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Jerry E. Norton

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DISCOVERY IN THE CRIMINAL PROCESS

JERRY E. NORTON†

"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."

—Learned Hand[1]

"This anachronistic apprehension that liberal discovery if extended to criminal causes will "inevitably" bring the serious and sinister dangers of perjury in its wake will seem strange to many when coming from this court which has been generally commended for its aggressive sponsorship of liberal discovery and effective pretrial procedures in civil causes and can point to the solid evidence of its beneficial results to the cause of justice without that defeat of justice through perjury foretold by the prophets of doom. It will be difficult to understand why, without proof but only from some visceral augury, we now assume that the hazard is so much greater in criminal causes.... Certainly without actual evidence and upon conjecture merely, and in the face of the contrary proof of our experience in civil causes, we ought not in criminal causes, where even life itself may be at stake, forswear in the absence of clearly established danger a tool so useful in guarding against the chance that a trial will be a lottery or mere game of wits and the result at the mercy of the mischiefs of surprise. We must remember that society's interest is equally that the innocent shall not suffer and not alone that the guilty shall not escape. Discovery, basically a tool for truth, is the most effective device yet devised for the reduction of the aspect of the adversary element to a minimum."

—William J. Brennan[2]

† Assistant Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology.

[This article is an expansion and up-to-date revision of a thesis prepared by Professor Norton in partial fulfillment of the requirements for a Master of Laws degree which he received from Northwestern University in 1967.]

[1] United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

The adjoining quotations suggest that the controversy over the proper scope of criminal discovery is grounded in differing conceptions of the premises underlying the criminal process. If one begins with the belief that the criminal process is an adversary process between two relatively equal parties and that the defendant's privilege against self-incrimination and other constitutional rights give him a great advantage over the prosecution, it is almost inevitable that the conclusion will be that the scope of criminal discovery should not be expanded. However, if one places an affirmative duty upon the state to guarantee that the defendant receive a fair trial and pictures the criminal process as an unequal contest between the state with its immense investigatory resources and an often poor and uneducated defendant, the opposite conclusion is inevitable.

Criminal discovery in the United States has historically been premised on the former view of the criminal process. This article will examine the development and status of criminal discovery in the United States and its underlying policy bases. The examination will encompass both constitutional requirements and the practical consequences of differing standards of disclosure. The article will conclude with a review of a comprehensive proposal which seeks to accomodate the dictates of the Constitution and fairness to the defendant with the preservation of ordered liberty.

THE COMMON LAW AND THE ADVERSARY PROCESS

In order to understand the reluctance of courts and legislatures to permit discovery in criminal cases, it is necessary to view the question against the background of the common law and its dependence upon the adversary process. Surprise, rather than being regarded as the enemy of truth, was considered its strongest ally. Any proposal tending to reduce the element of surprise was viewed with great alarm. When the defendant, in 1792 in *King v. Holland*,[3] requested that he be

[2] State v. Tune, 13 N.J. 203, 228–229, 98 A.2d 881, 894–895 (1953) (dissenting opinion).

[3] King v. Holland, 4 Durn. & East 691, 100 Eng. Rep. 1248 (K.B. 1792).

allowed to examine the report of a board of inquiry which had investigated his activities as an official of the East India Company, Lord Kenyon was incredulous.[4]

> I am extremely clear that we ought not to grant this application. There is not principle or precedent to warrant it. Nor was such a motion as the present ever made; and if we were to grant it, it would subvert the whole system of criminal law.

This prohibition of discovery applied equally to both parties in the criminal action. In 1748, in *Rex v. Purnell*,[5] the King's Bench denied the application of the Attorney General to be allowed to inspect the statutes and archives of Oxford University, of which one of the defendants was Vice-Chancellor. The court stated that

> we all agree the rule could not be granted, because it was a criminal proceeding, and that the motion was to make the defendants furnish evidence against themselves.[6]

Despite this language and the further statement in *Rex v. Purnell* that "no man is bound to accuse himself,"[7] extremely ruthless extrajudicial criminal interrogations were permitted in that day. As characterized by Yale Kamisar, the English courts of that day were concerned only with what occurred in the "mansions" of the law and pragmatically ignored the "gatehouses."[8] Perhaps also, attempts to induce or coerce the defendant to confess were not viewed as demanding disclosures likely to "subvert the whole system of criminal law."[9] Whatever the reason, the confession was an early exception to the common law rule prohibiting discovery in criminal cases.

