeable person concerned.

Why must men as government be less logical than men as men? Why, when the state is the actor, do we tip the scales in favor of values other than accuracy in fact ascertainment? Is it only because of the awesome power of the state, with its corresponding capacity for tyranny and cruelty?³⁰ Is it because of deep skepticism about the value of criminal law enforcement, even at its best, in relation to the human suffering it causes? Is it because so many of the criminal law's prohibitions, e.g., of gambling, are not rooted in anything like a substantially universal ethos, and involve no real victim to excite the passion for retribution?³¹ The individual cannot or at least will not afford to run the risk, which results from failure of proper inquiry and rational inference, of getting Sidney Hook's unsuitable secretary, nurse or baby sitter. American society, however, feels that it can, should, and will run that risk.

How much can society afford, how far down the road of obeisance does it will to travel? One way to focus inquiry is to ask whether the issue

²⁸ HOOK, COMMON SENSE AND THE FIFTH AMENDMENT 73 (1957).

²⁹ McNaughton, *The Privilege against Self-Incrimination, Its Constitutional Affection, Raison d'Etre and Miscellaneous Implications*, 51 J. CRIM. L., C. & P.S. 138 (1960). See also 8 WIGMORE, EVIDENCE § 2251 (McNaughton rev. 1961).

³⁰ But if this is the rationale, should we not begin to pay serious attention to practices of certain large-scale private employers who impose lie detector tests as conditions of employment? See Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694 (1961). California Labor Code § 432.2, enacted in 1963, prohibits private employers from requiring polygraph tests as a condition of employment or continued employment.

³¹ To a degree, this may essentially be restating the classic distinction between crimes *mala prohibita* and those *mala in se*. Or is our attitude toward invocation of the privilege more a function of what we consider to be our purposes in punishing, e.g., whether deterrence or retribution? Cf. Ehrenzweig, *A Psychoanalysis of the Insanity Plea—Clues to the Problem of Criminal Responsibility and Insanity in the Death Cell*, 73 YALE L.J. 425, 433 (1964). See note 35 *infra* and accompanying text.

separating Justices Traynor and Peters in *Jones* had to be framed in such comprehensive terms, as though their dispute embraced the whole privilege. Justice Peters charged that the majority opinion confused "the privilege of any witness not to give incriminating answers with the right of the accused not to take the stand in a criminal prosecution against him."³² It is elementary learning that the modern guarantee against self-incrimination embraces two discrete principles: that of *any person* not to answer questions that tend to incriminate, and that of a *defendant* to avoid all questioning by not taking the stand. A constituent of the former is the right not to submit under "testimonial compulsion"³³ documents or things that tend to incriminate. The real dispute between the Justices is limited to whether a *defendant's* documents and things are protected before trial against all judge-ordered production. Justice Peters answers "Yes," assimilating to the privilege against self-incrimination the defendant's historic posture of being under no compulsion to show his hand at all until the state's case in chief is rested. Chief Justice Traynor answers "Not always—not when the discovery order only advances the time of defendant's own presentation of the documents and things."³⁴

³² 58 Cal. 2d at 63, 372 P.2d at 923, 22 Cal. Rptr. at 883. To make the charge he borrowed language from Judge Goodrich in *United States v. Housing Foundation of America*, 176 F.2d 665, 666 (1949). See Recent Developments, 63 COLUM. L. REV. 361, 365 (1963).

³³ Under the Wigmorean and majority view, followed generally in California, see WITKIN, CALIFORNIA EVIDENCE § 454 (1958), the privilege protects only against conduct coerced by "testimonial compulsion," *i.e.*, oral testimony and production under judicial order of documents and things. Under this view many compelled uses of the body are not within the privilege, *e.g.*, fingerprinting, photographing, extraction of bodily fluids for testing, display of a scar or the fit of clothing, participation in police line-ups, and others. 8 WIGMORE, EVIDENCE § 2263 (3d. ed. 1940); MCCORMICK, EVIDENCE § 126 (1954). *Quaere*, how much longer will the "testimonial compulsion" test for applicability of the privilege remain viable? If a person under compelled narco-analysis makes incriminatory statements, are they merely "bodily manifestations" or "testimonial utterances"? See *Townsend v. Sain*, 372 U.S. 293, 307 (1963).

