

# Criminal Discovery: Dilemma Real or Apparent?

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## I

### HISTORY: THE DILEMMA STATED

FEW PROBLEMS of litigation today so intimately intermix practical, earthy considerations of feasibility and "common sense" with jurisprudential conundrums, as does that of discovery in criminal cases. Pity the trial judge faced, on the one hand, with the burgeoning acceptability of criminal discovery by his appellate masters, grounded in their realization that any rational system of settling disputes, whether or not adversary, must make available to the participants the underlying data; and on the other hand, with his own honest belief that to grant the discovery motion before him will facilitate all manner of evil conniving by the defendant member of a notorious criminal enterprise. How can the trial judge be rational, and at the same time, sensible? And how can the appellate courts—or legislatures, for that matter—establish guides flexible enough to take account of realities, without committing the matter to the trial judges' unfettered "discretion"—little more than a euphemistic slogan for leaving the trial bench wholly at large and therefore, potentially, wholly arbitrary?<sup>1</sup>

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<sup>1</sup> That the problem of criminal discovery is more than a local American one, was again recently demonstrated by a Japanese case, Supreme Court of Japan [1959] Shi No. 60. The Osaka district court had ordered the public prosecutor to let the defense attorney inspect all the evidence in the case in his possession, immediately after the court's interrogation to identify the accused at the first public trial session. The public prosecutor filed an objection to the order. This objection was overruled by the court, and the prosecutor took a special appeal to the Supreme Court of Japan. The latter set aside the order of the Osaka district court (3rd petty bench) assigning the following reasons (for the English translation of which I am indebted to Judge Shigeru Yamasaki of the Tokyo district court): "There is no provision of law which empowers the court to order the public prosecutor to allow the defense attorney the opportunity to inspect the whole or part of the documentary evidence or real evidence in the possession of the public prosecutor of which the court has no custody . . . regardless of whether or not the public prosecutor will use the evidence at the trial, or whether or not

It has been customary for writers on criminal discovery to state as their starting point that there was no such thing at common law.<sup>2</sup> The common law's abhorrence of criminal discovery has been variously ascribed, but the principal reasons can be summarized under three heads. First, there is the general one, reflecting attitude more than analysis, the uncritical assumption that to allow the defendant any right of discovery would subvert the whole system of criminal law. Nowadays this proceeds from the predicate that the defendant already is too much favored in our criminal procedure, and that to give him additionally the advantages of discovery would be to compound the imbalance. The most famous articulation of this idea is Judge Learned Hand's in *United States v. Garsson*:<sup>3</sup>

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

Secondly, it is urged that discovery in criminal cases would lead to intolerable perjury by defendants and tampering with documents and items of real evidence. Thus, in one of the most cited cases, *State v. Tune*, Chief Judge Vanderbilt said:<sup>4</sup>

it is competent; nor is there any provision of law which makes it the duty of the public prosecutor to allow the defense attorney such inspection as a matter of right." For a brief comment on the problem of criminal discovery in Europe, see Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221, 232 (1957).

<sup>2</sup> 6 WIGMORE, EVIDENCE § 1859g (3d ed. 1940); 2 WHARTON, CRIMINAL EVIDENCE § 671 (12th ed. 1955); Comment, *Pre-trial Inspection of Prosecution's Evidence By Defendant*, 53 DICK. L. REV. 301 (1949); Comment, *Pretrial Disclosure in Criminal Cases*, 60 YALE L.J. 626 (1951); Note, 38 MINN. L. REV. 397 (1954); Note, 32 ST. JOHN'S L. REV. 49 (1957); Note, *Criminal Discovery—the State of the Law*, 6 UTAH L. REV. 531 (1959); Note, *Discovery in Criminal Cases*, 13 FLA. L. REV. 242 (1960); Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 294 (1960).

<sup>3</sup> 291 Fed. 646, 649 (D.C.N.Y. 1923); cf. L. Hand, J., for the court in *United States v. Krulewitch*, 145 F.2d 76, 78 (2d Cir. 1944), upholding the right of defendant to inspection at trial: "It is one thing to say that an accused shall in advance of trial have inspection of statements of witnesses taken by the prosecution in preparation of its case; it is another to deny him the benefit of so much of such statements as is shown to be inconsistent with the witnesses' testimony on the stand, and would impeach him." See generally BORCHARD, CONVICTING THE INNOCENT (1932); FRANK & FRANK, NOT GUILTY (1957), critically reviewed in Sherry, Book Review, 35 U. DET. L.J. 650 (1958); HOUTS, FROM EVIDENCE TO PROOF (1956) (especially ch. 2, "Eyeball Witnesses").

<sup>4</sup> 13 N.J. 203, 210, 98 A.2d 881, 884 (1953), discussed in 38 MINN. L. REV. 397 (1954).

In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense, . . . . Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime . . . . All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings. The presence of perjury in criminal proceedings today is extensive despite the efforts of the courts to eradicate it and constitutes a very serious threat to the administration of criminal justice and thus to the welfare of the country as a whole. . . . To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice.

Thirdly, it is argued that criminal discovery is essentially inconsistent with the adversary system and unfair, in that any just system of discovery presupposes its equal availability to all adversaries, which is impossible with us because of the principle against self-incrimination. As put by the supreme court of Ohio in *State v. Rhoads*:<sup>5</sup>

Another argument advanced is that the prosecuting attorney represents the public of which Rhoads is one, and that he acts in a semijudicial capacity in discharging his duties, and that he should aid the defense when aid is needed. We agree that this officer should not endeavor to convict an innocent person, and he should not suppress or conceal evidence that might tend to acquit the prisoner. But that he should assist in the defense we deny. The state furnishes counsel to indigent prisoners and pays them. The trial, when the issue is joined, is not a friendly recitation, but a real trial. No morbid sentiment or sympathy for one charged with crime should overshadow the rights of the public. In these days criminals are both skilled and cunning, and it is a contest between the people and the criminals for the mastery. Neither the rules of courtesy, or supposed equitable considerations, should be allowed to subvert the practice sanctioned by long experience.

The state cannot compel the prisoner at the bar to submit his private papers or memoranda to the state for use or even examination, for he cannot be required to testify in the case, nor to furnish evidence against himself. Then, why should the accused be allowed to rummage through the private papers of the prosecuting attorney? Neither the sublime teachings of the Golden Rule to which we have been referred, nor the supposed sense of fair play, can be so perverted as to sanction the demands allowed in this case.

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<sup>5</sup> 81 Ohio St. 397, 424, 91 N.E. 186, 192 (1910).

But are the conventionally assigned reasons for the common law's antipathy to criminal discovery—the subversion of criminal law administration, the inducement to perjury, and the lack of mutuality of discovery—the *real* reasons in today's society? At an informal gathering of district attorneys, one is apt to hear the assertion that the prosecution's files *are* freely and voluntarily displayed to upright, ethical defendants' attorneys—those who can be trusted to eschew subornation of perjury and kindred tactics.<sup>6</sup> To what extent are the professed reasons for denying criminal discovery mere rationalizations of unarticulated reasons? Is discovery really often granted or withheld according to the type of case, defendant, or defendant's attorney before the court? Should it be? If so, to what extent and in what manner can such facts of life be taken into account in framing the formal rules?

That criminal discovery has made significant forward strides in the last decade, especially in California, is clear. Professor Fletcher recently has been able to state that “within the last three years alone, there have been five state appellate decisions recognizing or ordering discovery in a criminal case for the first time.”<sup>7</sup> The growth of criminal discovery in California during the past five years has been little short of phenomenal, when one considers that it has been the case by case work of the courts, unaided by statutory impetus analogous to California's acceptance in 1958 of the federal civil discovery rules.<sup>8</sup>

The books are replete with discussion of the historic struggle of criminal discovery for acceptance in the United States and descriptions of its present status, sometimes accompanied by discerning observations respecting its relation to the totality of criminal procedure.<sup>9</sup> There is little need

<sup>6</sup> An outsider—especially one like the author whose experience in criminal cases has been at the defendant's side of the table—may be pardoned a skeptical inquiry as to whether this is not done most typically in cases where it is believed that sharing the information will induce a plea of guilty. Probably many prosecutors will not in any case yield more than they must.

<sup>7</sup> Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN L. REV. 293, 297 (1960).

<sup>8</sup> CAL. CODE CIV. PROC. §§ 2016–35 adopted in 1957 and effective January 1, 1958 substantially enacts FED. R. CIV. P. 26–37. For a discussion of the California discovery law, with particular reference to the differences between it and the federal pattern, and illustrations of the integrated use of the various discovery devices, see Louisell, *Discovery Today*, 45 CALIF. L. REV. 486 (1957); LOUISELL & WILLIAMS, *TRIAL OF MEDICAL MALPRACTICE CASES* ch. X (1960). For a comprehensive discussion of all phases of discovery in civil cases, federal and state, see 4 MOORE, *FEDERAL PRACTICE* ¶¶ 26.23–26.25 (2d ed. 1950).

<sup>9</sup> See, in addition to the authorities cited in note 2 *supra*, Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1180 (1960); Justak, *The Inspection of State's Evidence by a Defendant in Advance of Trial*, 38 J. CRIM. L., C. & P. S. 249 (1947); Note, *The Scope of Criminal Discovery Against the Government*, 67 HARV. L. REV. 492 (1954); Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113 (1957); Comment, 70 HARV. L. REV. 1465 (1957); Comment, *Disclosure of Prior Statements of a Government Witness in Federal Criminal Prosecutions*, 106 U. PA. L. REV. 110 (1957); Hennings, *Equal Justice Under Law*,

to retill soil already plowed. The principal objective of this paper is to appraise some of the apparent dilemmas which have seemed to preclude a full-fledged acceptance of the philosophy of criminal discovery analogous to the acceptance of that of civil discovery. These dilemmas have given pause to action, the result being not only that the evolution of criminal discovery has been sporadic and uneven, but that it remains today, even in California, the state of its greatest growth, essentially an immature institution. Are the dilemmas true ones? Will criminal discovery remain the perpetual adolescent of the adversary system? Do the practical problems of administering criminal justice in the United States preclude a code of criminal discovery of the specificity of our rules of civil discovery? Does our guarantee against compulsory self-incrimination inevitably prevent full-fledged development of criminal discovery, so long as the fifth amendment and its state counterparts stand?

Before turning to considerations which underly such questions as these, an indication of the scope of the problem may help to refresh recollection and clear the way. Then follow brief summaries of the situations today in England and our federal jurisdiction. (A similar summary of state experience, on a nationwide basis, is omitted because of the ample recent coverage).<sup>10</sup> Next I examine in some detail the California developments, not only of immediate interest to many readers of this *Review*, but instructive for all as representing criminal discovery's most pronounced growth in the United States. Lastly, I undertake an analysis of the dilemma of criminal discovery.

## II

### SCOPE: THE DILEMMA IN CONTEXT

In the psychology of the American lawyer, "discovery" as a word of legal art seems to have acquired a meaning more restrictive than the dictionary's definition. Mention "discovery" and the lawyer thinks specifically of modern litigation's five formal disclosure techniques, now codified in

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46 GEO. L.J. 1, 13 (1957); Comment, *The Jencks Legislation: Problems in Prospect*, 67 YALE L.J. 674 (1958); Note, *Discovery of Grand Jury Transcripts Under the Federal Rules of Civil Procedure*, 43 VA. L. REV. 712 (1957); Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221, 312 (1957); Grady, *Discovery in Criminal Cases*, 1959 U. ILL. L.F. 827; Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166 (1958); cf. Berger and Krash, *Government Immunity from Discovery*, 59 YALE L.J. 1451 (1950).

<sup>10</sup> In *Cope v. Municipal Court*, Civil No. 19,346, District Court of Appeal, 1st App. Dist., Div. One, Calif., there was filed by the District Attorney of Contra Costa County, a brief dated Aug. 17, 1960 which probably contains the most comprehensive presentation extant today of state criminal discovery cases. An order, apparently unpublished, fixing the scope of discovery was entered on Nov. 21, 1960. For a recent discussion of state cases, see Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960).

the Federal Rules of Civil Procedure<sup>11</sup> and their state counterparts: oral and written depositions of parties and witnesses with or without subpoenas or subpoenas duces tecum; interrogatories to adverse parties; motions for inspection and copying; physical and mental examinations; and demands for admissions.<sup>12</sup> But a realistic appraisal, whether for criminal or civil litigation, of these formal discovery devices requires that they be viewed in the context of the total problem of fact ascertainment. In a word, discovery as an inclusive concept is the careful plodding through one's own files as well as the motion to inspect the adversary's; the old-fashioned pavement pounding of the lawyer-turned-sleuth in search of willing witnesses as well as the taking of the depositions of neutral or opposing ones; thorough, imaginative and patient interviewing of those eager to talk, as well as ferreting out admissions from those who would remain silent.

From such a perspective, one views criminal discovery as embracing, besides formal devices that go under that name, all available instruments of fact ascertainment. For the prosecution, these may include interrogation of the suspect before and after arrest with consequent confessions or admissions; conferences with witnesses, with written or otherwise recorded statements procured for the purpose of refreshing recollection or impeachment; blood, serum, urine, fingerprint, firearm, handwriting, hair, fiber, etc., procurement and study; real use of the defendant's body, *e.g.*, trying on garments or "voluntary" physical, mental and psychological examinations; use of secret informers; elaborate crime detection facilities equipped with all of modern science's accoutrements for chemical and other analyses; wiretapping; electronic devices for intrusion upon a suspect's living or bedroom conversations, or hushed whisper; the lie detector; legal requirements that defendant specify in advance certain kinds of defense, *e.g.*, alibi or insanity,<sup>13</sup> and that he name in advance proposed witnesses. Realis-

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<sup>11</sup> FED. R. CIV. P. 26-37.

<sup>12</sup> Practically viewed, the pretrial conference also may perform the function of a discovery device. See text at note 14 *infra*.

<sup>13</sup> CAL. PEN. CODE § 1016 requires a defendant who relies on the defense of insanity to plead "Not guilty by reason of insanity." Section 1016 goes on to provide: "A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged . . ." A number of other states have similar requirements, WEIHOFFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 357-59 (1954). The California Law Revision Commission has recommended that, upon demand by the prosecution, the defendant in a criminal action should be required to give notice of his intention to rely upon alibi testimony of witnesses other than himself. CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION AND STUDY RELATING TO NOTICE OF ALIBI IN CRIMINAL ACTIONS (1960). Fourteen states now have statutes providing that an accused who intends to rely upon alibi as a defense must give notice of his intention to the prosecution a specified number of days before trial, ARIZ. CRIM. PROC. RULES 192 (1956); IOWA CODE § 777.18 (1958); IND. ANN. STAT. §§ 9-1631-9-1633 (Burns 1956); KAN. GEN. STAT. ANN. § 62-1341 (1949); MICH. COMP. LAWS §§ 768.20, 768.21 (1948); MINN. STAT. ANN. § 630.14 (1947); N.J. RULES 3:5-9 (1953);

tically viewed, criminal discovery for defendants may include, in addition to the specified formal devices and some of the prosecution techniques mentioned above, transcripts of grand jury proceedings, preliminary hearings with opportunity of cross-examination of government witnesses transcripts sometimes being made available to defendants, the listing of witnesses on indictments, and bills of particulars.

A special word should be said about pretrial conference. Despite recent criticism of its use as an informal discovery device in civil cases,<sup>14</sup> there is no doubt that in reality it often serves that function; by its very nature it "offers the chance of bringing discovery measures to fruition."<sup>15</sup> To the extent that its use becomes feasible and desirable in criminal cases—by defendant's consent, through a waiver of rights against self-incrimination, or otherwise—presumably it would have something of its civil-case potential for discovery.<sup>16</sup>

Any rational attempt to compare the total discovery potential of the prosecution and the defense presupposes of course realistic regard, first, for the economic and social facts of life. For example, a particular witness may be theoretically available equally to both sides. Actually, the district attorney may have a number of trained investigators ready to seek him out and interview him, whereas the defendant may have no representative other than a busy assigned attorney, or none at all. On the other hand, the witness may be available to a criminal syndicate, but utterly uncooperative with the district attorney. Regard must be given, second, to the sanctions which limit the discovery potential of each side. Thus, confessions are limited by common-law and due process rules against coercion<sup>17</sup> and, in federal court, by the *McNabb-Mallory*<sup>18</sup> principle of prompt arraignment; wiretapping, by the Federal Communications Act;<sup>19</sup> some uses of scientific devices, by the *Rochin*<sup>20</sup> rule against brutality; certain uses of

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N.Y. CODE CRIM. PROC. § 295-1; OHIO REV. CODE ANN. § 2945.58 (Page 1954); OKLA. STAT. tit. 22, § 585 (1951); S.D. CODE § 34.2801 (1939); UTAH CODE ANN. § 77-22-17 (1953); VT. STAT. ANN. tit. 13, §§ 6561, 6562 (1958); WIS. STAT. § 955.07 (1957). See Dean, *Advance Specifications of Defense in Criminal Cases*, 20 A.B.A.J. 435 (1934).