Earlier, Parliament had made other exceptions in cases of treason. In 1695 it passed a statute requiring delivery to a defendant accused of high treason[10] a copy of the indictment five days before trial. In 1708 a statute was passed extending this privilege to include misprision of treason and requiring delivery of the copy of the indictment ten days before trial.[11] The most significant change brought about by the statute of 1708, however, was the requirement that such defendants were also to be supplied with a list of witnesses to testify for the prosecution at trial. It has been suggested that this exception to the common law rule was dictated by the uncertainties of political life at the turn of the eighteenth century which caused members of Parliament to provide protection in case they might be required to answer charges of high treason.[12]

Thus, at the time of the American revolution, no criminal discovery existed except in cases involving treason or extrajudicial confession.

In England, this prohibition upon discovery was retained for approximately fifty years. In the mid-nineteenth century, acts of Parliament, court rules and changes in professional practices dramatically changed the law. The institution of the grand jury declined and was replaced by a form of preliminary hearing.[13] At the English preliminary hearing today, unlike the American practice, the prosecution produces all witnesses it intends to call at trial, and the testimony of each is reduced to a summary which the witness signs. This is similiar to a deposition, although there is no verbatim record of the witness's testimony.[14]

In addition to the preliminary hearing, a professional practice of disclosure developed in England. The prosecutor is expected to disclose to the defense attorney the names and addresses o persons having information which may be useful to the defense. He is also expected to make medical and police laboratory reports available to the defense, as well as copies of the written statements of any defendant.[15] At the trial, if a witness contradicts a prior statement, the prosecutor is expected to hand the statement to defense counsel for purposes of cross-examination.[16]

In the United States, the institution of the

[4] *Id.* at 692, 100 Eng. Rep. at 1249.

[5] Rex v. Purnell, 1 Wils. 239, 95 Eng. Rep. 595 (K.B. 1748).

[6] *Id.* at 242, 95 Eng. Rep. at 597.

[7] *Id.* at 241, 95 Eng. Rep. at 596.

[8] See Y. KAMISAR, CRIMINAL JUSTICE IN OUR TIME, EQUAL JUSTICE IN THE GATEHOUSES AND MANSIONS OF AMERICAN CRIMINAL PROCEDURE: FROM POWELL TO GIDEON, FROM ESCOBEDO TO . . . (Howard ed. 1965).

[9] For a history of confessions under English law, see 3 WIGMORE, EVIDENCE, §§ 817–20 (3d ed. 1940).

[10] Act for Trials in cases of Treason, 7 & 8 W. 3, c. 3 (1695).

[11] Act for Improving the Union of the Two Kingdoms, 7 Anne, c. 21, § 11 (1708).

[12] 1 STEIHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 237–38 (1883).

[13] See 6 WIGMORE, EVIDENCE, § 1850 (3d ed. 1940); Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U.L. REV. 749 (1964); Administration of Justice (Misc. Provisons) Act, 1933, 23 and 24 Geo 5, c. 36 § 1. *See generally* Burrows, *Criminal Law and Procedure* 51 L.Q. REV. 36, 49–52 (1935); Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. CRIM. L.C. & P.S. 3 (1938).

[14] Traynor, *supra* note 13, at 754.

[15] *Id.* at 761.

[16] *Id.* at 763.

grand jury has largely been preserved. Even where the preliminary hearing has been substituted for it, however, the common law rule regarding discovery remained relatively undisturbed, at least well into the twentieth century. In 1912 the Minnesota Supreme Court was shocked by the ruling of a trial court which directed the prosecution to give a copy of the defendant's testimony before a state fire marshall to the defendant's attorney. The appellate court said "if the practice be once adopted that an indicted person is entitled to be furnished with some evidence in the possession of the county attorney, where is the line to be drawn?"[17] The court's attitude toward this threat to the adversary process was very much like that of the King's Bench in the case of *King v. Holland*[18] more than a century earlier.