³⁴ Are the logical implications of the Traynor-Peters controversy more fully effectuated by the following imaginary dialogue: TRAYNOR: The court has not compelled self-incrimination; what the defendant is ordered to produce will, by his own protestations, exculpate. PETERS: But what if defendant has to reply to the order, "I don't have the documents." Does this not then tend to incriminate? Is the prosecution not then more advantageously situated tactically than it would have been without this datum? TRAYNOR: But if that has to be his answer, knowing it ahead of trial facilitates accurate fact-ascertainment. You wouldn't deny that if at the trial the prosecution is taken by surprise by unanticipated evidence, it might get a continuance to meet that evidence. We've only ordered defendant to produce now what he's already told us he will produce at trial. Thus we simply facilitate an orderly trial. PETERS: But suppose the defendant refuses to produce the specified items ahead of trial, but at the trial changes his mind and wants to introduce them. Isn't the defense then impermissibly handicapped by the pretrial order? The self-incrimination principle was never intended to promote accurate fact-ascertainment, but to keep the defendant from being a compelled instrument of his own doom. TRAYNOR:

However sharp the disagreement of the Justices as to the operative scope of the principle in respect of a *defendant's* documents and things, there is no necessary dispute between them as to its operation for *other persons*, for *non-defendants*. It is in this area that the fifth amendment's significance seems least affected by modern due process and related developments, and where it still has a vital role in the protection of freedom, as a barrier to the "drag-net" philosophy of law enforcement. We want no official issuing "show cause" orders forcing citizens to justify themselves or go to jail.³⁵ It would have been salutary for the giants to have proclaimed a consensus on this much.

Jones, however, is concerned only with the rights of a defendant. Within that limited category it is of narrow compass. It concerns only an order to a *defendant* to produce in advance of trial things he had announced his intention to produce at trial. Even so, it authorizes a discovery order for the prosecution.³⁶ The defendant's historic immunity

We have developed criminal discovery as an effective instrument for the defendant in finding out the truth, and we can do no less for the prosecution except as explicitly inhibited by the privilege against self-incrimination. PETERS: Helping the prosecution find the truth by forcing a defendant to show his hand is *per se* inhibited by the privilege. That is one meaning of the privilege.

³⁵ Indeed, with constantly multiplying governmental impingements on life's concerns, a result of increasing population and social complexities, is not this phase of the privilege arguably of correspondingly greater importance today and tomorrow than yesterday? Why is the wholesale traffic check apparently repellant to so many, including those who try to be law-abiding? Can any person as he approaches the surreptitiously erected police barricade not wonder—however sober, however meticulous in attention to the mechanical condition of his car, however punctual in his registration, tax-paying, and smog-control obligations and (in many places) the duty of regular submission of the vehicle to official inspection—whether *something* won't be found wrong about the car or him? Much of modern "criminality" is of this kind. Often the consequences for the individual of rectifying the situation after being caught are serious in time and energy expenditure if not otherwise. Little wonder, then, that observation of another's enmeshment in the criminal law's toils frequently inspires not law-enforcement instincts but rather—there but for the grace of God go I! The fifth amendment may not be the most logical check on Leviathan, but it is a check. See note 31 *supra* and accompanying text.

A proper conceptual separation of the self-incrimination rule's two discrete principles—that of a *defendant* to avoid all questioning, and that of *any person* to refuse to answer incriminating questions—is facilitated by remembering that the former's constitutional vitality was dormant until the middle 1800s because until then defendants were *incompetent* as witnesses. McCORMICK, EVIDENCE § 122 (1954).

³⁶ Limited though *Jones* be, inevitably it excites inquiry as to the possible next step. In his dissenting opinion, Justice Peters said: "If the majority opinion were sound, it would mean logically that the prosecution could serve interrogatories upon a defendant demanding to know whether or not he intends to rely on an 'affirmative' defense, what it is, and what evidence he has to support it." 58 Cal. 2d at 66, 372 P.2d at 925, 22 Cal. Rptr. at 885; see also Recent Developments, 15 STAN. L. REV. 700, 707 (1963). But see Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 247 (1964). In *People v. Lopez*, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963) (consolidated murder cases) one of defendants' contentions was that the trial court had erred in granting the People's discovery application. The trial court had ordered the defendants to produce, *inter alia*,

from the need to "show his hand" is something less since *Jones* than it was before. If such immunity is an inherent part of the privilege against self-incrimination,³⁷ there has been a new encroachment however small on the privilege. Do the gains for criminal discovery justify it?