<sup>14</sup> Chandler, *Discovery and Pre-trial Procedure in Federal Courts*, Minn. Bench & B., Dec. 1960, p. 38. The author, the Chief Judge, United States District Court for the Western District of Oklahoma, argues *inter alia* that discovery should be completed before the pretrial conference, and that the conference should not be used for discovery purposes.

<sup>15</sup> Louisell, *Discovery and Pre-trial Under the Minnesota Rules*, 36 MINN. L. REV. 633, 660 (1952).

<sup>16</sup> Kaufman, *Pre-trial in Criminal Cases*, 42 J. AM. JUD. Soc'y 160 (1959); cf. Fee, *Pre-trials in Criminal Cases*, 4 F.R.D. 338 (1946).

<sup>17</sup> Brown v. Mississippi, 297 U.S. 278 (1936); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Leyra v. Denno, 347 U.S. 556 (1954); McCORMICK, EVIDENCE § 117 (1954).

<sup>18</sup> McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957); see McCORMICK, EVIDENCE § 118 (1954) for an analysis of the rationale of these cases.

<sup>19</sup> 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

<sup>20</sup> Rochin v. California, 342 U.S. 165 (1952).

defendant himself, by the guarantee against compulsory self-incrimination; certain kinds of eavesdropping, by the guarantee against unreasonable searches plus the exclusionary rule;<sup>21</sup> the effectiveness of informers, by the requirement that their identity be revealed under certain circumstances.<sup>22</sup> On the other hand, defendant's discovery potential even where theoretically existent, may be circumscribed; *e.g.*, the preliminary hearing may meet legal requirements yet be scant to the point of worthlessness. Of course intelligent appraisal of limitations on discovery potential will take account not only of the nature, but of the extent, of these limitations. A coerced confession may be inadmissible, yet provide valuable leads to other admissible items.

Further, it should be remembered that the extension to criminal litigation of such formal discovery devices as pretrial depositions presumably would be accompanied by the built-in checks which characterize civil discovery and are regarded as essential in an adversary system. Chief is the principle of *Hickman v. Taylor*<sup>23</sup> against compulsory disclosure of the attorney's work product. Further, the government's claim of confidentiality for official secrets presumably would be as cogent in criminal discovery proceedings as in similar civil proceedings where the government is plaintiff.<sup>24</sup>

Lastly, while in this section we have been indulging the general assumption that "discovery" connotes only pretrial ascertainment of the facts, such an approach is itself something of an artificiality. Access to sources of information at the trial may be equally important to parties, or even of

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<sup>21</sup> *McDonald v. United States*, 335 U.S. 451 (1958); *cf.* *On Lee v. United States*, 343 U.S. 747 (1952).

<sup>22</sup> *Roviaro v. United States*, 353 U.S. 53 (1957).

<sup>23</sup> 329 U.S. 495 (1947), discussed in Louisell, *Discovery and Pre-trial Under the Minnesota Rules*, 36 MINN. L. REV. 633, 635 (1952). See McCORMICK, EVIDENCE § 100 (1954). It seems to me very important to maintain the clear distinction between confidentiality for client-attorney communications, and the attorney's "work product" doctrine, Louisell, *Discovery Today*, 45 CALIF. L. REV. 486, especially 488, n.18 (1957); *cf.* *Schmitt v. Emery*, 211 Minn. 547, 2 N.W.2d 413 (1942). Compare *Holm v. Superior Court*, 42 Cal. 2d 500, 267 P.2d 1025 (1954), *Carroll v. Superior Court*, 42 Cal. 2d 874, 267 P.2d 1037 (1954) and *New York Cas. Co. v. Superior Court*, 30 Cal. App. 2d 130, 85 P.2d 965 (1938) with *Union Oil Co. v. Superior Court*, 151 Cal. App. 2d 286, 311 P.2d 640 (1957). *Cf.* *Grand Lake Drive In, Inc. v. Superior Court*, 179 Cal. App. 2d 122, 3 Cal. Rptr. 621 (1960).

<sup>24</sup> See McCORMICK, EVIDENCE ch. 15 (1954) ("Privileges for Governmental Secrets"). Compare, *e.g.*, *Roviaro v. United States*, 353 U.S. 53 (1957) (disclosure of identity of informer required in narcotics prosecution), *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959) (secrecy of grand jury minutes upheld in antitrust prosecution), *Palermo v. United States*, 360 U.S. 343 (1959) (nondisclosure of government agent's summary of witness's interrogation upheld in prosecution for evasion of income taxes), with *United States v. Reynolds*, 345 U.S. 1 (1953) (nondisclosure of Air Force's accident investigation report upheld in suit against United States under the Torts Claims Act). For an excellent discussion of discovery against the Government in civil cases, see 4 MOORE, FEDERAL PRACTICE ¶ 26.25 (2d ed. 1950).



greater importance depending on the circumstances, as the famous *Jencks*<sup>25</sup> case and its progeny dramatically attest. In fact, sound analysis probably would be promoted by regarding discovery, both pretrial and at trial, as presenting phases of a single problem. It cannot be denied that the timing of the discovery attempt has significance respecting possible abuse. Thus, possibilities of facilitating perjury usually would be greater when discovery is before trial and ample opportunity is thereby afforded for concocting a defense. Nevertheless, the timing of the discovery attempt is often less significant than its objectives, penetration of the adversary's strategy and maximum disclosure of probative evidence. The idea that discovery before trial and at trial present essentially an integral problem is furthered by the fact that the California Supreme Court granted pretrial discovery in *Powell v. Superior Court*,<sup>26</sup> on the authority of *People v. Riser*,<sup>27</sup> an at-trial discovery case, quoting in *Powell* from *Riser*: "To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts."<sup>28</sup>

### III

#### ENGLAND: DILEMMA SUBMERGED<sup>29</sup>

If an American lawyer inquires of an English barrister about the present status of criminal discovery in England, the rejoinder likely will be: "What do you mean by discovery?" When the American replies with a reference to rules 26 through 37 of the Federal Rules of Civil Procedure, the Englishman is apt to say: "There is no discovery in English criminal practice." Yet in reality the English preliminary hearing-deposition procedure is the quintessence of discovery—indeed to many American defend-

<sup>25</sup> *Jencks v. United States*, 353 U.S. 657 (1957), discussed in *The Aftermath of the Jencks Case*, 11 STAN. L. REV. 297, 301 (1959); Note, 26 GEO. WASH. L. REV. 106 (1957); Note, 32 ST. JOHN'S L. REV. 49, 52 (1957); Hennings, *Equal Justice Under Law*, 46 GEO. L.J. 1, 13 (1957); Comment, *The Jencks Legislation: Problems in Prospect*, 67 YALE L.J. 674 (1958). See also *Palermo v. United States*, 360 U.S. 343, 346 (1959). A number of the decisions of the federal district courts, rendered after the *Jencks* case and before the so-called *Jencks* legislation, 18 U.S.C. § 3500 (1958), are collected in the statement of the Attorney General contained in H.R. REP. NO. 700, 85th Cong., 1st Sess. (1957) and in S. REFS. NOS. 569 and 981, 85th Cong., 1st Sess. (1957).

<sup>26</sup> 48 Cal. 2d 704, 312 P.2d 698 (1957).

<sup>27</sup> 47 Cal. 2d 566, 305 P.2d 1 (1956).

<sup>28</sup> 48 Cal. 2d at 707, 312 P.2d at 699, quoting from 47 Cal. 2d at 586.

<sup>29</sup> This section draws heavily upon the experience of Mr. Robert Burge, a former student at Boalt Hall, who under a grant of its International Legal Studies Committee spent approximately nine months in England studying criminal procedure. He had the advantage of having a seat in the chambers of a barrister with a criminal practice, and he did much to facilitate my research in England in July 1960.

ants' lawyers, including the federal criminal practitioner, the very ideal of discovery.

In England in every case where the defendant is prosecuted upon indictment,<sup>30</sup> with two minor exceptions, he is entitled by statute to a preliminary hearing.<sup>31</sup> At this hearing defendant is entitled to be present during the testimony of each witness, and to cross-examine each prosecution witness.<sup>32</sup> He may be represented by counsel.<sup>33</sup> The substance of the testimony of each witness is recorded in narrative form and after he has finished testifying, it is read to him. If he agrees that it represents the testimony he intended to give, he signs the paper and it becomes his deposition. Upon committal for trial the defendant is entitled to copies of these depositions upon payment of the prescribed fee.<sup>34</sup> Parenthetically, it may be noted that the defendant is also entitled at the preliminary hearing to put forth his defense if he wishes, but he rarely does so.<sup>35</sup> The process of recording the substance of each witness' testimony, then reading it to him to procure his signature, can be a laborious and tedious one,<sup>36</sup> but it produces full-fledged depositions.

The chief reason why the preliminary hearing, designed to determine whether the defendant should be made to stand trial and if so whether he should be retained in custody, in fact has become an effective discovery method for defendant, is that the prosecution puts forward at the preliminary hearing all the evidence which it then has that it intends to offer at the trial.<sup>37</sup> If any evidence is obtained by the prosecution subsequently

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<sup>30</sup> Although the grand jury is abolished in England, the accusation upon which most felonies and some misdemeanors are prosecuted is still called as "indictment." ARCHBOLD, CRIMINAL PLEADING, EVIDENCE & PRACTICE §§ 1-2 (34th ed. Butler & Garsia 1959); DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 121 (1958) (hereinafter cited as DEVLIN).

<sup>31</sup> Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 2, schedules 1-3. One exception is the case where the consent of the High Court is obtained to try a person upon indictment without a committal. The other is the situation where a judge, or other proper judicial official, determines that a person has committed perjury in the proceeding before him. He then is empowered to order that person tried for perjury without the necessity of a preliminary hearing. Perjury Act, 1911, 1 & 2 Geo. 5, c. 6, § 9. Both of these exceptions are relatively rare.

<sup>32</sup> Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55.

<sup>33</sup> Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 99, 10 HALSBURY, LAWS OF ENGLAND 359 (3d ed. 1955); R. v. Griffiths & Williams, 504 L.T.R. (n.s.) 280 (1886).

<sup>34</sup> Rule 13, Magistrates' Courts Rules, 1952. These rules were issued pursuant to specific statutory authorization of the Magistrates' Courts Act, 1952, § 122(f).

<sup>35</sup> DEVLIN 108.

<sup>36</sup> DEVLIN 111.

<sup>37</sup> DEVLIN 113. A preliminary hearing in a negligent homicide case in a Magistrates' Court in London in July 1960, witnessed by the author, well illustrated this. The accused was charged for the death of a passenger on the accused's motorcycle, which occurred when the cycle in passing a motor coach collided with an oncoming vehicle. Passengers on the motor coach, the investigating officers, the pathologist who performed the autopsy, and other witnesses testified in detail—as much detail as normally would be evoked on direct examination at a trial of a

to the preliminary hearing which is intended for use at the trial, it is made available to the defendant by means of a notice of additional evidence. The notice is substantially like a deposition, for it contains the name and address of the witness from whom the evidence will be obtained, together with the substance of the evidence which it is proposed to elicit from the witness at the trial.<sup>38</sup>

However effective the English preliminary hearing-deposition procedure is as a criminal discovery device—especially in relation to the near void of many American jurisdictions—it is a mistake to think of it as the panacea for all of defendant's legitimate discovery needs. After all, the English procedure is geared to make available to the defendant only admissible evidence which the prosecution intends to offer at the trial. There could be much information which the defendant might need for proper preparation of his defense which would not be disclosed to him by this machinery, either because it is withheld by the prosecution as not admissible, or because, although admissible, it is evidence which the prosecution does not intend to offer at the trial. More specifically:

(a) Sometimes the prosecution puts into evidence only part of the information given to it by the witness in his "proof," the written statement of evidence taken by the police from a prospective witness. It is obvious

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similar case in the United States—concerning all relevant aspects of the collision. The accused's counsel did not hesitate to cross-examine when he thought it profitable to do so, but offered no evidence on behalf of the accused. The hearing took approximately three hours. It would be difficult to imagine what evidence in addition to that offered at the preliminary hearing the prosecution would want for the trial, so completely was the story told by the numerous witnesses called at the hearing. The accused was committed for trial, but was not held in custody.

<sup>38</sup> The authority for the requirement that the prosecution put forth all its evidence either at the preliminary hearing or in notices of additional evidence is difficult to ascertain. It is not to be found in the Magistrates' Court Act, 1952, which is the statutory authority governing the preliminary hearing. In ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES § 1375 (34th ed. Butler & Garsia 1959) seven cases are cited on this subject. Only two of these, however, are cited for the proposition that this complete disclosure of intended evidence is mandatory. One of these is *R. v. Hawkins*, an unreported case in the Queen's Bench Division in 1896, which is not recorded in either *Halsbury's Laws of England* or the *English and Empire Digest*. It is also worthy of note that Justice Devlin ignored this case as precedent for the rule in the discussion of the matter in his book, *DEVLIN* 112-16. The other case is *R. v. Stiginani*, 10 Cox Crim. Cas. 552 (1867). The case was repudiated on this point, however, in the later case of *R. v. Greenslade*, 11 Cox Crim. Cas. 412 (1870). The other cases cited by Archbold are adequately discussed by Justice Devlin. Even a stranger's skepticism could conjure up no reason to doubt his position that, although there is no case which can be cited as direct authority that all evidence must be disclosed either at the preliminary hearing or by notices of additional evidence, it is difficult to imagine a prosecutor trying today to offer significant evidence which had not been disclosed to the accused. One trial was observed in which the prosecution offered evidence appearing neither in the depositions nor formal written notices of additional evidence, but the prosecutor said before introducing it that he had orally told the defense counsel of the intended evidence before the trial and that the defense counsel had agreed to its introduction. It did not appear to be crucial to the main issues in the case.

that it might be helpful to defendant to know the full information given to the police by this witness. No cases have been found which have considered requests made before trial for such statements, but the cases which have considered such requests made during trial to get help for cross-examination indicate that there is no general right to such statements, although the requests have been granted in some instances.<sup>39</sup>

(b) The prosecution may take a "proof" from a prospective witness and subsequently decide not to use him as a witness at all. Again, it can readily be seen that the defendant might need to know the information this person gave to the prosecution, in order adequately to prepare his defense. The only case found dealing with this situation held that the prosecution was under no duty to give the defense the statement which such a person had given to the police, but was only under a duty to inform the defendant of the existence of this witness so that the defendant could call him if desired.<sup>40</sup>

(c) The preliminary hearing-deposition machinery will of course not make available to a defendant information supplied to the police about the crime by a confidential informer never intended to be a witness.<sup>41</sup>

Just as the most important function of modern English preliminary hearing procedure—criminal discovery for defendant—is the product not so much of parliamentary design as of an evolved tradition, it is also likely that to tradition should be attributed the great deal of informal discovery between prosecution and defense counsel that goes on in England today.<sup>42</sup>

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<sup>39</sup> ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES (34th ed. Butler & Garsia 1959, 5th Cum. Supp. May 26, 1960) contains a good collection of the cases. The three main cases are *R. v. Clarke*, [1930] 22 Crim. App. R. 58; *R. v. Hall*, [1958] 43 Crim. App. R. 29; *Baksh v. Queen*, [1958] A.C. 167.

<sup>40</sup> *R. v. Bryant & Dickson*, [1946] 31 Crim. App. R. 146. It should be added that, although the issue was not clearly drawn, it seems apparent that the ruling of the case applies to requests made during as well as before trial. *Quaere*, how does English practice adapt to this situation: At the outset of the trial the prosecutor plans not to use a certain witness even though the police had procured a "proof" from him. At some later stage of the trial it suddenly becomes important to use his testimony for impeachment purposes.

<sup>41</sup> See *Marks v. Beyfus*, [1890] 25 Q.B.D. 494.

<sup>42</sup> Unquestionably in England a great deal of informal discovery occurs between prosecution and defense counsel. And there is an indication in a pronouncement by the Lord Chancellor in a debate in the House of Lords that the prosecution should not withhold from the defense any document "relevant to the defense in criminal proceedings." 197 H.L. DEB. 741, 754 (1956); *Crime and Crown Privilege*, CRIM. L. REV. (Eng.) 10-18 (1959). However, in that same speech the Lord Chancellor specifically excluded from the above pronouncement statements by informers (and presumably their identities), which exception he said was made for "obvious" reasons. *Quaere*, as to how often today in England statements made to police, which are not intended to be used at the trial, are still withheld from the defense.