In 1927, some change became apparent when Justice Cardozo of the New York Court of Appeals reviewed the actions of a trial court which ordered the prosecution to deliver to the defense copies of statements of an alleged accomplice and results of certain examinations of the victim.[19] Justice Cardozo held the trial court in error. He traced the history of civil discovery from equity to statutory codification. Because discovery is in derogation of the common law, he said, it may be imposed only by statute. Justice Cardozo noted, however, that some courts were beginning to allow limited discovery. "The beginnings or at least the glimmerings of such a doctrine are to be found, as we have seen, in courts other than our own."[20]

Wigmore, an early advocate of more liberal discovery practices, criticized the narrow view taken by Justice Cardozo.

> But what at least ought to be clear is that the judiciary power, as exercised by the Supreme Court, is ample to grant such inspection in proper cases without waiting for a remedial statute. The question is one of policy, not of power.
>
> And so it is strange to find a Supreme Court in a leading and scholarly opinion accepting impotently the view that the Judiciary must wait on the Legislature for doing justice in such cases. . . .[21]

[17] State *ex rel.* Robertson v. Steele, 117 Minn. 384, 386, 135 N.W. 1128, 1129 (1912).

[18] 4 Durn. & East 691, 100 Eng. Rep. 1248 (K.B. 1792).

[19] People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84, 52 A. L. R. 200 (1927).

[20] Id. at 32, 156 N.E. at 86.

[21] Wigmore, *supra* note 13 at 395.

But, most courts continued to oppose the introduction of discovery into criminal procedure. More specific objections to discovery replaced emotional rejection based on the adversary traditions. Many judges, including Learned Hand, felt that any disadvantage which the criminal defendant may suffer was more than compensated by other procedural safeguards which he enjoyed.[22]

The supporters of liberalized discovery have argued that in practice any imagined balance between the parties has turned to the advantage of the state.[23] They point out that law enforcement agencies are at a distinct advantage in obtaining evidence. First, the law enforcement agency is often at the scene of the crime shortly after its commission. While at the scene, the police have better access to witnesses with fresher recollections. They are authorized to confiscate removable evidence. In addition, the financial and investigatory resources of law enforcement agencies permit an extensive analysis of all relevant evidence.

The defendant has the option of hiring a private unvestigator. However, the investigator will probably get to the scene long after the occurrence of the crime and after the police have made their investigation and removed all relevant physical evidence. The defendant's investigator may have difficulty viewing the scene if it is on private property. Witnesses may be less accessible; their recollections will probably be less precise. Indeed they may choose not to cooperate at all with the defendant's investigator.[24] However, it may all be irrelevant if, as is often the case, the defendant is unable to afford an investigator or is incarcerated pending trial.

The defendant is helpless to cope with the uncooperative witness while the prosecutor has numerous means to compel testimony. First, there is the possibility of coroner's inquest or a preliminary hearing.[25] And if the prosecution prefers

[22] *See* n. 1 *supra*, and accompanying text. *See also*, United States v. Dilliard, 101 F.2d 829, 837 (2d Cir. 1938).

[23] See more extended discussions of these arguments in Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 86–90 (1961); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149, 1180–99 (1960).

[24] Louisell, *supra* note 23, at 87; INBAU AND REID, CRIMINAL INTERROGATIONS AND CONFESSIONS 122 (2d ed. 1967).

[25] Louisell, *supra* note 23, at 87. Professor Pye has mentioned that some prosecutors also resort to an "informal subpoena" in order to persuade witnesses to submit to questioning. Pye, *The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 82, 84 (1963).

not to have the defense present, some jurisdictions allow the prosecution to take testimony while the defendant and his attorney are excluded.[26] The uncooperative witness can be subpoenaed to appear before the grand jury and required to testify, again without the presence of the defense. The defense cannot, usually, discover the grand jury minutes.[27]