When hard cases come, when the principle against self-incrimination confronts a countervailing cogent social need, is it not inevitable that the outcome will be at least partially influenced by the judge's basic appraisal of the contemporary value of the principle? I do not for a moment suggest that any conscientious judge, let alone Roger Traynor, would set at naught a clear constitutional mandate for the sake of his own notions of the public weal. But when it is a question of the reach of the mandate, can a judge fail to take into the balance his own strongly held convictions of a countervailing felt social need? For Roger Traynor,³⁸ as for many of us,³⁹ the need for development of criminal discovery is felt and real. A mind as rational as his could hardly avoid asking: Can criminal discovery prove viable without some reciprocity, some mutuality?⁴⁰ At root, therefore, the question for him seems to have been: Is not the viability of criminal discovery more important and valuable than avoidance of a relatively slight additional encroachment on the principle against self-incrimination?⁴¹ Even in answering "Yes" he was cautious. Witness his

(1) the names and addresses of persons defendants anticipated calling as alibi witnesses, (2) written statements or notes of statements by such witnesses, and (3) recordings, transcriptions of recordings and written statements or notes of statements of witnesses who had testified at the preliminary hearing. The supreme court overruled this contention because there was no showing that any information was actually furnished to the People under the discovery order. In affirming, the unanimous court, per Schauer, J. said: "This court has recently held that, within certain narrow limitations, the People have the right to discovery of defense evidence. . . . [*Jones* cited] Even if this were not the rule, however, defendants are in no position to complain It is manifest that the mere granting of the order did not deprive defendants of a fair trial." 60 Cal. 2d at 244, 384 P.2d at 28, 32 Cal. Rptr. at 436.

³⁷ Of course, if such immunity is not a part of the privilege against self-incrimination or any other constitutional guarantee, the principal hurdle to development of Chief Justice Traynor's "two-way" street is overcome. See *Jones v. Superior Court*, 58 Cal. 2d at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881. There still remains the question of the desirability of judicial as contrasted with legislative development. See dissenting opinion of Dooling, J., 58 Cal. 2d at 68, 372 P.2d at 926, 22 Cal. Rptr. at 886.

³⁸ See Traynor's articles on criminal discovery cited in note 6 *supra*; see also the cases cited in note 8 *supra*.

³⁹ See, e.g., *DILEMMA*; authorities cited in *DILEMMA* at 57 n.2; 59 n.9; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

⁴⁰ See *DILEMMA* at 87, 93-95, 97.

⁴¹ It has been argued that "Perhaps such a restriction upon the traditional privilege against self-incrimination [as that effected in *Jones*] can be justified if strong policy considerations militate for such a result. The court in [*Jones*], however, made no such showing; instead, it relied heavily upon the alibi statutes, which are of questionable analogic value." Recent Developments, 63 COLUM. L. REV. 361, 367 (1963). Compare Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964), where, after

limitation of permissible discovery to the items defendant was to introduce in evidence. That a mind of his rationality, and a libertarian of his proven commitment for a quarter of a century, could answer "Yes" bespeaks not only the importance of criminal discovery. It also seems to argue that, valued friend though the rule against self-incrimination historically has been, today there is something less necessary, less significant, less sacred about it as it concerns a *defendant* than about other prized constitutional guarantees, *e.g.*, that against unreasonable searches and seizures. For one who so concludes there is reason, in the inevitable process of balancing constitutional guarantees against encroaching claims,⁴² not to push the principle against self-incrimination to an extreme that would occasion no hesitancy were another guarantee involved.

Depending on his own value judgments, one may take issue with Chief Justice Traynor's underlying assumptions in the great case of *Criminal Discovery v. No Self-Incrimination*. If one accepts those assumptions, however, it is hard to fault his logic. Indeed, I find the latter task hard for all Traynor opinions, for even when I disagree,⁴³ or remain frankly skeptical,⁴⁴ it is difficult to say *why*.

stating the facts in *Jones*, the court's rationale and the grounds of dissent, the Chief Justice continues at 248:

One must keep in mind that in the event of a surprise defense, the prosecution in all likelihood would be granted a reasonable continuance to meet it. Certainly, such a continuance would not impair the privilege against self-incrimination or the due process requirements of a fair trial. Likewise, nothing is lost of the privilege, and much is gained in orderly procedure, if the defendant is required to give advance notice of the evidence he intends to offer in defense after he has himself received pretrial discovery of the prosecution's case. He can hardly demand pretrial discovery and still insist on reserving his own surprises for the trial. The good coin of discovery gains in value when it is fairly exchanged at the appropriate procedural hours. Neither the privilege against self-incrimination nor the due process requirements of a fair trial fix the time when the prosecution has presented its evidence at the trial as the only procedural hour at which the defendant can be required to make his decision whether to remain silent or to present his defense. Surely he can be required to make that decision before trial if he is given discovery of the prosecution's case before trial. A contrary decision in the *Jones* case would not only have compelled resort to continuances with their attendant delays, but would have foreclosed the development in criminal cases of pretrial conferences, which in civil cases have served to limit and refine issues and to facilitate the settlement of cases.