## IV

## THE FEDERAL JURISDICTION: DILEMMA RAMPANT

The practitioner knowledgeable in modern discovery in civil cases might assume, on the face of the Federal Rules of Criminal Procedure, that the following are pertinent to discovery in federal criminal cases: Rule 6(e), secrecy and disclosure of grand jury proceedings; Rule 7(f), bills of particulars; Rule 15, depositions; Rule 16, discovery and inspection; Rule 17(c), subpoenas duces tecum.<sup>43</sup>

Of these, rules 7(f) and 15 will be disposed of quickly here. Writing about three years before the Federal Rules of Criminal Procedure became effective in 1946, Judge Yankwich said: "The Bill of Particulars, which is supposed to supply additional information [to the indictment], is of little assistance, because it is granted very seldom and the higher courts have, as a rule, supported the trial courts in most instances where there has been a denial."<sup>44</sup> The Advisory Committee intended rule 7(f) to be "substantially a restatement of existing law on bills of particular."<sup>45</sup> While in recent years a number of federal district courts have granted helpful bills of particulars to defendants,<sup>46</sup> it is hardly an exaggeration to say that the attitudes toward them are as multitudinous as the federal judges themselves. The one safe generality seems to be that the denial of particulars is seldom if ever a reversible error.<sup>47</sup> Rule 15 on depositions is not a discovery measure at all; its sole function is to enable defendants to obtain the testimony of witnesses unable to attend a trial or hearing. This leaves for our more detailed consideration rules 6(e), 16 and 17(c).

*A. Rule 6(e): Grand Jury Proceedings*

Rule 6(e), after stating that disclosure of matters occurring before the grand jury other than its deliberations and individuals' votes may be made to government attorneys, goes on to provide this rule of confidentiality:

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<sup>43</sup> On their face or in the nature of things, FED. R. CRIM. P. 7(f), 15 and 16 can operate only for a defendant, not for the Government. As to rule 15 on depositions, see Orfield, *Depositions in Federal Criminal Procedure*, 9 S.C.L.Q. 376 (1957). It should also be noted that under 18 U.S.C. § 3432 (1958) a person charged with treason or other capital offense is entitled, at least three days before commencement of trial, to a list of government witnesses with the places of their abode. In a certain sense, the provision in FED. R. CRIM. P. 28 for court-appointed experts has the potential of operating as a discovery device for the Government.

<sup>44</sup> Yankwich, *Concealment or Revelation?*, 3 F.R.D. 209, 210 (1944); see Ann. 5 A.L.R.2d 444 (1949).

<sup>45</sup> 4 BARRON, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 851 (Rules ed. 1951).

<sup>46</sup> 4 BARRON, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL, 1960 Pocket Part p. 50 *et seq.* (Wright) (Rules ed. 1951).

<sup>47</sup> Wong Tai v. United States, 273 U.S. 77, 82 (1927); Braden v. United States, 272 F.2d 653, 662 (5th Cir. 1959), *cert. granted*, 362 U.S. 960 (1960) (but undecided at this writing); United States v. Cohen, 145 F.2d 82, 92 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1945).

Otherwise a juror, attorney, interpreter or stenographer may disclose matter occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule . . . .

The hope that the quoted provision would provide a significant measure of discovery for defendants suffered a telling blow in *United States v. Proctor & Gamble*,<sup>48</sup> a civil antitrust suit brought by the Government after a federal grand jury investigation produced no indictment. The Government was using the grand jury transcript to prepare the civil case for trial, and defendants sought the same privilege by moving for pretrial discovery and production under Federal Rule of Civil Procedure 34. The district court, holding that defendants had shown the good cause required by the rule, granted the motion. The Supreme Court, in a six to three decision, reversed. It held defendants' showing for discovery inadequate in view of the historic policy of grand jury secrecy. Even less auspicious for broadened discovery was the denial, at the trial, in the criminal antitrust case, *Pittsburgh Plate Glass Co. v. United States*,<sup>49</sup> of production of the grand jury transcript of the testimony of a chief government witness who had testified both before the grand jury and at the trial. The Supreme Court affirmed, in a five to four decision, the Chief Justice and Justices Brennan, Black and Douglas dissenting.<sup>50</sup>

The Supreme Court's refusal to give rule 6(e) significant discovery scope proceeds, it is submitted, from an uncritical exaltation of secrecy

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<sup>48</sup> 356 U.S. 677 (1958). For this case's sequelae, illustrating that despite the "indispensable secrecy of grand jury proceedings" there can be circumstances where there is "compelling necessity" to pierce the secrecy, see *United States v. Proctor & Gamble Co.*, 174 F. Supp. 233 (D.N.J. 1959); *United States v. Proctor & Gamble Co.*, 175 F. Supp. 198 (D.N.J. 1959); *United States v. Proctor & Gamble Co.*, 180 F. Supp. 195 (D.N.J. 1959); see 59 COLUM. L. REV. 1089 (1959). The Government uses grand jury testimony, not only in civil cases as in *Proctor & Gamble*, but also to refresh the recollection of witnesses in criminal trials. *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 231 (1940). It seems to be the general rule that federal grand jury proceedings are transcribed only when the government attorney so orders.

<sup>49</sup> 360 U.S. 395 (1959), critically discussed in Comment, 48 CALIF. L. REV. 160 (1960).

<sup>50</sup> Defendants' motions to inspect federal grand jury minutes for the purpose of laying foundations for motions to dismiss indictments are almost never granted. Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 453 (1959); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960) (particularly at 1184 n.116). One circumstance where a defendant has some real chance to inspect grand jury minutes, at least in the Second Circuit, is that of inconsistency between a government witness's grand jury and trial testimony; the procedure is for an *in camera* reading by the judge to determine whether an inconsistency exists. *United States v. Zborowski*, 271 F.2d 661, 665 (2d Cir. 1959), discussed in 35 N.Y.U.L. REV. 961 (1960). Compare CAL. PEN. CODE § 938.1; see note 59 *infra*.

for secrecy's sake.<sup>51</sup> In a number of human relationships, *e.g.*, attorney-client, the social values of confidentiality may clearly exceed those of complete discoverability of facts in litigation,<sup>52</sup> but each relationship requires a careful weighing of the respective values of secrecy and disclosure, not an indiscriminate condemnation of disclosure under the shibboleth of "secrecy." The classically expressed values of grand jury secrecy, summarized in *United States v. Rose*<sup>53</sup> and quoted in the *Procter & Gamble* case,<sup>54</sup> are:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Once an accused is indicted and arrested, obviously reasons (1) and (5) become inoperative. Reason (2) does not stand analysis as an argument against discovery, because it is not disclosure of deliberations that is sought but testimony of witnesses, and discovery of course is not possible until after the indictment is rendered when the chance to importune is gone. Reason (3) seems to dissipate and (4) to diminish in significance where, as in *Pittsburgh Plate Glass Co.*,<sup>55</sup> discovery of a witness's grand jury testimony is not sought until after he has testified at the trial. Even as to pretrial discovery, it will be noted that reason (3) is largely the generalized notion that discovery, by reducing surprise, may facilitate perjury—the underlying predicate being that potential abuse universally condemns a technique—which is the antithesis of the philosophy undergirding civil discovery. Reason (4) undoubtedly has some validity as an argument against pretrial discovery of grand jury testimony, because witnesses may

<sup>51</sup> See *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 407 (1959) where Brennan, J., dissenting, says for himself, the Chief Justice, and Black and Douglas, JJ., "The Court's insistence on secrecy exalts the principle of secrecy for secrecy's sake. . . ." That this assertion is really unanswerable, I think is demonstrated in Comment, 48 CALIF. L. REV. 160 (1960).

<sup>52</sup> Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 109 (1956); Louisell and Crippin, *Evidentiary Privileges*, 40 MINN. L. REV. 413 (1956). A current illustration of the significance of the attorney-client privilege is afforded by *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). Compare *McCORMICK*, EVIDENCE § 81 (1954).

<sup>53</sup> 215 F.2d 617, 628 (3d Cir. 1954), based on summary in *United States v. Amazon Industrial Chem. Corp.*, 55 F.2d 254, 261 (D.C. Md. 1931).

<sup>54</sup> 356 U.S. at 681 n.6; see 8 WIGMORE, EVIDENCE § 2360 (3d ed. 1940).

<sup>55</sup> 360 U.S. 395 (1959).

be willing to go before the grand jury if the fact will not be publicized and if they won't be called at the trial.<sup>56</sup> Thus the value judgment really involved is a function of the weighing of the social significance of testimony given under arrangements of quasi-secrecy only, against the defendant's need to pierce the secrecy in order adequately to prepare his defense. Even the confidential informer's anonymity must give way where justice demands: "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."<sup>57</sup> It is difficult to see why the informer-become-grand-jury-witness should be more privileged. In any event, analysis should focus precisely on the values involved, and not be confused by vague references to "secrecy" in the abstract. The now recognized capacity of the grand jury to indict upon hearsay evidence<sup>58</sup> seems potentially to enhance a defendant's need to discover grand jury testimony. The approach of California and several other states, of making available grand jury transcripts after indictment,<sup>59</sup> commends itself to the careful appraisal of the Advisory Committee on Rules of Criminal Procedure.

*B. Rules 16 and 17(c): Motions for Inspection and Subpoenas  
Duces Tecum*

Rule 16 is the primary discovery rule of federal criminal procedure. It provides that

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<sup>56</sup> It should always be borne in mind, however, that there is no pretense of *absolute* secrecy for federal grand jury proceedings under any circumstances. Thus, by the terms of FED. R. CRIM. P. 6(e) itself, government attorneys always have access to the proceedings (other than deliberations and votes); the witness himself is not bound to secrecy by rule 6(e).

<sup>57</sup> *Roviano v. United States*, 353 U.S. 53, 60-61 (1957). And compare the discoverability of government witnesses' statements under *Jencks v. United States*, 353 U.S. 657 (1957), even as circumscribed by the so-called *Jencks* legislation, 18 U.S.C. § 3500 (1958); see text at notes 66-73 *infra*.

<sup>58</sup> *Costello v. United States*, 350 U.S. 359 (1956); compare California's rule that a defendant is illegally held to answer without reasonable or probable cause if his commitment is based entirely on incompetent evidence or evidence illegally obtained; and if the trial court does not set aside the information, a writ of prohibition preventing trial will issue. *Priestly v. Superior Court*, 50 Cal. 2d 812, 330 P.2d 39 (1958); cf. *Mitchell v. Superior Court*, 50 Cal. 2d 827, 330 P.2d 48 (1958).

<sup>59</sup> CAL. PEN. CODE § 938.1. "California's actual experience in this area seems to indicate that the dangers of disclosure of grand jury testimony are seriously overrated. California has followed the procedure of providing the defendant in a criminal prosecution with a copy of the transcript of the grand jury testimony before trial. This has been the practice since 1897 whenever a transcript was available. Such practice became compulsory in all cases with the passage of an amendment in 1927 which provided that transcripts be made of all grand jury testimony. This law appears to have had no adverse effect, as the grand jury has remained a vital and active force in California." Comment, 48 CALIF. L. REV. 160, 161-62 (1960). See Kennedy, *Historical and Legal Aspects of the California Grand Jury System*, 43 CALIF. L. REV. 251 (1955). As to the few other states that follow the California pattern, see Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1184 n.116 (1960).



Upon motion of a defendant . . . the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items may be material to the preparation of his defense and that the request is reasonable.

It will immediately be noted that, unlike civil discovery's provisions for the taking of the deposition of *any* witness, rule 16 contemplates inspection only of items in the hands of the government attorney. But to a degree, rule 17(c) supplements rule 16, for under rule 17(c) certain "evidentiary" items may be subpoenaed *duces tecum* even though not within rule 16.<sup>60</sup> The possible operation of rule 17(c) as a pretrial discovery device results from its express provision that the court may order production of subpoenaed items ahead of trial.

However, the civil practitioner who first looks into these rules likely will be amazed at the limitations inherent in or encrusted upon them. For example, a number of cases hold that under rule 16 the defendant's own confession is not discoverable by him, because it was not a pre-existing document "obtained from or belonging to" the defendant.<sup>61</sup> This rationale has been extended to render nondiscoverable objects and documents in addition to confessions.<sup>62</sup> 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.<sup>63</sup> Even when construed to be a discovery measure, rule 17(c)'s operative scope has often been a very narrow one;<sup>64</sup> thus, the holdings that the documents sought must have evidentiary, as distinct from merely discovery, value.<sup>65</sup>

<sup>60</sup> *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951).

<sup>61</sup> *Orfield, Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221, 242 (1957); *Kaufman, Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113 (1957).

<sup>62</sup> *United States v. Black*, 6 F.R.D. 270 (N.D. Ind. 1946).

<sup>63</sup> *United States v. Carter*, 15 F.R.D. 367, 369 (D.D.C. 1954); cf. *Dession, The New Federal Rules of Criminal Procedure* (pt. 2), 56 YALE L.J. 197, 221 (1947); *United States v. Malinsky*, 19 F.R.D. 426 (S.D.N.Y. 1956); *United States v. Peltz*, 18 F.R.D. 394 (S.D.N.Y. 1955); *United States v. Evangelista*, 20 F.R.D. 631 (S.D.N.Y. 1957).

<sup>64</sup> *United States v. Brown*, 17 F.R.D. 286 (N.D. Ill. 1955); *United States v. Brockington*, 21 F.R.D. 104 (E.D. Va. 1957).

<sup>65</sup> 4 BARRON, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL, 1960 Pocket Part § 2044 (Wright) (Rules ed. 1951). A carefully reasoned opinion in *Fryer v. United States*, 207 F.2d 134 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 885 (1953), upheld pretrial discoverability under Fed. R. CRIM. P. 17(c) of witnesses' statements which might be used for impeachment purposes, but such holdings would seem overruled now by the *Jencks* legislation, 18 U.S.C. § 3500 (1958). See text at notes 72-73 *infra*.

Perhaps, however, the most significant restriction on the effectiveness of rules 16 and 17(c) as criminal discovery devices—at least if the opinion for the Court written by Mr. Justice Frankfurter in *Palermo v. United States*<sup>66</sup> endures as the authoritative interpretation of the so-called *Jencks* legislation<sup>67</sup>—is the limitation on discoverability of statements of actual or prospective government witnesses. Adequately to put this problem in context requires brief consideration of the famous case of *Jencks v. United States*,<sup>68</sup> its judicial aftermath, the congressional palliative, and the latter's construction in *Palermo*.<sup>69</sup>

In *Jencks*, crucial testimony against defendant, charged with filing an affidavit stating falsely that he was not a member of the Communist Party,<sup>70</sup> was given by two undercover agents of the FBI. They stated on cross-examination that they had made regular oral and written reports to the FBI on the subjects of their direct testimony. Defendant moved for production of these reports for inspection by the judge with a view to their use by defendant for impeachment purposes. The motion was denied; defendant was found guilty. His conviction, affirmed by the Court of Appeals,<sup>71</sup> was reversed by the Supreme Court which held that defendant was entitled to examine the reports without—as some previous cases had required—a preliminary showing of inconsistency between the reports and the agents' testimony, or a preliminary *in camera* inspection of the reports by the judge to determine relevancy. *Jencks* thus concerned discovery *at the trial*, and compelled such discovery of government agents' *written* reports and *oral reports as recorded*. *Jencks* was followed, however, by lower court decisions extending its rationale to pretrial discovery.<sup>72</sup>

*Jencks* was decided June 3, 1957; 18 U.S.C. § 3500 became effective September 2, 1957. Its pith is that no government witness's statement is discoverable by defendant until the witness has given his direct testimony at the trial. Thereafter it is discoverable, but only if it is the witness's own written statement or a substantially verbatim reproduction of his oral statement (thus excluding governmental agents' résumés of witnesses' statements). If it meets this test, it is discoverable in its entirety, provided all of it relates to the direct testimony (thereby confirming *Jencks*' disclaimer of certain previous holdings requiring a preliminary showing of

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<sup>66</sup> 360 U.S. 343 (1959).

<sup>67</sup> 18 U.S.C. § 3500 (1958).

<sup>68</sup> 353 U.S. 657 (1957).

<sup>69</sup> 360 U.S. 343 (1959); see also *Campbell v. United States*, 81 Sup. Ct. 421 (1961).

<sup>70</sup> The affidavit is required by the National Labor Relations Act § 9(h), 61 Stat. 143 (1947), as amended, 65 Stat. 601 (1951), 29 U.S.C. § 159(h), and if false is punishable under 18 U.S.C. § 1001 (1958).

<sup>71</sup> 226 F.2d 540 (5th Cir. 1955).

<sup>72</sup> See note 25 *supra*.

inconsistency). If the Government claims that parts of it do not so relate, the court after *in camera* inspection is to excise the parts that do not relate to the direct testimony (thereby negating *Jencks*' disclaimer of the *in camera* inspection). All of the statement is to be preserved for use of the appellate court in the event of conviction and appeal. Failure of the Government to comply with the discovery order causes the witness's direct testimony to be stricken or, if justice requires, a mistrial (this substitutes for the *Jencks*' rule of dismissal as the penalty of nondisclosure).

The chief repercussions on discovery of the *Jencks* legislation, construed by *Palermo*'s<sup>73</sup> majority opinion as now providing the exclusive measure of discoverability of government witnesses' statements in possession of the Government, therefore are: (1) No discovery of such witnesses' statements is possible until after commencement of trial. (2) No discovery of the Government's résumés, summaries, or condensations of witnesses' statements is ever possible. The latter may be regarded as something of an analogue to *Hickman v. Taylor*'s<sup>74</sup> work product rubric governing discovery in civil cases, although that doctrine was limited to *counsel's* work product.<sup>75</sup> But the denial of any discovery of witnesses' statements until trial, is a negation in federal criminal law administration of the philosophy of full disclosure of which federal civil law administration is the chief exemplar. Indeed, federal criminal discovery, far from being the leader, is now a lagger, certainly vis-à-vis California as the next section will show. Fortunately, the functioning now of the Advisory Committee on Criminal Rules appointed by Chief Justice Warren presents the chance for a wholesale reappraisal.