Many states require that the defendant give notice of intended alibi[28] or insanity[29] defenses.[30] The prosecution's burden, in bringing a charge, in contrast, has been substantially lessened.[31] Mere recitation of the statute may be a sufficient pleading of the charge.[32] Amendments to the indictment or information are liberally allowed; duplicity and variances are no longer serious defects.[33] Liberal pleading rules deprive the defendant of effective notice of the circumstances of the offense. It is also argued that the alleged balance in criminal proceedings is not maintained in practice by the requirements of proof beyond a reasonable doubt and the presumption of innocence since the jury probably does not apply these concepts effectively.[34]

Proponents of expanded discovery also refute the balance of advantage or "handicap" theories by emphasizing their irrelevance. The important factor is whether expanded discovery turns the balance more toward the truth.[35] The criminal trial should not be characterized as a mere game in which the parties are controlled by rules constructed solely to create a balance between the two sides. Rather, the proceeding should be directed toward uncovering truth, and the merits of any proposed change in discovery rules should be judged according to the potential of the change toward promoting this objective.

While many courts and prosecutors agree that pretrial discovery is justifiable if it promotes an objective finding of the truth, those opposing liberalized discovery fear that it would often defeat, not aid, the determination of truth. This fear was clearly stated by the New Jersey Supreme Court in *State v. Tune*.[36]

> 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.... 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.[37]

Supporters of extended discovery have acknowledged the problem of possible intimidation or bribery of witnesses which can affect a witness's willingness to testify. This risk may be greatest in cases involving organized crime, but these instances should not be the basis for refusing discovery in the great majority of criminal proceedings.[38] This position has led to Louisell's proposal that discovery in "typical" criminal

[26] *See, e.g.* ILL. REV. STAT. ch. 38, § 203-13 (1965); KAN. STAT. ANN. § 62-301 (1963), Handler, *The Constitutionality of Investigation by the Federal Trade Commission*, 28 COLUM. L. REV. 708, 905, 925-928 (1928).

[27] Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); and *see* United States v. Proctor & Gamble Co. 356 U.S. 677 (1958).

[28] *See, e.g.* N.Y. CODE CRIM. PROC. § 295-1 (1935).

[29] *See, e.g.*, ALA. CODE tit. 15, § 423 (1940). For a list of the statutes, see State v. Whitlow, 45 N.J. 3, 11-14, 210 A. 2d 763, 767, n. 1 (1965); for a discussion of the constitutionality of such a requirement, see 5 AM. CRIM. L. Q. 46 (1966).

[30] *See generally*, Fletcher, *Pre-trial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 315-16 (1963).

[31] Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149, 1175-1178 (1960).

[32] *See e.g.* KANS. STAT. ANN. § 62-1009, n. 2, (1962).

[33] *See e.g.* ILL. REV. STAT. ch. 38, § 111-5 (1967).

[34] *See* Goldstein, *supra* note 31, at 1186.

[35] Louisell, *supra* note 23, at 97. But, of course, the function of the defense attorney is not necessarily to search for truth, but rather it may simply be to require the prosecution to prove the charge beyond a reasonable doubt within the law. See Flannery, *Prosecutors; Position:* 33 F.R.D. 74 (1963); Starrs, *Professional Responsibility: Three Basic Propositions*, 5 AM. CRIM. L. Q. 17 (1966).

[36] 13 N.J. 203, 98 A.2d 881, (1953). *But see* State v. Johnson, 28 N.J. 133, 145 A.2d 313, (1958); State v. Cicenia, 6 N.J. 296, 78 A.2d 568 (1951).

[37] 13 N.J. at 210-11, 98 A.2d 884.

[38] Louisell, *supra* note 23, at 98-101.

cases should be as broad as in civil cases.[39] In those circumstances where the prosecution clearly demonstrates to the court that because of the "nature of the accused's associations and representatives" there would be a possibility of coercing witnesses or procuring perjured testimony, discovery should be withheld or restricted.[40] Such flexibility would reduce the dangers of abuse in exceptional cases. As Justice Brennan pointed out in his dissent to *State v. Tune*[41] the extension of civil discovery did not result in the abuses raised by the opponents of that innovation.[42] Neither has it caused major problems in criminal discovery in England or Canada.[43]