⁴² Compare Justice Black's denouncement of the balancing of the privilege as a "recently emphasized constitutional philosophy under which no constitutional right is safe from being 'balanced' out of existence," *Cohen v. Hurley*, 366 U.S. 117, 133 (1961) (dissenting opinion). But is not the modern privilege the result of the balancing process of generations? See note 23 *supra* and accompanying text; Comment, 51 CALIF. L. REV. 135, 136 (1963); see also Louisell, *The Man and the Mountain: Douglas on Religious Freedom*, 73 YALE L.J. 975, 994 n.90 (1964).

⁴³ *Loper v. Morrison*, 23 Cal. 2d 600, 145 P.2d 1 (1944) (Traynor, J., dissenting from the court's holding that whether a bill-collecting milkman, outside the boundaries of his route, was within the scope of employment, was a question for the jury).

⁴⁴ *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.*, 58 Cal. 2d 601, 375 P.2d 439, 25

When Roger Traynor first went to the bench in 1940, California was still an essentially agricultural, non-complex, leisurely society. For years I knew of him only from afar, as I knew of Mount Whitney, a distant landmark, a far away star. Now California is an industrial giant, the first state in the Union, complex and tense, burdened with all the problems of a globe hurtling to a Great Society—or obliteration. His terms as Justice and now as Chief Justice have spanned the transition. I am now privileged to enjoy his friendship, to gather with his old colleagues around the luncheon table as he dissects the hard problems. I have heard from them the tales whose telling is especially delightful when they can be hitched to eminence: of his uncontrollable enthusiasm at football games, his stature on mountain trails, the unflagging interest he sustained at the classroom's podium. I sense a rare combination of youth's zest with maturity's calm judgment, in a mind always asking, "What makes sense?" Little wonder that it is a mind incisive and courageous enough to be skeptical about even the values that underlie the now "nationalized" constitutional principle against self-incrimination.

As I reflect upon that rare combination of youth's zeal with maturity's restraint, I recall a scene which occurred some years ago when I was driving with my wife and family to New York. We came with unexpected suddenness upon Manhattan's startling skyline. Giving scope to the parental wont of uttering inspirational thoughts for the benefit of one's offspring, I dramatically exclaimed: "Give me men to match my mountains!" With equivalent dramatic intensity, but perhaps a nicer sense of relevancy, my then six-year old retorted: "Give me kids to match my cities!"

Perhaps he was not being as contradictory as he intended. Perhaps at root the problems of mountain and city, of yesterday and tomorrow

Cal. Rptr. 559 (1962) (collateral estoppel precludes a civil litigant [here, the plaintiff] from relitigating an issue previously found against him in a criminal prosecution). The doctrine is carried perhaps to its extremity in *Newman v. Larsen*, 225 A.C.A. 37, 36 Cal. Rptr. 883 (1964), where collateral estoppel precluded the defendant in a civil suit for assault from relitigating the issue of wantonness decided against him in the criminal prosecution. I continue to wonder whether legitimate tactical considerations in the defense of criminal cases may so radically differ from those for civil cases, as to preponderate over considerations of avoidance of a second litigation, grounded in the desire to conserve the courts' time. Thus a defendant in the criminal case may elect to take the stand only for a limited purpose with corresponding limitation of cross-examination, whereas in the civil case the same person may testify fully. Instead of invoking conservation of the court's time as a reason for precluding reexamination of an issue in a different context, maybe more judges should work harder—like Roger Traynor! But see Currie, *The Contributions of Roger Traynor—Civil Procedure: The Tempest Brews*, *supra* this Symposium at n.12. Compare the approach of the court in *Connecticut Fire Ins. Co. v. Ferrara*, 277 F.2d 388 (8th Cir. 1960), *cert. denied*, 364 U.S. 903 (1960) (prior criminal case should be appraised to ascertain, from a practical viewpoint, its significance for the civil case—the criminal judgment should not automatically and conclusively be accepted).

are really one. Perhaps for maturity as for youth the first need is still courage. In any event, as Exhibit A for that proposition, I summon the life and career of Roger Traynor.⁴⁵

⁴⁵ See Traynor, *Better Days in Court for a New Day's Problems*, 17 VAND. L. REV. 109, 123 (1963):

For all the great expansions of statutory law, indeed, in part because of it, a judge has key responsibility for the well-being of the law. If he tends it badly or merely passively, it can develop weaknesses or disorders or, worse still, frightening powers, no matter how well put together it is. If he tends it well it will thrive, even if it is of clumsy structure. So long as it thrives it gives both evidence and assurance of a society healthy enough to manage its anxieties and to resolve its conflicts in open and orderly ways.