## V

### CALIFORNIA: DILEMMA OVERBORNE?

The great case-by-case development of criminal discovery by the California appellate courts in the last several years attests to the continuing vitality of the common-law method, even in this legislative age. But while it is true that California's development of criminal discovery is essentially the work of the courts—unlike that of civil discovery, whose full blossom-

<sup>73</sup> 360 U.S. 343 (1959); see also *Campbell v. United States*, 81 Sup. Ct. 421 (1961); *cf.* *Clancy v. United States*, 29 U.S.L. WEEK 4241 (U.S. Feb. 27, 1961), where the statements held producible were those of government agents called as trial witnesses.

<sup>74</sup> 329 U.S. 495 (1947); see note 23 *supra*.

<sup>75</sup> *Cf.* *Alltmont v. United States*, 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950). Sometimes the "work product" theory is explicitly extended by rule to embrace writings obtained or prepared by the adverse party, his surety, indemnitor or agent, as well as his attorney, e.g., MINN. R. CIV. PROC. 26.02; see *Louisell, Discovery and Pre-trial Under the Minnesota Rules*, 36 MINN. L. REV. 633, 635 (1952). For a comprehensive analysis of discovery in civil cases of matters obtained in the adverse party's preparation for trial, see 4 MOORE, FEDERAL PRACTICE ¶¶ 26.23-26.25 (2d ed. 1950).

ing required the legislature's adoption of the federal discovery rules<sup>76</sup>—would not a realistic appraisal acknowledge that in a certain sense the legislature had paved the way for criminal discovery too? For it is the Penal Code itself that provides that “the names of the witnesses examined before the Grand Jury . . . must be inserted at the foot of the indictment, or indorsed thereon . . . ,”<sup>77</sup> that requires the delivery of a copy of the grand jury transcript to each indicted defendant,<sup>78</sup> and that provides for the preliminary hearing-information proceeding under which most California criminal cases are processed and which includes the requirement of delivery to each defendant, free of charge, of a copy of the preliminary hearing transcript.<sup>79</sup> Nevertheless, the significance of judicial initiative—especially that of the California Supreme Court—has doubtless been the primary force in catapulting California into national lead in developing criminal discovery. The seedling planted with *People v. Riser*<sup>80</sup> and *Powell v. Superior Court*<sup>81</sup> bids fair to become a full-grown tree. Doubtless there are district attorneys who would allege that it already has, and that the tree needs pruning.

### A. Discovery at Trial

The supreme court in *People v. Riser*<sup>82</sup> announced the basic rule that the defendant, at his criminal trial, has a right to get the pretrial statement made to police by a witness who identifies the defendant at the trial—at least upon some showing of inconsistency between the witness's statement and his trial testimony. The defendant in the *Riser* case had been charged with a robbery and two murders. Part of the evidence against him was his identification by an eyewitness. After this witness' direct testimony the defense established on cross-examination that she had made a statement to the police shortly after the incident had occurred, and made some showing that the earlier statement was inconsistent with her testimony at the trial.<sup>83</sup>

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<sup>76</sup> See note 8 *supra*.

<sup>77</sup> CAL. PEN. CODE § 943. The significance of this provision seems now to have been largely superseded, in view of the availability to defendants of grand jury transcripts. But before the 1927 requirement (Cal. Stat. 1927, ch. 684, § 2) that transcripts be made of all grand jury testimony, this provision could operate significantly as a discovery device.

<sup>78</sup> CAL. PEN. CODE § 938.1.

<sup>79</sup> CAL. PEN. CODE § 869.

<sup>80</sup> 47 Cal. 2d 566, 305 P.2d 1 (1956).

<sup>81</sup> 48 Cal. 2d 704, 312 P.2d 698 (1957).

<sup>82</sup> 47 Cal. 2d 566, 305 P.2d 1 (1956). The conclusion seems inescapable, despite language in the opinion to the contrary, see 47 Cal. 2d at 585–86, 305 P.2d at 13, that this case presents a departure from the prior law. See *People v. Silberstein*, 159 Cal. App. 2d 848, 850, 323 P.2d 591, 592 (1958). No survey is here attempted of the previous cases; for such a survey, see Carr and Lederman, *Criminal Discovery*, 34 CAL. S.B.J. 23 (1959).

<sup>83</sup> The local newspapers had printed sufficient of the witness's statement to indicate that it was inconsistent with her testimony at the trial. See 47 Cal. 2d at 584, 305 P.2d at 12.

Upon an automatic appeal from a judgment of conviction imposing the death penalty the supreme court held that under the circumstances it was error to deny the defendant the right to compel the prosecution to produce the prior statement.<sup>84</sup> Some earlier cases were noted which reached an opposite result, but these were distinguished on the ground that they contained no adequate showing of the admissibility of the object sought to be discovered, or at least of its useability for impeachment purposes.<sup>85</sup>

Under the aegis of *Riser* the courts have granted the defendant many discovery rights during the progress of the trial which for convenience can be classified into three groups: first, the defendant's right to inspect any statement which he has made to the prosecution; second, his right to inspect statements made to the prosecution by persons other than himself; third, his right to compel the prosecution to produce other documentary items and physical evidence and other information which it has in its possession.

The defendant's right to inspect at the time of trial any statements which he has made to the prosecution seems settled beyond doubt.<sup>86</sup> The prosecution will be compelled to allow such inspection upon defendant's allegation that he cannot fully recall the contents of the statement.<sup>87</sup> Since it readily can be seen that the defendant almost always is able to make the required showing, it is apparent that the defendant's right in this regard is nearly absolute.

The defendant has also been given a fairly broad right to inspect statements made to the prosecution by persons other than himself.<sup>88</sup> Although

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<sup>84</sup> The court affirmed the judgment, however, that there was sufficient other evidence from which the jury would have found the defendant guilty and hence the error was considered not prejudicial. 47 Cal. 2d at 590, 305 P.2d at 16; CAL. CONST. art. VI, § 4½. On this point the late Carter, J., dissented, 47 Cal. 2d at 590, 305 P.2d at 16.

<sup>85</sup> The cases expressly so distinguished were *People v. Gallardo*, 41 Cal. 2d 57, 257 P.2d 29 (1953); *People v. Bermijo*, 2 Cal. 2d 270, 40 P.2d 823 (1935); *People v. Glaze*, 139 Cal. 154, 72 Pac. 965 (1903). But in *People v. Estrada*, 54 Cal. 2d 713, 716, 7 Cal. Rptr. 897, 898, 355 P.2d 641 (1960) the unanimous court said: "Either before or during trial, an accused can compel the People to produce the written statement of a prosecution witness relating to matters covered in his testimony. In laying a foundation for production, the accused is not required to show that the document was signed by the witness or otherwise acknowledged by him as accurate or that there is any inconsistency between the statement and the testimony of the witness." See also *People v. Chapman*, 52 Cal. 2d 95, 98, 338 P.2d 428 (1959); *Funk v. Superior Court*, 52 Cal. 2d 423, 424-25, 340 P.2d 593 (1959).

<sup>86</sup> *People v. Cartier*, 51 Cal. 2d 590, 335 P.2d 114 (1959); cf. *People v. Carter*, 48 Cal. 2d 737, 752, 312 P.2d 665, 674 (1957) (defendant at trial may discover his own witness's statement which the prosecution has used to impeach the witness and which defendant seeks to inspect for the purpose of rehabilitation); see *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957); *Vance v. Superior Court*, 51 Cal. 2d 92, 330 P.2d 773 (1958).

<sup>87</sup> *People v. Cartier*, 51 Cal. 2d 590, 335 P.2d 114 (1959); see *Powell v. Superior Court*, 48 Cal. 2d 704, 707, 312 P.2d 698, 699-700 (1957); *Vance v. Superior Court*, 51 Cal. 2d 92, 330 P.2d 773 (1958).

<sup>88</sup> *People v. Riser*, 47 Cal. 2d 566, 584-88, 305 P.2d 1, 12-15 (1956); *People v. Chapman*, 52 Cal. 2d 95, 338 P.2d 428 (1959); *People v. Carter*, 48 Cal. 2d 737, 752-53, 312 P.2d 665, 674 (1957).

his demand for this type of statement usually comes after the person who made it has taken the stand and testified for the prosecution, the defendant no longer is required to show inconsistency between the witness's testimony at the trial and the prior statement, since this usually would be impossible.<sup>89</sup> "In laying a foundation for production, the accused is not required to show that the document was signed by the witness or otherwise acknowledged by him as accurate or that there is any inconsistency between the statement and the testimony of the witness."<sup>90</sup>

The defendant also apparently enjoys fairly broad rights of discovery of documents in addition to the mentioned statements, *e.g.*, police reports,<sup>91</sup> and tangible objects such as a narcotic register<sup>92</sup> and photographs,<sup>93</sup> where he can make at least a *prima facie* showing that the thing sought will be relevant and admissible as evidence at the trial. Even in the absence of such a showing, however, there is authority for granting the defendant the right to compel inspection where the document, object, or information sought is reasonably necessary to enable the defendant properly to prepare his defense.<sup>94</sup>

Deserving of special mention is defendant's enlarged right to obtain disclosure of the identity of persons who have given information to the police regarding the crime with which he is charged. Such discovery has been resisted primarily on the basis that the so-called informer's identity is privileged as a confidential communication, rather than on the ground that the information sought would not be relevant to the defense.<sup>95</sup> The clash of policy interests presented by the assertion of the privilege is obvious. The defendant's right to a fair trial demands that he obtain all information which might be material to his defense. The privilege of withholding the informer's identity, on the other hand, is based on the rationale that confidentiality promotes the continued flow of information from informers, and

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<sup>89</sup> See note 85 *supra*.

<sup>90</sup> *People v. Estrada*, 54 Cal. 2d 713, 716, 7 Cal. Rptr. 897, 898, 355 P.2d 641 (1960); see also *People v. Cooper*, 53 Cal. 2d 755, 770, 3 Cal. Rptr. 148, 157, 349 P.2d 964, 973 (1960), discussed *infra* at note 113 and accompanying text.

<sup>91</sup> *People v. Silberstein*, 159 Cal. App. 2d 848, 323 P.2d 591 (1958).

<sup>92</sup> See *People v. Day*, 159 Cal. App. 2d 572, 575, 323 P.2d 1051 (1958). See also cases respecting pretrial discovery of objects, cited in note 108 *infra*.

<sup>93</sup> See *People v. Norman*, 177 Cal. App. 2d 59, 63, 1 Cal. Rptr. 699, 702 (1960), *cert. denied*, 364 U.S. 820 (1960).

<sup>94</sup> *Cf. Walker v. Superior Court*, 155 Cal. App. 2d 134, 317 P.2d 130 (1957) (autopsy and C.I.I. reports discoverable before trial, although latter presumably not admissible in evidence).

<sup>95</sup> CAL. CODE CIV. PROC. § 1881(5) provides in part: "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: . . . (5) A public officer cannot be examined as to communications made to him in official confidence, where the public interest would suffer by the disclosure." See *McBaine, CALIFORNIA EVIDENCE MANUAL* § 182 (2d ed. 1960); *Witkin, CALIFORNIA EVIDENCE* § 444 (1958).

thereby promotes efficient future law enforcement.<sup>90</sup> In accordance with the basic philosophy of criminal discovery, the courts have resolved this conflict in favor of disclosure whenever the informer participated in the acts with which the defendant is charged, or disclosure, in justice, is necessary to defendant's defense.<sup>97</sup>

Upon an erroneous denial of the defendant's discovery rights during the progress of the trial, his procedural remedy is appeal after the conviction, on the ground that the denial of his discovery request was prejudicial error. Where the denial is held to be error, it usually is held to be prejudicial for the reason that it is impossible accurately to determine what the result of the trial would have been had defendant been granted the requested discovery.<sup>98</sup>

### *B. Discovery before Trial*

The perhaps inevitable extension of the rule of the *Riser* case<sup>99</sup> was made in *Powell v. Superior Court*,<sup>100</sup> where the supreme court established the basic right of the accused in a criminal case to certain discovery before trial as well as at the trial itself. Powell, who had been indicted on charges of embezzlement of public funds, sought a writ of prohibition to prevent the superior court from bringing his case to trial because that court had denied his motion for an order authorizing him to inspect and make copies of a signed statement which he had made to police and a typed transcript of a tape recording which he had made at the police office. The supreme court instead of prohibition of trial granted a writ of mandamus to the trial court directing it to grant the pretrial orders which the defendant sought. This basic extension of discovery was made in reliance upon the broad right

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<sup>96</sup> WIGMORE, EVIDENCE § 2374 (3d ed. 1940); McCORMICK, EVIDENCE § 148 (1954).

<sup>97</sup> *People v. Durazo*, 52 Cal. 2d 354, 340 P.2d 594 (1959); *People v. Williams*, 51 Cal. 2d 355, 333 P.2d 19 (1958); *People v. McShann*, 50 Cal. 2d 802, 330 P.2d 33 (1958); *cf. Priestly v. Superior Court*, 50 Cal. 2d 812, 330 P.2d 39 (1958); *but cf. Mitchell v. Superior Court*, 50 Cal. 2d 827, 330 P.2d 48 (1958); *Tupper v. Superior Court*, 51 Cal. 2d 263, 331 P.2d 977 (1958). If it appears that the informer's identity is necessary to some issue respecting defendant's guilt, the duty to disclose is not satisfied by merely giving the informer's name; rather, the prosecution must disclose enough of his description and address to afford the defendant reasonable opportunity to locate him. *People v. Diaz*, 174 Cal. App. 2d 799, 345 P.2d 370 (1959). When this has been done, however, the prosecution is not under a duty to produce the informer as a witness at the trial. *People v. Smith*, 174 Cal. App. 2d 129, 344 P.2d 435 (1959). A number of bills have been introduced in the legislature in session as this article is written, their purport apparently being to overrule or restrict in narcotics cases the obligation of the prosecution to reveal the identity of informers, as it has evolved under the cases cited above in this note.

<sup>98</sup> *People v. Chapman*, 52 Cal. 2d 95, 338 P.2d 428 (1959); *People v. Castiel*, 153 Cal. App. 2d 653, 315 P.2d 79 (1957); see also *Castiel v. Superior Court*, 162 Cal. App. 2d 710, 328 P.2d 476 (1958); *People v. Carter*, 48 Cal. 2d 737, 312 P.2d 665 (1957); *contra, People v. Riser*, 47 Cal. 2d 566, 588, 305 P.2d 1, 15 (1956).

<sup>99</sup> *People v. Riser*, 47 Cal. 2d 566, 305 P.2d 1 (1956).

<sup>100</sup> 48 Cal. 2d 704, 312 P.2d 698 (1957).

to disclosure announced in the *Riser* case, and also, by analogy, upon a case which granted a similar pretrial order in a civil action.<sup>101</sup>

The extent of the pretrial discovery rights which have been established since *Powell* can best be shown by classifying them into the categories used above for discovery during trial.<sup>102</sup>

The absolute right of the defendant to inspect before trial any statement which he has made to the police now seems settled.<sup>103</sup> His right in this regard is not dependent upon any showing by him as to the admissibility of the statement at the trial itself, but only upon a claim that he cannot fully recall the contents of such statement.<sup>104</sup>

One of the most significant advances of the California Supreme Court in the pretrial discovery area is the express pronouncement in *Funk v. Superior Court*<sup>105</sup> that the defendant has a right to inspect statements made to the prosecution by persons other than the defendant. This decision was based upon the rationale that there is no reason to deny the discovery rights before trial which he would be entitled to at the trial. Since the defendant's right to inspect such statements at the trial is well established, the court reasoned that it should logically be upheld upon a motion before trial as well. The court further pointed out that the defendant's discovery request was not barred by the fact that the records sought had neither been signed by the witnesses nor otherwise acknowledged by them as accurate records of their statements.<sup>106</sup> This also was an extension of a rule which had its origin in *Riser*, involving discovery at trial.<sup>107</sup>

Likewise, defendants have been accorded significant pretrial discovery rights respecting documents, in addition to their own statements and those

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<sup>101</sup> *Powell v. Superior Court*, 47 Cal. 2d 483, 304 P.2d 1009 (1956). The court in *Powell* also quoted at length with approval from *State v. Tippet*, 317 Mo. 319, 296 S.W. 132 (1927), where it was held error to deny defendant's motion to inspect a prior statement of one of the state's witnesses. The overruling of the *Tippet* case by *State ex rel. Page v. Terte*, 324 Mo. 925, 25 S.W.2d 459 (1930), was not commented upon, but apparently it is *Terte* and not *Tippet* that is authoritative in Missouri today.

<sup>102</sup> See text following note 85 *supra*.

<sup>103</sup> *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957); *Vance v. Superior Court*, 51 Cal. 2d 92, 330 P.2d 773 (1958); *McAllister v. Superior Court*, 165 Cal. App. 2d 297, 331 P.2d 654 (1958); *McCarthy v. Superior Court*, 162 Cal. App. 2d 755, 328 P.2d 819 (1958); *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 327 P.2d 68 (1958); *Cordry v. Superior Court*, 161 Cal. App. 2d 267, 326 P.2d 222 (1958); *Walker v. Superior Court*, 155 Cal. App. 2d 134, 317 P.2d 130 (1957); *cf.* *Cash v. Superior Court*, 53 Cal. 2d 72, 346 P.2d 407 (1959).

<sup>104</sup> *E.g.*, *Vance v. Superior Court*, 51 Cal. 2d 92, 330 P.2d 773 (1958); *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957).

<sup>105</sup> *Funk v. Superior Court*, 52 Cal. 2d 423, 340 P.2d 593 (1959); see also *Vance v. Superior Court*, 51 Cal. 2d 92, 330 P.2d 773 (1958); *Cash v. Superior Court*, 53 Cal. 2d 72, 346 P.2d 407 (1959). In *Funk*, the discovery request upheld was both for the original notes made by the police officers and the written statements prepared from the notes.

<sup>106</sup> 52 Cal. 2d at 424, 340 P.2d at 594.

<sup>107</sup> *People v. Riser*, 47 Cal. 2d 566, 587, 305 P.2d 1, 14 (1956).



of witnesses, certain tangible objects, and other information.<sup>108</sup> Here again the right seems clearest where the defendant can show that the information sought will probably be relevant and material at the trial.<sup>109</sup> But this right has also been accorded where no such showing could be made.<sup>110</sup>

The defendant's right to compel pretrial disclosure of an informer's identity has two aspects. If after preliminary hearing the defendant has been committed for trial with the only evidence against him being that gained by a search of his person or property after an arrest based solely upon a tip from an informer, he is entitled to a writ of prohibition to prevent his case from going to trial unless the prosecution discloses the informer's identity.<sup>111</sup> Even when the defendant has been committed for trial upon evidence adequate for commitment, he is nevertheless entitled to disclosure of the informant's identity upon a showing that this is reasonably necessary to his defense.<sup>112</sup>

To the foregoing developments in pretrial discovery must now be juxtaposed *People v. Cooper*.<sup>113</sup> Does it indicate a retreat, either strategic or tactical, after the long forward march? Has the pendulum begun to swing in the other direction in California? In *Cooper* defendant was prosecuted for two atrocious murders. Another suspect, Fry, originally had been charged with one of the murders, and seven persons had testified at his preliminary

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<sup>108</sup> Norton v. Superior Court, 173 Cal. App. 2d 133, 343 P.2d 139 (1959) (photographs of defendant from which eyewitnesses of the crime had failed to identify him, and names and addresses of three witnesses who were not used at the preliminary hearing); Schindler v. Superior Court, 161 Cal. App. 2d 513, 327 P.2d 68 (1958) (medical specimens and samples of tissue taken from the body of defendants' deceased four-year-old daughter; court regarded autopsy report as a public record which any citizen may inspect; court held that district attorney should be ordered to cease interfering with defendant's counsel's right to talk with autopsy surgeon); Walker v. Superior Court, 155 Cal. App. 2d 134, 317 P.2d 130 (1957) (autopsy report a public record which any citizen may inspect; defendant has right to inspect report of State Bureau of Criminal Identification and Investigation; see note 110 *infra*).

<sup>109</sup> See Schindler v. Superior Court, 161 Cal. App. 2d 513, 327 P.2d 68 (1958).

<sup>110</sup> In Walker v. Superior Court, 155 Cal. App. 2d 134, 317 P.2d 130 (1957), the theory of the prosecution was that defendant, indicted for murder, had kicked the victim in the head. Defendant's shoes were sent by the sheriff to the State Bureau of Criminal Identification and Investigation for a laboratory analysis of any materials deposited on the shoes which might have evidentiary value; no such materials were available to defendant. The court held that defendant was entitled to inspect the state's laboratory report even though it would not be admissible evidence at the trial, because inspection was considered vital to a fair trial.

<sup>111</sup> Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958), critically discussed in 47 CALIF. L. REV. 395 (1959); cf. Mitchell v. Superior Court, 50 Cal. 2d 827, 330 P.2d 48 (1958); Tupper v. Superior Court, 51 Cal. 2d 263, 331 P.2d 977 (1958). For a comprehensive discussion of a predicate of *Priestly's* holding—the exclusionary rule of *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955)—see Barrett, *Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CALIF. L. REV. 565 (1955). See note 97 *supra*.

<sup>112</sup> See *People v. Mitchell*, 30 Cal. 2d 827, 829, 330 P.2d 48 (1958); Tupper v. Superior Court, 51 Cal. 2d 263, 331 P.2d 977 (1958).

<sup>113</sup> 53 Cal. 2d 755, 3 Cal. Rptr. 148, 349 P.2d 964 (1960).

hearing.<sup>114</sup> Prior to Cooper's trial his counsel moved to inspect all statements in the possession of the People, including statements made to the police by the mentioned seven. The trial court ordered Cooper's own statements produced, but denied production of the other statements with the reservation that it would order production at the trial of the statements of any of the seven who might testify for the People. At the trial, three of the seven so testified, and the prosecution furnished Cooper with the statement of one of them. Cooper did not renew his motion for production of any of the other statements. On appeal from a judgment imposing the death penalty, Cooper urged *inter alia* that his right to pretrial inspection was absolute and that his failure to renew his discovery demand at the trial was immaterial because "production at the time of trial cannot aid a defendant in the preparation of his case since . . . a witness whose testimony might damage a prosecutor's case would never be called by him."<sup>115</sup>

The supreme court affirmed the judgment. Its holding perhaps does not of itself indicate a swing of the pendulum against criminal discovery—for Cooper did not seek to compel pretrial disclosure by mandamus but raised the point only on appeal; his counsel did have a copy of the Fry preliminary hearing transcript; the discovery motion was not made until ten days before trial; and defendant did not renew the request at the trial. The court felt justified in characterizing the discovery effort as a "blanket request," "a mere desire for the benefit of all information which has been obtained by the People . . . ."<sup>116</sup> It is the tenor of the language, rather than the holding itself, that might reasonably be thought to indicate a swing of the pendulum. The unanimous court concluded with the observation that the People as well as defendant are entitled to "due process of law."<sup>117</sup>

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<sup>114</sup> Fry, too drunk to remember the events, pleaded guilty to manslaughter but was pardoned when Cooper confessed. 53 Cal. 2d at 759, 3 Cal. Rptr. at 150, 349 P.2d at 966.

<sup>115</sup> 53 Cal. 2d at 769, 3 Cal. Rptr. at 157, 349 P.2d at 973.

<sup>116</sup> 53 Cal. 2d at 770, 3 Cal. Rptr. at 157, 349 P.2d at 973.

<sup>117</sup> 53 Cal. 2d at 771, 3 Cal. Rptr. at 158, 349 P.2d at 974. It may be significant, as possibly indicating a swing of the pendulum in California, that the latest district courts of appeal decisions found as this article goes to press uphold denials of discovery. *People v. Brommel*, 185 A.C.A. 57 (1960) (no prejudice in erroneous denial of pretrial inspection, where all material requested by defendant was made available to him prior to its use in court); *People v. Otash*, 186 A.C.A. 132 (1960) (defendant must show something more than a "mere desire for the benefit of all information which has been obtained by the People," citing *People v. Cooper*, 53 Cal. 2d 755, 3 Cal. Rptr. 148, 349 P.2d 964 (1960)); *People v. Cathey*, 186 A.C.A. 233 (1960) (personal notes of the prosecuting attorney not discoverable—essentially a "work product" ruling); *People v. Williams*, 9 Cal. Rptr. 722 (1960) (reversal not necessary where failure of defendant's counsel to get a police officer's notes was not due to deliberate suppression by the district attorney, but apparently resulted from a misunderstanding of the trial judge's discovery order; the district attorney stated he did not know about these notes before their existence was revealed on cross-examination); cf. *People v. Nothuaegel*, 187 A.C.A. 261 (1960) (where no proper demand is made by defendant for a document or report desired, the prosecution is under

*C, California's Struggle for a Philosophy of Criminal Discovery*

Although there are statements in some of the California cases to the effect that the defendant's right to pretrial disclosure is within the discretion of the trial court<sup>118</sup> and that such disclosure is "not a matter of right in all cases,"<sup>119</sup> it seems clear—at least if *People v. Cooper* is put to one side—that the present discovery capacity of the defendant, as established in the California Supreme Court cases discussed above, is well nigh an absolute right, and that the trial court will be allowed little leeway to deny it.<sup>120</sup> The defendant's proper procedural attack upon an erroneous denial of his pretrial discovery motion is to petition for a writ of mandamus to the trial court compelling it to grant the motion. The supreme court has indicated, however, that it will not deny relief in an otherwise proper case, just because the defendant has pursued the wrong procedural remedy.<sup>121</sup>

The statement most often repeated of the rationale of criminal discovery is that first used in *People v. Riser*:<sup>122</sup> "Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case . . . ."

When in *Powell* the supreme court first granted the defendant the right to pretrial discovery, it referred to the broad basis of discovery announced in *Riser* and then added:<sup>123</sup>

In the circumstances of the present case, to deny inspection of defendant's statements would likewise be to lose sight of the objective of ascertainment of the facts, and would be out of harmony with the policy of this state that the goal of criminal prosecutions is not to secure a conviction in every case by any expedient means, however odious, but rather, only through establishing the truth upon a public trial fair to defendant and the state alike.

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no duty to volunteer it). Of course, all of these cases involved review after conviction, rather than the use of a writ to get pretrial review of a discovery matter. The last California Supreme Court case allowing criminal discovery, *People v. Estrada*, 54 Cal.2d 713, 7 Cal. Rptr. 897, 355 P.2d 641 (1960) is an at-trial situation. *But see Vetter v. Superior Court*, 189 A.C.A. 135 (1961), which appeared after this article went to press.

<sup>118</sup> *E.g.*, *Brenard v. Superior Court*, 172 Cal. App. 2d 314, 317-18, 341 P.2d 743, 745 (1959), wherein *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957), is cited for the general proposition that the defendant's discovery rights are a matter of discretion with the trial court. It should be remembered, however, that the opinion in *Powell* was written in the context of granting a defendant, for the first time in California, pretrial discovery rights.

<sup>119</sup> *People v. Sauer*, 163 Cal. App. 2d 740, 744, 329 P.2d 962, 964 (1958).

<sup>120</sup> See supreme court cases cited in notes 103, 105 and 111 *supra*, and *McCarthy v. Superior Court*, 162 Cal. App. 2d 755, 760, 328 P.2d 819, 822 (1958); *Cordry v. Superior Court*, 161 Cal. App. 2d 267, 326 P.2d 222 (1958).

<sup>121</sup> *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957).

<sup>122</sup> 47 Cal. 2d 566, 586, 305 P.2d 1, 13 (1956).

<sup>123</sup> *Powell v. Superior Court*, 48 Cal. 2d 704, 707, 312 P.2d 698, 699-700 (1957).

This rationale was again echoed in *Cash v. Superior Court*,<sup>124</sup> where the court made the broad pronouncement that "the basis for requiring pretrial production of material in the hands of the prosecution is the fundamental principle that an accused is entitled to a fair trial." The logical bases of this general pronouncement were then specified as follows:

In *Powell v. Superior Court*, . . . it was noted that an accused was denied production at early common law because he might fabricate evidence to meet the state's case and because the prosecution did not have a reciprocal right in view of the privilege against self-incrimination. In granting relief, however, this court pointed out that to deny production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the purpose of a trial, which is the ascertainment of the truth; that nondisclosure partakes of the nature of a game; and that the state is so solicitous of according a defendant a fair trial that it will not hinder him in the preparation of his defense by depriving him of competent material and relevant evidence. In other words, although there is a possibility that a defendant may be acting in bad faith and may be seeking merely to acquire advance knowledge of the details of the prosecution's case with a view to shaping his defense accordingly, such a possibility is subordinate in importance to the danger of convicting the innocent and does not warrant denying a request for production where there is a sufficient showing that the request should be granted in the interests of a fair trial. In the present case, as we shall see, there is such a showing.

Obviously, it would be difficult to phrase a philosophical predicate for criminal discovery in terms more comprehensive and basic than those used in *Riser*, *Powell* and *Cash*.

Moreover, if the language of *People v. Cooper*<sup>125</sup> and *People v. Estrada*<sup>126</sup> can be depended upon—it is only dicta respecting pretrial discovery—admissibility as a condition of discoverability, still adhered to by the supreme court in *Riser*, has now eroded away. Between *Riser* and *Estrada* at least one district court case based denial of discovery on the ground that the item sought would be inadmissible<sup>127</sup> and one expressly allowed discovery of an inadmissible item for the reason that such discovery was considered necessary for the defense.<sup>128</sup> Most of the intervening cases, however, which allowed discovery did so without discussion of whether admissibility is a condition of discoverability. Now *Cooper* teaches, at least by

<sup>124</sup> 53 Cal. 2d 72, 75, 346 P.2d 407, 408 (1959).

<sup>125</sup> 53 Cal. 2d 755, 770, 3 Cal. Rptr. 148, 157, 349 P.2d 964, 973 (1960).

<sup>126</sup> 54 Cal. 2d 713, 716, 7 Cal. Rptr. 897, 898, 355 P.2d 641 (1960).

<sup>127</sup> In *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 519, 327 P.2d 68, 73 (1958), the court held that the trial judge did not abuse his discretion in not permitting either husband or wife, jointly charged with the murder of their daughter, to inspect statements made by the other to the district attorney. The statements of each, having been made out of the presence of the other, would not be admissible against the other.

<sup>128</sup> *Walker v. Superior Court*, 155 Cal. App. 2d 134, 141, 317 P.2d 130, 135 (1957).

way of dicta, "[T]he defendant does not have to show, and indeed may be unable to show, that the evidence which he seeks to have produced would be admissible at the trial . . . ." <sup>129</sup> And *Estrada* states: "In laying a foundation for production, the accused is not required to show . . . that there is any inconsistency between the statement and the testimony of the witness." <sup>130</sup> Thus, the criminal discovery law of California apparently now accords with its civil discovery law in that "it is not ground for objection that the . . . [information sought by discovery] will be inadmissible at the trial if . . . [it] appears reasonably calculated to lead to the discovery of admissible evidence." <sup>131</sup> This development is sound. For whatever reasons there may be to impose restrictions on criminal discovery that are not imposed on civil discovery, there is nothing about admissibility per se which justifies, in logic or policy, distinction between civil and criminal cases. <sup>132</sup>

Thus in California the defendant is entitled to criminal discovery where necessary for a fair trial, and the discovery is not limited to admissible items. "The basis for requiring pretrial production of material in the hands of the prosecution is the fundamental principle that an accused is entitled to a fair trial." <sup>133</sup> But when is discovery necessary for a fair trial? "The defendant in a criminal case can *on a proper showing* compel production of documents in the possession of the People which are relevant and material to the defense . . . ." <sup>134</sup> But when is the showing proper? Take, for example, *Brenard v. Superior Court*. <sup>135</sup> Defendant in that case was charged with vehicle manslaughter and felony hit-run driving. After the preliminary hearing defendant moved for pretrial inspection of these items: (1) accident reports; (2) reports concerning blood taken from defendant and other persons involved in the accident; (3) diagram by the highway patrol of the scene of accident; (4) statement by the defendant to the highway patrol; (5) statements to the highway patrol by other people; (6) names and addresses of witnesses not involved in the accident; (7) photographs of scene of accident; (8) *all other relevant and material reports recorded by the highway patrol*. <sup>136</sup> The district court upheld a denial of the defendant's

<sup>129</sup> 53 Cal. 2d at 770, 3 Cal. Rptr. at 157, 349 P.2d at 973.

<sup>130</sup> 54 Cal. 2d at 716, 7 Cal. Rptr. at 898. See also *Funk v. Superior Court*, 52 Cal. 2d 423, 424, 340 P.2d 593, 594 (1959); *People v. Chapman*, 52 Cal. 2d 95, 98, 338 P.2d 428, 430 (1959).

<sup>131</sup> CAL. CODE CIV. PROC. § 2016(b).

<sup>132</sup> It has often been argued that the peculiar genius of modern discovery in civil cases lies largely in the clear-cut distinction between the right to discover, on the one hand, and the right to use the fruits of discovery, on the other. It is this distinction which makes possible the utmost freedom in taking depositions and propounding interrogatories, because of the restrictions imposed upon their use. See 4 MOORE, FEDERAL PRACTICE ¶ 26.04, at 1029 (2d ed. 1950).

<sup>133</sup> *Cash v. Superior Court*, 53 Cal. 2d 72, 75, 346 P.2d 407, 408 (1959).

<sup>134</sup> *People v. Chapman*, 52 Cal. 2d 95, 98, 338 P.2d 428, 430 (1959). (Emphasis added.)

<sup>135</sup> *Brenard v. Superior Court*, 172 Cal. App. 2d 314, 341 P.2d 743 (1959).

<sup>136</sup> 172 Cal. App. 2d at 315-16, 341 P.2d at 744.

request for this discovery on the ground that he had made no showing as to *why* he was entitled to the items sought. "No case has gone so far as to state that the denial of a motion for pretrial inspection is an abuse of discretion without a showing before the trial court as to why the material is needed."<sup>137</sup> And in *People v. Cooper* the unanimous supreme court, after noting that discoverability can exist without admissibility, went on to say that defendant "does have to show some better cause for inspection than a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime."<sup>138</sup> But what is this "better cause?" How specifically can it be known? How certainly must it be shown?

The truth seems to be that the California courts have not yet established—at least, the supreme court has not—a method of ascertaining whether or not discovery of a given item is necessary to accord defendant a fair trial. In certain areas of discovery, such as defendant's statements to the prosecution, certain statements of witnesses to prosecution officials and the identity of informers, it is now pretty clear, at least in terms of verbal formulae, what showing is necessary. Thus, to get a copy of his own statement to police, it is generally enough for defendant to allege in an affidavit that he cannot remember its contents. But a comprehensive rule of adequate specificity is by no means apparent. When, for example, should defendant get a chemical analysis by the People's expert of various blood samples? The lack of an adequate general rule probably will cause the district courts of appeal increasingly to lapse into notions of uncircumscribed discretion.

Also lacking is a rule to take account of the situation where the defendant does not know whether an item exists and therefore cannot establish, but can only assume, that it does; *e.g.*, defendant's request in *Brenard* for "all other reports relevant and material which were recorded by the California Highway Patrol."<sup>139</sup> Apart from the question of possible abuses by defendant of disclosures obtained, the purely logical position would seem to be that discovery of all of the prosecution's information germane to the crime involved and defendant's alleged participation in it, would be promotive of a fair trial for defendant. How can defendant go about establishing that discovery of data he does not know exists will promote the fairness of his trial? How general and inclusive can his discovery request be without, for some reason of judicial administration, condemning itself? It seems clear that, however far California has gone to date in forging a philosophy

<sup>137</sup> 172 Cal. App. 2d at 318, 341 P.2d at 746. The inadequacies of the record may do much to explain the result in this case. The court stated: "What we have said will not prevent the petitioner from renewing his motion before the trial court," and went on to state that if a proper showing were made, petitioner would be entitled to a copy of the blood test report, and his statement to the highway patrol.

<sup>138</sup> 53 Cal. 2d at 770, 3 Cal. Rptr. at 157, 349 P.2d at 973.

<sup>139</sup> 172 Cal. App. 2d at 316, 341 P.2d at 744.

of criminal discovery, she still encounters, to some extent at least, some of the perplexities next discussed which confront other jurisdictions, state and federal.

## VI

### FACTS AND ANALYSIS: THE DILEMMA RESTATED

The continuing prominence of serious, often brutal and revolting crime makes understandable the public's antipathy toward any measure interpretable as enhancing the difficulties of law enforcement. That discovery in criminal cases has something of that potential about it, however, should lead not to its out-of-hand condemnation but to a careful balancing of its assets and liabilities to the extent they are ascertainable or reasonably predictable. On a theoretical level at least, the philosophy of civil discovery—that pretrial disclosure tends to reduce surprise and contributes to more accurate fact ascertainment—would seem applicable also to criminal cases. Seemingly, that philosophy is as reconcilable with the adversary principle in criminal as in civil litigation. Are there countervailing considerations which make the problem essentially different in criminal cases? Unquestionably some innocent persons prosecuted for crimes need the help that criminal discovery would afford.<sup>140</sup> Must their need be subordinated to valid conflicting social interests? These problems require a careful analysis of relevant factors, not a blind striking at criminal discovery as the whipping boy for other possible evils in law enforcement such as under-staffed, inefficient, lax or corrupt police departments, ineffective prosecution or suborned defense, excessive review procedures, and the like.

Further, any appraisal of criminal discovery as a factor in the balance between state and accused must, to speak with adequate precision, (1) take account of all of the weights on the scales, informal circumstances as well as formal rules, and (2) consider the problems of each jurisdiction separately. For example, the relatively excellent discovery devices of California—furnishing transcripts of grand jury testimony and preliminary hearings to defendants—must be judged not in the abstract but in the context of California's abandonment of the no-comment rule as a facet of the privilege against self-incrimination.<sup>141</sup> In such an appraisal of the California situ-

<sup>140</sup> See BORCHARD, *CONVICTING THE INNOCENT* (1932); FRANK & FRANK, *NOT GUILTY* (1957), critically reviewed in Sherry, *Book Review*, 35 U. DET. L.Q. 650 (1958). The increasing significance of scientific evidence presents problems of proof, and hence of discoverability, unknown a generation ago. Mistakes can be made in laboratory analyses, as in other affairs involving the human instrumentality. We concede the utility and legitimacy of inquiring into the possibility of such mistakes at the trial by cross-examination. Is not discovery of such scientific evidence the logical fulfillment of the philosophy of cross-examination? See note 175 *infra* and accompanying text.

<sup>141</sup> CAL. CONST. art. I, § 13; CAL. PEN. CODE §§ 1093(6), 1323; *Adamson v. California*, 332 U.S. 46 (1947); WITKIN, *CALIFORNIA EVIDENCE* § 458 (1958); MCBAIN, *CALIFORNIA EVIDENCE MANUAL* § 241 (2d ed. 1960).

ation one must have regard only for factors that prevail in California; it is irrelevant that most jurisdictions still follow the no-comment rule.<sup>142</sup> With these cautions in mind, we turn to some of the dilemmas of criminal discovery.

### A. Self-Incrimination

*Discovery is Unacceptable in Criminal Cases Because it Cannot be Fair; Fair Discovery Presupposes Reciprocity and Mutuality Between Adversaries; This is Impossible in Criminal Cases Because of the Constitutional Principle Against Compulsory Self-Incrimination*<sup>143</sup>

Adequate appraisal of this apparent dilemma requires, for each jurisdiction, close attention to the formal principle against self-incrimination, the theoretical limitations inherent in or encrusted upon it, the extent of its actual application, and the total investigative process upon which it is superimposed. Among relevant considerations are the following:

(a) The prevalent psychology of the investigative process after commission of crime normally strengthens the arm of the police and prosecutors in arranging conferences, calling witnesses in for questioning, and the like. Over the suspect is the sanction of arrest; over other knowledgeable persons, that of detention as material witnesses.<sup>144</sup> The natural reluctance of most persons to become involved in legal proceedings is more effectively overcome for neutral witnesses by the awe of police and public authority than by any appeal available to the accused. On the other hand, the witnesses may not be neutral but relatives or friends of the suspect, or co-members of the suspect in a criminal enterprise, and hence truly adverse to the prosecution. Whether the state or the accused has the psychological advantage, therefore, in the investigative process seems utterly dependent on the type of crime involved and the facts of each case. If any generality is justified (and doubtless none is scientifically verifiable) it seems to me to be this: The accused, other than a member of a professional syndicate or class, is generally disadvantaged relative to the state in respect of the approachability of witnesses.

(b) To the extent that proof is a function of access to scientific evidence, both raw data and its analysis, the state generally is in a strong position in relation to all accused persons.<sup>145</sup>

<sup>142</sup> 8 WIGMORE, EVIDENCE §§ 2272, 2272a (3d ed. 1940); MCCORMICK, EVIDENCE § 132 (1954); 18 U.S.C. § 3481 (1958).

<sup>143</sup> For a discussion of waiver of the privilege against self-incrimination as a possible factor in discovery, see note 159 *infra* and accompanying text.

<sup>144</sup> The California provisions on material witnesses are in CAL. PEN. CODE §§ 878, 879. They provide that material witnesses can be put by the magistrate or judge under bond to appear and testify. These provisions apparently are rarely used in California, and experienced prosecutors seem to regard them as essentially unusable.

<sup>145</sup> Exhaustive accumulation of scientific data, and its elaborate analysis, often characterize important criminal cases. An excellent illustration is afforded by *Magnuson v. State*,



(c) The principle against self-incrimination does not bar exhaustive interrogation of the accused and all witnesses, whether prior to or after detention, subject, however, in federal cases to the limitation inherent in the *McNabb-Mallory*<sup>146</sup> requirement of prompt arraignment. While a person at all stages of the investigative and litigative process involving him as an accused has the theoretical right not to make testimonial utterances; and while all persons have such a right at all times not to answer questions which tend to incriminate them under the law of the interrogating sovereign,<sup>147</sup> the significance of these theoretical rights depends largely on the extent they are known and exercised by the affected persons. The extent to which persons are told of such rights and warned as to the consequences of waiver varies not only from state to state but from police station to police station.

(d) Other than in federal court where the *McNabb-Mallory*<sup>148</sup> rule prevails, the principle limitation on the effectiveness of police and prosecutor interrogation is the doctrine excluding coerced confessions.<sup>149</sup> While doubtless the Supreme Court's increasing supervision under the due process clause of police interrogation, by precluding use of physically or psychologically coerced confessions, is one of the most significant developments of criminal law administration of the past several decades, Professor Goldstein recently has stated that:

In state prosecutions, and in federal prosecutions in which the accused has been brought promptly before a magistrate, the police may use methods of interrogation involving trickery, fabricated evidence, subtle threats, violations of confidence, and a myriad other techniques for manipulating the fearful or suggestible. None of these conventional methods of interrogation is prohibited by law. None of them, alone, suffices to invalidate confessions or admissions following from its use. Each constitutes one among many factors to be considered in determining the complex issue of the "trustworthiness" or "voluntariness" of the confession. And because that issue has been arbitrarily limited to permit just such methods, police are invited to press to the limits of interrogation.<sup>150</sup>

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187 Wis. 122, 203 N.W. 749 (1926). See McCORMICK, EVIDENCE §§ 170-78 (1954); HOUTS, FROM EVIDENCE TO PROOF (1956); LOUISELL & WILLIAMS, THE PARENCHYMA OF LAW ch. XVI (1960).

<sup>146</sup> *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957); see also *Upshaw v. United States*, 335 U.S. 410 (1948).

<sup>147</sup> McCORMICK, EVIDENCE ch. 13 (1954) (especially § 122).

<sup>148</sup> See note 146 *supra*.

<sup>149</sup> See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Lyons v. Oklahoma*, 322 U.S. 596 (1944); *Leyra v. Denno*, 347 U.S. 556 (1954); cf. *Stein v. New York*, 346 U.S. 156 (1953). California now holds that the necessity for determining the voluntary character of a statement by defendant exists respecting admissions as well as confessions. *People v. Atchley*, 53 Cal.2d 160, 346 P.2d 764 (1959), discussed in Note, 48 CALIF. L. REV. 697 (1960).

<sup>150</sup> Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 nn.128 & 129 (1960).

Even when a confession is held inadmissible, the interrogation which produced it may still have served vital discovery functions by providing leads to other evidence. It can hardly be gainsaid that investigative interrogation, save when the person interviewed is disciplined to the process' realities by frequent contacts with the police as the professional criminal typically is, weighs heavily on the scales as an effective discovery device for the state.

(e) The principle against self-incrimination, even in theory, in most jurisdictions only precludes incrimination by testimonial utterance; in most places including California the body and its constituents and characteristics can be used as evidence against the accused.<sup>151</sup> Indeed, it is the general rule that an accused who stands mute in the face of an accusatory statement can be considered to have made an admission,<sup>152</sup> although increasingly the distinction is gaining favor between standing mute and expressly invoking the right to do so.<sup>153</sup>

(f) In a few jurisdictions, including California, the self-incrimination principle does not preclude comment on the defendant's failure to testify.<sup>154</sup> Moreover, it is sometimes held that preclusion of comment on defendant's failure to testify does not prevent comment on his failure to produce the testimony of others under his control.<sup>155</sup> Presumably there is no constitutional barrier to the state's taking for discovery purposes<sup>156</sup> any number of pretrial depositions of witnesses other than the defendant, just as it may subpoena them for the trial. That such witnesses might elect not to answer specific questions on the ground of tendency to incriminate is a possibility existent in civil deposition procedure also, as indeed it is in all testimony-taking procedures. Likely the reason that one does not hear proposals to allow the state to take discovery depositions of witnesses other than defendant is that realistically there is no need of such depositions because the informal availability of witnesses to the state's interrogation is generally

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<sup>151</sup> 8 WIGMORE, EVIDENCE § 2263 (3d ed. 1940); MCCORMICK, EVIDENCE § 126 (1954); *People v. Haeussler*, 41 Cal. 2d 252, 260 P.2d 8 (1953); *People v. Duroncelay*, 48 Cal. 2d 766, 312 P.2d 690 (1957); cf. *Breithaupt v. Abram*, 352 U.S. 432 (1957); *contra*, *State v. Wolf*, 164 A.2d 865 (Del. 1960).

<sup>152</sup> MCCORMICK, EVIDENCE § 247 (1954); *People v. Wein*, 50 Cal. 2d 383, 401, 326 P.2d 457, 467 (1958).

<sup>153</sup> See *United States v. Kelly*, 119 F. Supp. 217 (D.D.C. 1954); *People v. McGee*, 31 Cal. 2d 229, 187 P.2d 706 (1947); WITKIN, CALIFORNIA EVIDENCE § 237 (1958).

<sup>154</sup> See note 141 *supra* for California authorities; as to other jurisdictions, see MCCORMICK, EVIDENCE § 132 (1954).

<sup>155</sup> *Miller v. Commonwealth*, 153 Va. 890, 149 S.E. 459 (1929); MCCORMICK, EVIDENCE § 132 (1954).

<sup>156</sup> To be distinguished, of course, is the matter of *using* depositions at the criminal trial, which potentially raises problems under the confrontation guarantee of the sixth amendment and analogous state provisions. See *Reynolds v. United States*, 98 U.S. 145 (1878); *Mattox v. United States*, 156 U.S. 237 (1895); *Motes v. United States*, 178 U.S. 458 (1900).

satisfactory. And the state's capacity to question the defendant, with the aim of procuring confession, normally makes all but irrelevant defendant's non-amenability to deposition.

(g) The principle against self-incrimination does not prevent various pleading devices to obtain advance knowledge of the nature of the defense, e.g., the requirements of express pleading of insanity or alibi.<sup>157</sup>

(h) If within a given jurisdiction the recognition of discovery rights in a defendant excessively imbalances the postures of state and defendant respecting access to the facts, because of the defendant's privilege against self-incrimination, possibilities of waiver of the privilege in whole or in part are logically and constitutionally available to restore the balance. It is well established that the constitutional privilege can be set aside by provision for an adequate substitute, e.g., a witness can be compelled to answer incriminating questions if granted complete exoneration from the criminality exposed thereby.<sup>158</sup> It would seem that a discovery order in defendant's favor, conditioned, for example, upon defendant's disclosure of data of roughly equivalent probative value, would be constitutionally permissible and, in some cases at least, administratively feasible.<sup>159</sup>

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<sup>157</sup> See note 13 *supra*. In addition to the insanity and alibi requirements, note that "Washington has an interesting reciprocal aspect in its statute [Wash. Rev. Code § 10.37.030 (1951)] requiring the prosecutor to list his witnesses; within five days from the time that the prosecutor furnishes his list, the defendant is likewise to furnish a list of the witnesses upon whom he intends to rely. The author is informed, however, that in practice the Washington statute is rarely observed by the defendant, since the statute does not provide the complementary sanction of possible exclusion of the nonlisted witness's testimony." Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 315-16 (1960).

<sup>158</sup> 8 WIGMORE, EVIDENCE §§ 2279-84 (3d ed. 1940); MCCORMICK, EVIDENCE § 135 (1954). When the statutory protection falls short of the constitutional guarantee, the former is inadequate and the witness continues to enjoy the right to refuse to answer despite the statute. *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

<sup>159</sup> After this article was written, a recent case was found tending to substantiate the statement in the text, *McCain v. Superior Court*, 184 A.C.A. 853 (1960), a prosecution under CAL. PEN. CODE § 288 (exciting lust of child). There, defendant moved for pretrial discovery of certain data in the hands of the prosecution. The People countered with a discovery motion against the defendant. At the hearing the judge inquired of the defendant as to whether he had any objection to the granting of the People's motion in conjunction with granting his motion. Eventually defendant indicated he was ready to submit to whatever orders the court made, and the court granted both orders for pretrial discovery on a "reciprocal contemporaneous basis." Defendant and the People then exchanged materials. Later that day defendant invoked his privilege against self-incrimination and other constitutional privileges. When the case was called for trial defendant moved for a dismissal, relying on CAL. PEN. CODE § 1324, which provides that when a person furnishes incriminating information under a court order he is entitled to immunity from prosecution. The motion for dismissal was denied and defendant sought prohibition against proceeding with the trial. Prohibition was denied essentially, I judge, because defendant by consenting to the discovery order waived his privilege against self-incrimination; hence, production was not pursuant to § 1324's mandate, but to the waiver of the constitutional right, which had been invoked after the waiver and therefore too late. The court's conclusion gets support, doubtless essential, from the fact that due process's pro-

*B. Is Criminal Discovery a Deterrent to Preparation  
of Documentary Evidence?*

*A District Attorney, Compelled to Disclose his Case Ahead of Trial and Thereby Expose It to the Dangers of a Fabricated Defense, Inevitably Will Protect Against the Evil by Striving so far as Possible to Make His Case Non-Disclosable; i.e., He Will Commit to Memory, Rather Than Paper or Other Record, the Results of His Investigative Labors*

This is more than an idle threat. At least, not infrequently it is informally advanced by district attorneys, fresh from the disappointment of a discovery order, as their likely future path. One district attorney in a large metropolitan area, who formerly made it a practice to tape all of his office interviews with prospective witnesses, is reported to have dropped the practice with the growth of discovery orders. In the Supreme Court's latest *Jencks*-type case, *Campbell v. United States*,<sup>160</sup> there is in the dissenting-concurring opinion of Frankfurter, J., for four members of the Court frank recognition of the possibility of this method of frustrating potential discovery orders:

Nothing in the legislative history of the [*Jencks*] Act remotely suggests that Congress' intent was to require the Government, with penalizing consequences, to preserve all records and notes taken during the countless interviews that are connected with criminal investigation by the various branches of the Government.<sup>161</sup>

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tective mantle does not envelope criminal discovery. *Leland v. Oregon*, 343 U.S. 790 (1952); *Cicenia v. LaGay*, 357 U.S. 504 (1958). The allowance of one constitutional right hardly could be conditioned on the waiver of another.

For a suggestion that this doctrine of waiver might appropriately be limited to the professional or organized crime situation, rather than generally applied in all criminal cases, see text at note 192 *infra*. For a viewpoint favoring the development of criminal discovery without the requirement of waiver of the privilege against self-incrimination, "as a mark of the maturity of our state and the consummate respect it pays to the dignity of the individual, both for his own sake and for the benefit of a society seeking to impress upon its police and prosecutors the high obligation to proceed against a citizen only when they have independent evidence of his crime," see Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 *YALE L.J.* 1149, 1197 (1960). Cf. Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 *U. CHI. L. REV.* 472 (1957); MacNaughton, *The Privilege Against Self-Incrimination*, 51 *J. CRIM. L., C. & P. S.* 138 (1960). Compare GRISWOLD, *THE 5TH AMENDMENT TODAY* (1955), with MAYERS, *SHALL WE AMEND THE FIFTH AMENDMENT* (1959) and HOOK, *COMMON SENSE AND THE FIFTH AMENDMENT* (1957).

<sup>160</sup> 81 Sup. Ct. 421 (1961).

<sup>161</sup> 81 Sup. Ct. at 430. Compare the statement in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947): "Were such materials [counsel's memoranda, etc.] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." Perhaps *Campbell* suggests that the potential impairment of record keeping which might ensue upon a liberal discovery policy would be even more serious respecting police records than prosecutor's files. It would seem, at least in California, that usually original records of interviews with defendants and witnesses are found in the prosecutor's files only in the more serious homicide cases and fraud investigations. Moreover, obviously the prosecutor's files normally are more clearly within the "work product" concept than police files as such.

The particular evil in this threat against discovery of course is the potential further exaltation of feeble human recollection over more reliable recordations.<sup>162</sup>

Of course there are obvious limits to the operation of this threat. A prosecutor who refrains from taking a witness's statement in writing, in order to frustrate its potential discovery by defendant, may find that it is he who most needs a writing at trial in order to impeach the witness who has disappointed his expectations.<sup>163</sup> One may also ask why, if the threat is a real one, comparable destruction of documentary evidence has not characterized the administration of civil discovery? Likely the answer chiefly is—besides the inherent differences between criminal and civil litigation and, often, between the practicing lawyers—that documentary items are often vital to the business involved in civil cases as well as important to the litigation, whereas the prosecutor's business is *prosecuting*.<sup>164</sup> In any event, two conclusions about this threat are suggested: (1) To the extent such prosecutor reactions to discovery are rational, they may represent the felt need for adequate development in criminal practice of *Hickman v. Taylor's*<sup>165</sup> "work-product" philosophy. The prosecuting attorney, no less than the defendant's counsel or their civil counterparts, normally has need to preserve in privacy his own thought processes about pending litigation—with the resultant need of notes and memoranda to help him. (2) In the area of discovery as elsewhere, prosecutors, as officers of the court, must be held strictly to the ethical standards implicit in the fact that their primary job is not to convict, but to see that justice is done.<sup>166</sup> Frustration of proper discovery orders by chicane or deceit or the half-told truth cannot be tolerated.<sup>167</sup>

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<sup>162</sup> See MCCORMICK, EVIDENCE § 9 (1954) (Cf. § 197).

<sup>163</sup> Of course a writing acknowledged by a witness as his own in the nature of things usually affords the most convincing basis for impeachment, but it is by no means essential in theory or indispensable in practice. Effective impeachment often is possible through the testimony of a witness who merely heard the impeached witness's prior inconsistent statement.

<sup>164</sup> Cf. *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943) (engineer's statement after grade crossing collision not within business records exception to hearsay rule; as to such statements "Their primary utility is in litigating, not in railroading.").

<sup>165</sup> 329 U.S. 495 (1947). See notes 23, 75 *supra*. It should be pointed out that perhaps more significant than the danger of avoidance or destruction of writings or other records by the prosecutor himself is the danger of the pattern which might be set in the police department by his policy.

<sup>166</sup> AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS No. 5, in part: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." *Quaere*, as to the need of greater specificity in this Canon, rather than general reliance on the prosecutor's subjective notions of "justice."

<sup>167</sup> To pronounce such a generality is of course easy, but its proper application in an adversary system is potentially fraught with the gravest complexities. A highly skilled former prosecutor, of unimpeachable integrity and ethical standards, recently said to the writer: "If I

### *C. Criminal Discovery and the Adversary Method*

#### *Discovery in Criminal Cases is Essentially Inconsistent with the Adversary Method; Its Acceptance Will Undermine Our Accusatory System*

In few other areas of the law is the danger that semantics will play tricks with analysis as great as it is in this area. What is the rationale of our adversary, as distinguished from an inquisitorial, system? Is it not that, human nature being what it is, self-interest is one of the surest spurs to diligent ascertainment and effective presentation of facts, and cogent invocation of legal principles? Respecting the adversary principle, significant differences between civil and criminal litigation immediately occur. Between two individuals, or two other jurial entities at odds over their rights, the clashes of self-interest provoke roughly equivalent motivations for self-protection. But in any realistic sense, can the protagonist in the criminal case—"society as a whole"—be equated with its civil case counterpart? Of course, perhaps especially in a democracy such as ours, the district attorney, police and others associated with the prosecution are under the self-interest motivation of making a good record.<sup>168</sup> But at least

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were to investigate a criminal case today in California, I would do so upon the assumption that much of what I discovered, if not everything, would be in imminent peril of discovery. Since I am a product of the adversary system, I would do everything possible to limit and restrict what the defense might compel me to disclose. If any disclosure was to be made, I would want to exercise control over it. I'm sure that I could protect my situation pretty effectively, that is, I could frustrate all of the supposedly noble purposes of discovery. And that is just what law enforcement people are trying their best to do. Hope for change must lie in your suggestion for reciprocity. There's a lot to be said for the well known *quid pro quo*." This reminded me of an argument I once had with a colleague as to whether the addressee of interrogatories under Fed. R. Civ. P. 33 must voluntarily come forward with further answers after the accuracy of his first answers has been undermined by information later acquired. Cf. 4 MOORE, *FEDERAL PRACTICE* § 33.26 (2d ed. 1953). Getting nowhere in our dispute, we agreed to carry it to one of America's foremost legal scholars, a distinguished Dean. The best answer he could come up with, after giving the matter his usual thoughtful attention, was: "Sufficient unto the day are the evils thereof."

<sup>168</sup> On a theoretical level, at least, it is of course arguable that the civil-servant type prosecutor of the continental countries, serving under the direction of a ministry of justice, is less motivated to the extremes of partisanship than his American counterpart dependent upon popular election. Generalities in this area are particularly dangerous, but the type of political motivation for conduct might differ according to whether one is dependent upon a popular election, or the approval of his civil-servant superiors. In regard to excess of partisanship or zeal, is the average of performance of the appointed U.S. District attorney substantially different from that of elected state prosecutors? Perhaps the real difference in this regard between the continental and American methods of selecting prosecutors is not so much a matter of appointment or election, as it is that of civil service contrasted with political status. The continental method involves centralized control by a ministry of justice, with at least the theoretical possibility of uniformly imposed standards. As against the advantages of such a method, obviously must be weighed the possibility of abuse for political purposes as in the modern tyrannies. Compare the English method, whereby the prosecuting authority, e.g., Director of Public Prosecutions, retains for trial of criminal cases barristers from a panel of counsel specialists in criminal cases, who may also try cases for the defendant. See DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* (1958) (especially at 22-25).

we have the theory that their function is not to convict but to see that justice is done, and surely the theory permeates to some extent the public psychology. The moral intolerability of complete adversariness in criminal cases, on the part of the prosecution, is obvious in a society with any pretensions to humaneness.

Thus it is that we do not leave the indigent helpless in prosecution; we provide court-appointed counsel or finance legal aid, and sometimes waive trial and appellate court expenses.<sup>169</sup> In some circumstances, such as pleas of insanity, we furnish assumedly neutral alienists. On the other hand, the prosecution sometimes gets the benefit of explicit pleas such as that of alibi or insanity. Recently the United States Supreme Court, in *Campbell v. United States*,<sup>170</sup> had occasion to delimit an area of the trial itself wherein operation of the adversary principle was deemed inappropriate: the inquiry as to whether a witness's statement was producible under the *Jencks* legislation.<sup>171</sup> Extension of discovery rights cannot, therefore, logically be condemned by arbitrary application of abstract notions of adversariness. Rather, such extension, (1) where it can be reciprocal and mutual, is not at war with the adversary principle but only an attempt to confine the contest to the heartland of the actual controversy;<sup>172</sup> (2) where it cannot be reciprocal and mutual, must be examined on its own merits as promotive *vel non* of accurate fact ascertainment and not condemned in the name of a nonexistent absolute adversariness.

#### *D. Diligence and Sloth*

*To Give Defendants Extensive Discovery Rights Will Motivate Their Lawyers to Refrain from Diligent Investigation of Their Own; Increasingly They Will Lean on the Prosecution's Efforts until the Criminal Investigatory Process, Realistically Viewed, Will be a Unilateral One, and the Acute Incentive to Fact Ascertainment Generated by Self-Interest, Will be Largely Dissipated*

This is more than a shibboleth; theologians classify sloth among the capital sins and lawyers are not beyond its corrosive influences. Perhaps

<sup>169</sup> The reference to expenses is to the United States generally, and might be misleading without explanation as to California particularly. Non-California lawyers are often amazed at the liberality of the practice here respecting the economic ease of appeal by defendants in criminal cases. Transcripts are furnished without cost to defendants; there are no necessary printing expenses, as even briefs may be typed; there are no docketing fees. Doubtless these facts help to explain the apparently large number of appeals in criminal cases in California, relative to other states. There is of course power in the court to discipline lawyers for frivolous appeals. Few students of judicial administration would fail to prefer the latter sanction, rather than an economic one, as the inhibiting factor on taking appeals.

<sup>170</sup> 81 Sup. Ct. 421, 427 (1961).

<sup>171</sup> 18 U.S.C. § 3500 (1958).

<sup>172</sup> Cf. Louisell, *Discovery and Pre-trial Under the Minnesota Rules*, 36 MINN. L. REV. 633, 639-40 (1952).

such considerations as these underlay the California Supreme Court's recent observation in *People v. Cooper*<sup>173</sup> that to obtain discovery defendant must show some better cause "than a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime." Similar charges not infrequently are informally heard respecting civil discovery, although the latter by reason of its inherent mutuality would seem better able to generate its own sanctions against the indolent. If diligence in preparing for trial, whether civil or criminal, is with any substantial number of lawyers an inverse function of the efficiency of discovery—if the zeal in preparing one's own case diminishes according as he is able to raid his opponent's workshop—then, indeed, in such indolence would there be danger that we would end with unilateral inquiry only into the facts. The essence of the adversary principle would be gone.

But does not the argument suggest the wrong cure for the disease, even assuming that the latter has been accurately diagnosed? That is, if professional tradition and pride will not generally inspire diligent performance in matters as vital as criminal cases, the disease would seem to be at the heart of the profession itself; medication at the periphery would hardly be adequate therapy. Needless to say, there are still serious problems of adequate representation for defendants in criminal cases—notoriously so in federal court where, except in the District of Columbia, assigned counsel must still serve without pay. But it would be hard indeed to sustain the generality that defendants' lawyers soldier on the job in criminal cases. The deficiencies are more those of lack of training and effectiveness particularly with scientific data, than lack of zeal. How often in civil litigation will a lawyer depend on an adversary's response to an interrogatory, rather than go himself directly to a source reasonably available to him? Certainly those who would abolish civil discovery on the "diligence" argument are either few in number or feeble in protest.

Further, whatever the significance in civil litigation of the "diligence" objection, other considerations tend to diminish its relevance in the context of the criminal investigatory process. For often the defendant, in a practical sense, simply does not have the access to witnesses that the prosecution has. In at least one California case, defendant's discovery attempts were apparently motivated in part by the unwillingness of witnesses to communicate with his attorney.<sup>174</sup> When a defendant's lawyer confronts witnesses who have been told explicitly or implicitly by police or prosecutor "not to talk," an attempt to find out the facts on his own is an uphill fight. The more diligent the attempt, the more likely his own exposure to the charge of tampering with witnesses or suborning perjury. Hence it is rea-

<sup>173</sup> 53 Cal. 2d 755, 770, 3 Cal. Rptr. 148, 157, 349 P.2d 964, 973 (1960).

<sup>174</sup> *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 327 P.2d 68 (1958).



sonably arguable at least in some criminal cases that the need of discovery, for obtainment of all the facts, is greater than in those civil cases which do not pose equivalent barriers to free access to witnesses.

### *E. Science and the Public Domain*

#### *Compelled Disclosure of Scientific Data by the Prosecution Violates the State's Property Rights*

Increasingly the issue in modern litigation, criminal as well as civil, turns upon scientific data and its interpretation.<sup>175</sup> Often the latter is not the subject of reasonable dispute. The conclusive nature of properly conducted blood tests as excluding the possibility of parentage and finger print identification are but two of the most frequently encountered demonstrations of the significance of scientific evidence today. For example, in *People v. Riser*<sup>176</sup> the court said: "Fingerprint evidence is the strongest evidence of identity, and is ordinarily sufficient alone to identify the defendant."

Is the state on orthodox property concepts to have exclusive pretrial rights in scientific data just because they are gathered by its own trained specialists and analyzed and interpreted in its own laboratories? Doubtless such property concepts gain currency in the criminal field by analogy to civil litigation, where it has been held that one party is not allowed to utilize discovery against his adversary's experts in such manner as to profit from the adversary's expenditures.<sup>177</sup> Even in civil litigation, the notion becomes intolerable at its extremes,<sup>178</sup> and in criminal cases the "state" more directly represents all of the interests involved, including that of defendant to a fair trial. No one would dispute that by cross-examination of the state's experts at trial, defendant has the right to share the usefulness of the state's scientific data. Should the right be cut off before trial, simply in the name of ownership notions?<sup>179</sup> It seems clear that the data of science, procured at the taxpayers' expense, are normally in the public

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<sup>175</sup> See LOUISELL & WILLIAMS, *THE PARENCHYMA OF LAW* ch. XVI (1960); note 140 *supra*.

<sup>176</sup> 47 Cal. 2d 566, 589, 305 P.2d 1, 15 (1956).

<sup>177</sup> See 4 MOORE, *FEDERAL PRACTICE* ¶ 26.24 (2d. ed. 1950). Cf. *Grand Lake Drive In, Inc. v. Superior Court*, 179 Cal. App. 2d 122, 3 Cal. Rptr. 621 (1960).

<sup>178</sup> See LOUISELL & WILLIAMS, *TRIAL OF MEDICAL MALPRACTICE CASES* ¶ 10.11 (1960).

<sup>179</sup> Apart from such property concepts is the notion, sometimes held by the expert, or criminalist, that the knowledge that his work may be handed over to the defense has a crippling effect on his relation to the prosecutor and the police. In this aspect, the problem seems to be one of the reach of the "work product" theory and to arise essentially out of the psychology of the expert as a partisan witness. Cf. *REPORT OF THE SPECIAL COMMITTEE, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, IMPARTIAL MEDICAL TESTIMONY* (1956), reviewed in *Louisell, Book Review*, 45 CALIF. L. REV. 572 (1957). See 2 WIGMORE, *EVIDENCE* § 563 (3d ed. 1940); MCCORMICK, *EVIDENCE* § 17 (1954); Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285, 293 (1943); but see Diamond, *The Fallacy of the Impartial Expert*, 3 ARCHIVES OF CRIM. PSYCHODYNAMICS 221 (1959).

domain, and should be available for equal use by all interested parties—provided the use be not distorted to abuse by fabrication or falsification.

*F. State and Accused: Does Discovery Pervert the Balance?*

*The Scales Already are Unduly Weighted in Favor of the Accused; Discovery Means Further Distortion to the Loss of Society*

Perhaps this objection is a mere rephrasing of that pertaining to the adversary method. In any event, both objections seem to have primary regard for maintenance of ideal conditions for an even contest, rather than for the objective of the contest: accurate fact ascertainment. The ultimate question is, or should be, not simply whether discovery tends to tilt the scales, but whether it tends to tilt them to a right conclusion. As earlier pointed out, this kind of analysis necessitates regard for *all* of the factors in the criminal investigatory and adjudicative process. Significant factors, perhaps too often ignored in denying discovery, include these: (1) The modern developments of liberal notions of pleading, in indictments and informations as well as civil complaints, mean that the party pleaded against now often is (and perhaps always was) inadequately informed of the charge against him. Extensive discovery rights in civil cases constitute a frank recognition of the reality that something besides pleading is essential for preparation for trial.<sup>180</sup> (2) There is some protection for the prosecution against disclosure it can ill-afford, in established doctrines of confidentiality, *e.g.*, those of state secrets and informer privilege—although the extremities of the latter have been eroding away.<sup>181</sup> (3) In federal court, and in a number of other jurisdictions,<sup>182</sup> including California,<sup>183</sup> the trial court's right to comment on the evidence, including credibility of witnesses, would seem a significant potential protection against the dangers of fabrication which may be facilitated by pretrial discovery.<sup>184</sup>

<sup>180</sup> See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, esp. 1175, 1180 (1960).

<sup>181</sup> See notes 22, 24, 97 *supra*; also, *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

<sup>182</sup> 9 WIGMORE, EVIDENCE §§ 2551, 2551a (3d ed. 1940).

<sup>183</sup> CAL. CONST. art. VI, § 19; CAL. PEN. CODE § 1127. The extent of actual use today of the power of comment is, of course, another matter. See WITKIN, SUMMARY OF CALIFORNIA LAW, *Crimes* § 275 (6th ed. 1946).

<sup>184</sup> It is sometimes said that criminal discovery will only proliferate collateral issues and confuse the process of getting to the heart of the matter—innocence or guilt. It cannot be denied that cases like *Campbell v. United States*, 81 Sup. Ct. 421 (1961), contain forebodings of such dangers. There in the midst of a bank robbery trial the question of the existence *vel non* in the hands of the Government of a statement producible under the *Jencks Act* (18 U.S.C. § 3500 (1958))—a collateral matter—came practically to dominate the litigation. Note, however, that *Campbell* involved at-trial discovery. It is arguable from the opinion (and writing without knowledge of the record) that reasonable pretrial discovery there would have seasonably resolved the collateral issue and facilitated an orderly trial of the real questions.

### G. Discovery and Discretion

*Whatever the Merits of Discovery in Criminal Cases, It Should not be a Matter of Right; It Should be within the Discretion of the Trial Court*

From the viewpoint of the appellate judge faced with the task of writing opinions, this is doubtless a pleasant and facile solution. But is it good enough? Not for those who agree with Holt, C. J., that "discretionary" is "but a softer word for arbitrary."<sup>185</sup> And the tremendous variation in viewpoint about the fundamentals of discovery among trial judges seems to argue in the negative.

By setting up the verbal formula "discretion of the trial judge," we often mislead ourselves, at least subconsciously, into thinking of it as a legal doctrine like *res judicata*, or purchaser for value without notice, or consideration. But when we think precisely, we realize it is no such thing. It is as nebulous as "fairness," or "in the public interest," or "justice" itself. It means little more than that, the appellate process being with us what it is—the review of a record rather than a case<sup>186</sup>—some things are best left to the judgment of the trial judge; except, of course, when his judgment is so atrocious as to be intolerable. Looked at realistically, instead of as a neat legal concept, "discretion of the trial judge" in the area of criminal discovery appears more clearly for what it often is: an escape hatch from the rigors of formulating a reasonable rule for a complex situation. Actually, discretion of the trial judge has been pretty much the rule in criminal discovery for many years with the result that in most jurisdictions there has been no such discovery.<sup>187</sup>

In short, in the area of criminal discovery as elsewhere, we must struggle for norms that are objectively identifiable, observable, and reasonable. One defendant should not liberally be accorded discovery, and another wholly denied it, with nothing more than the "luck of the draw" at motion's calendar to explain the difference. Is there, then, no area of criminal discovery suitable for operation of the "discretion of the trial judge?" To this problem we now turn.

### H. Organized Crime, or the Criminal Syndicate

*Criminal Discovery is Intolerable Because, by Facilitating Easy Defenses for Professional, Organized or Conspiratorial Criminals, It Will Further Reduce Social Defenses Against One of America's Greatest Evils*

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<sup>185</sup> *Walcot's Case*, Holt, K. B. 680, 90 Eng. Rep. 1275 (1793).

<sup>186</sup> With all that this implies, by way of recognition that cold print may not connote the living realities, and that the appellate process at best is cumbersome and often expensive. See Louisell and Degnan, *Rehearing in American Appellate Courts*, 44 CALIF. L. REV. 627 (1956); 34 CAN. B. REV. 898 (1956); 25 F.R.D. 143 (1960).

<sup>187</sup> Cf. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960); Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960).

It is with this objection that one approaches the heart of the dilemma of criminal discovery. Often district attorneys are willing to open up their files for inspection by defendant's counsel, when the latter is considered trustworthy in the sense that he would not be a party to subornation of perjury or an illegally fabricated defense. But they feel that some counsel, especially those who habitually appear for professional criminals, will stop at nothing to get their man discharged, and that discovery will only facilitate such antisocial designs. Without disparaging the many conscientious lawyers who, out of a sense of duty more often than one of profit, refuse to shun criminal law administration and thus appear at least occasionally for one charged with crime, it cannot be denied that among the practitioners in American criminal courts are those who not only represent defendants as trial counsel but essentially act as advisors to the criminal syndicates to which their clients belong.<sup>188</sup> The organized criminal may be motivated either commercially or by notions of subversion of the government, or otherwise. His legal representation is a delicate matter difficult to write about, but a reality that cannot be ignored in a candid appraisal of the American scene.

The lawyer who defends the more usual homicide case—the killing of passion during the spousal or family quarrel, for example—is as likely to be imbued with a proper sense of the ethical limitations on advocacy as his counterpart in civil litigation. Knowing on the one hand that he owes “entire devotion to the interest of his client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and abil-

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<sup>188</sup> In *Ex parte McDonough*, 170 Cal. 230, 149 Pac. 566 (1915), Lawlor, J., dissenting, made the following observations respecting the operation of criminal enterprises: “The court could not have done justice to the state, as well as to the petitioner, if it failed to keep in mind the common experience in the administration of criminal justice, that in relation to crimes involving conspiracy and confederation those who plan them remain in the background, while reckless tools are sent forth to do the actual work under promises of reward, protection, and defense. If exposure follows, the men who actually committed the criminal act are alone brought to the bar of justice. Then an attorney, chosen by the heads of the enterprise, appears to defend them. Deference is generally paid to appearances by having one attorney for each individual. If conviction follows, the leaders in the background are naturally anxious about the outcome. Will the district attorney be able to obtain confessions from the men already in the toils of the law, and, in that way, develop all the facts of the crime and reach out for the prime conspirators? In such circumstances the advantage of hiring an attorney to guide the criminals already in the clutches of the law can hardly be exaggerated. What would be the conception of duty on the part of an attorney who would, in such a situation, accept employment to represent the two sets of malefactors? This is not an unusual experience by any means, as every one familiar with criminal litigation is aware.” 170 Cal. at 247, 149 Pac. at 572.

See also *Abbott v. Superior Court*, 78 Cal. App. 2d 19, 21, 177 P.2d 317, 318 (1947), where the court said: “The evidence, if believed, is sufficient to establish that petitioner [an attorney] was an active member of the conspiracy to violate the law prohibiting abortions and was counselling a fellow member of the conspiracy in an attempt to further its illegal purposes.”

ity . . . ,"<sup>189</sup> he realizes on the other hand that advocacy must stop short of ethically abhorrent conduct, *e.g.*, subornation of perjury. The permanently retained lawyer of the criminal syndicate, *e.g.*, dope peddlers, may however stop at nothing. Or, whatever his personal inhibitions, he may be overwhelmed by the pressures emanating from the gang, or the latter's more or less independent acts of subornation, or getting rid of state witnesses, which the attorney is powerless to control.

Even in jurisdictions which give the broadest scope to the privilege against self-incrimination, and where consequently the prosecution might be disadvantaged vis-à-vis the accused respecting formal criminal discovery, society probably could afford and indeed would profit by substantial development of criminal discovery in the typical case, to the end that surprise as an element in outcome would be as effectively reduced in criminal as it is now in civil litigation.<sup>190</sup> Are the factors introduced by organized crime in the American social pattern of such overwhelming significance as justifiably to bar the path to rationality which discovery could help to open up? Likely the organized power of at least some criminal syndicates is so great, as to rival in overall effectiveness that of any state, or the federal government itself. Must reform be held at bay by the fact of organized crime?

Rather, it would seem that the law should take account of these realities, and draw the line between typical, and organized, crime. In the usual criminal case, the norm would be discovery as full-fledged as that which now characterizes civil litigation in federal court and those many jurisdictions which have emulated the federal civil discovery rules. Discovery, however, would be withheld, or perhaps allowed subject to restrictions, upon a showing by the state that by reason of the nature of the accused's associations and representatives, it would likely lead to improper uses such as threats to witnesses, hired or professional perjury, or the like. Among such restrictions might be delaying the time of allowance of discovery, *e.g.*, allowing it only shortly before trial so as to reduce to a minimum

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<sup>189</sup> AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS No. 15; *cf.* No. 5, stating in part: "Having undertaken [defense of a person accused of crime] the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."

<sup>190</sup> From the prosecutor's viewpoint, it is argued that criminal discovery disadvantages the prosecution most seriously in those cases where the witnesses are friendly or subservient to the defendant, and that this does not occur only in the organized crime situation; that a simple drunk driving case can present this problem and often does. But, viewing the matter simply as one of balancing the scales in an adversary system—and premitting the considerations discussed in the text, *supra*, following note 167—it is hard to believe that in the generality of drunk driving cases, for example, discovery for defendant unduly handicaps the prosecution. To the contrary, the latter's increasing facilities for scientific aids seem to necessitate criminal discovery for a fair trial, particularly as to data pertaining to scientific tests.

chance for interference with state witnesses.<sup>191</sup> Or, waiver of the self-incrimination privilege might be imposed as a condition of discovery on applicants representing the professional criminal groups, although not generally imposed.<sup>192</sup> Undoubtedly this approach would necessitate a measure of "trial court discretion," but it would be a discretion delimited by some tangible, objective considerations. It would be something like the kind of discretion apparently appropriate in fixing the amount of bail. Federal Rules of Criminal Procedure rule 46(c), which may be taken as representative,<sup>193</sup> provides that if defendant is admitted to bail the amount shall be such as will insure his presence "having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." Under this standard, one court considered, *inter alia*, that defendant when apprehended was in the company of a bail-jumper and was a person "without respect for legal processes."<sup>194</sup> Other courts have deemed significant defendant's character and reputation,<sup>195</sup> his criminal record,<sup>196</sup> his "consistent pattern of behavior,"<sup>197</sup> and the extensive criminal operations of the defendant.<sup>198</sup> Douglas, J., in recently denying without prejudice a bail application pointed out that "this traditional right to freedom during trial and pending judicial review has to be squared with the possibility that defendant may flee or hide himself."<sup>199</sup> This seems to be the kind of practical appraisal in which are relevant defendant's connections and associations, whether law abiding or not, as they are relevant to the likelihood *vel non* of abuse of criminal discovery.<sup>200</sup>

Such an approach to criminal discovery, distinguishing as it does the run-of-the-mill accused from the professional, could be accompanied by provision for expeditious review of discovery orders, such as prevails in California by means of mandamus proceedings.

<sup>191</sup> See *The Aftermath of the Jencks Case*, 11 STAN. L. REV. 297, 318-19 (1959).

<sup>192</sup> See note 159 *supra*. Obviously we would have to do better with problems of definition than New Jersey did in defining a "gang" as "consisting of two or more persons," producing a standard so vague as to be repugnant to the due process clause. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). See *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960).

<sup>193</sup> Cf. CAL. PEN. CODE § 1275: "In fixing the amount of bail, the judge or magistrate shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his appearing at the trial or hearing of the case . . ."

<sup>194</sup> *United States v. Stein*, 18 F.R.D. 248 (S.D.N.Y. 1955), *bail reduced*, 231 F.2d 109 (2d Cir. 1956).

<sup>195</sup> *Ex parte Jagles*, 44 Nev. 370, 195 Pac. 808 (1921).

<sup>196</sup> *People ex. rel. Sammons v. Snow*, 340 Ill. 464, 173 N.E. 8 (1930).

<sup>197</sup> *In re Morehead*, 107 Cal. App. 2d 346, 237 P.2d 335 (1951).

<sup>198</sup> Cf. *People ex. rel. Gross v. Sheriff of City of N.Y.*, 277 App. Div. 546, 101 N.Y. Supp. 2d 271 (1950) (material witness).

<sup>199</sup> *Bandy v. United States*, 81 Sup. Ct. 197, 198 (1960).

<sup>200</sup> Cf. Foote, *Foreword: Comment on the New York Bail Study*, 106 U. PA. L. REV. 685 (1958).

## CONCLUSION

A basic premise of an adversary system is that the self-interest of each opponent will generate efficient pursuit of the facts by each. To the extent that our criminal law administration is adversary it, like civil law administration, naturally and legitimately occasions in respect to discovery the problem of balancing as between adversaries the potential for fact ascertainment. But the balance must be struck on a realistic appraisal of all pertinent factors, of which the formal discovery devices are but a few among many.

However, adversariness as such is not the ultimate value of our legal system, certainly not of criminal law administration. Adversariness is only a means to ascertainment of the facts, and must be subordinated to the substantive objective when that means fails to promote the objective as efficiently as competing means would promote it. Our criminal system is replete with instances of encroachment upon the adversary principle. The latest illustration was afforded the other day by the United States Supreme Court in *Campbell v. United States*,<sup>201</sup> concerned with producibility under the *Jencks* legislation,<sup>202</sup> for impeachment purposes, of a statement in possession of the FBI. The Court in an opinion joined in by the Chief Justice said:

The inquiry being conducted by the judge was not an adversary proceeding in the nature of a trial controlled by rules governing the allocation between the parties of the burdens of proof or persuasion. The inquiry was simply a proceeding necessary to aid the judge to discharge the responsibility laid upon him to enforce the statute. The function of prosecution and defense at the inquiry was not so much a function of their adversary positions in the trial proper, as it was a function of their duty to come forward with relevant evidence which might assist the judge in the making of his determination . . . .<sup>203</sup>

Therefore, when discovery genuinely promotes ascertainment of the facts, it cannot arbitrarily be withheld in the name of protecting the balance between the state and the accused. As put by the California Supreme Court in *Riser*,<sup>204</sup> and repeated in *Powell*,<sup>205</sup> "To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts." Moreover, with

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<sup>201</sup> 81 Sup. Ct. 421 (1961).

<sup>202</sup> 18 U.S.C. § 3500 (1958).

<sup>203</sup> 81 Sup. Ct. at 427. *Quaere*, as to whether the quoted comment in so far as it concerns an obligation on the defense potentially impinges upon the privilege against self-incrimination of the fifth amendment.

<sup>204</sup> 47 Cal 2d at 586, 305 P.2d at 13.

<sup>205</sup> 48 Cal. 2d at 707, 312 P.2d at 699.

the increasing significance of scientific data for fact ascertainment—indeed, often science's capacity to place beyond reasonable disputation certain issues that heretofore legitimately could have been the subject of intense forensic contest<sup>206</sup>—further inroads upon the adversary principle, including developments of criminal discovery, may be anticipated.

In conclusion, I hope it is more than a remnant of the 19th century's naïve assumption of the inevitability of social progress through science, that makes me predict that, for the simple reason that man's legal processes increasingly will tend to the rational, the long-term path for criminal discovery is one of development. Sound development will be furthered not by retrogressive reliance on sterile generalities about trial court discretion but by precise focusing on the difficulties that inhibit growth, such as the reality in this country of organized, professional or conspiratorial crime, and their intelligent resolution. In the long run, the possibility of abuse of discovery, although real, will not be permitted to condemn wholesale the technique itself.

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<sup>206</sup> LOUISELL & WILLIAMS, *THE PARENCHYMA OF LAW* ch. XVI (1960).