> The possibility that a dishonest accused will misuse such an opportunity is not reason for commiting the injustice of refusing the honest accused a fair means of clearing himself. That argument is outworn; it was the basis (and with equal logic) for the one-time refusal of the criminal law ... to allow the accused to produce any witnesses at all.[44]

Another fear is that extensive discovery procedures may encourage sloth and discourage documentation.[45] Experience with the new civil rules should alleviate this concern. Referring particularly to the fear of sloth, one writer observed:

> 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.[46]

In order to minimize disclosures under a liberal discovery rule, attorneys may refrain from preparing documents on the case. Yet, this problem is avoidable if the rules would protect the attorney's "work product."[47]

The often inadequately considered belief that discovery cannot be reciprocal frequently persuades courts to refuse to extend criminal discovery.[48] Understandably courts are reluctant to establish rules which will operate to the advantage of only one of the parties. They will deny discovery by assigning proprietary rights in certain information to the parties.[49] In *State v. Rhoads*,[50] the defendant received permission to examine, among other things, the transcript of a witness's interview. In sustaining state exceptions to the trial court's ruling, the court said,

> 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.[51]

However this decision was recently overruled in *State v. White*[52] where the Ohio Supreme Court ordered the trial court to allow the defendant to inspect the recorded pretrial statements of a key witness as well as to conduct an *in camera* inspection of the pretrial statement of other witnesses.[53] The standard for determining the defendant's right to inspect the statement was whether the court, in the *in camera* proceeding, finds variation between the statements and the testimony sufficient to deprive the defendant of due process of law and prohibit him from receiving a fair trial.[54] The proprietary implications of the *Rhoads* decision were quite properly discarded. As Pro-

[39] *Id.* at 100.
[40] *Id.* at 100–1. See Moore, *Criminal Discovery*, 19 HAST. L.J. 865, 890 (1968) for an alternative to the Louisell theory on the ground that it may constitute a denial of equal protection. As an alternative the author then proposes that the judge assess the dangers of discovery in light of the particular attorney requesting discovery, the association and character of the accused and the crime with which he is charged and the danger of hampering related prosecution. *Id.* at 891–2.
[41] 13 N.J. 203, 98 A.2d 881 (1953).
[42] *Id.* at 228, 98 A.2d at 894 (Brennan, J. dissenting).
[43] See Traynor, *supra* note 13 at 752, n. 19 and text.
[44] Dean Wigmore as quoted by Mr. Justice Brennan in 33 F.R.D. 47, 63 (1963).
[45] Louisell, *supra* note 23 at 94.
[46] *Id.* at 95.
[47] See Hickman v. Taylor, 329 U.S. 495 (1947).
[48] Louisell, *supra* note 23 at 91–92.
[49] *Id.* at 96.
[50] 81 Ohio St. 397, 91 N.E. 186 (1910).
[51] *Id.* at 425, 91 N.E. at 192.
[52] 15 Ohio St. 2d 146, 239 N.E.2d 65 (1968).
[53] *Id.* at 158, 239 N.E.2d at 74. *But see*, Coleman v. Maxwell, 399 F.2d 662, 664–5 (6th Cir. 1968), *cert. denied* 393 U.S. 1058 (1969).
[54] State v. White, 15 Ohio St. 2d 146, 159, 239 N.E.2d 65 (1968). Inconsistencies between testimony and pre-trial statements now require *in camera* inspection although private papers and work product are not subject to defense scrutiny.

fessor Louisell points out, unlike the context of the civil proceeding where one may have a property interest in some evidence,[55] the evidence of the prosecution belongs to the public.[56] The state represents the interests of all the people including the defendant's. The state's interest is to see that justice is done and its evidence should be accessible to all.[57] The court also disregarded the notion that reciprocity plays any role in this circumstance. The defendant's right against self-incrimination[58] cannot be properly used by the prosecution in this case to justify the refusal to produce the statements.[59]

It is clear also that the Supreme Court, which stated in *Brady v. Maryland*[60] that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. . . ." [61] would not regard a state's proprietary interest, or the defendant's privilege not to testify against himself, a justification for suppressing evidence favorable to the accused.

There are some indications, especially in the state courts, that the door to criminal discovery is being nudged open. In California, *People v. Riser*[62] provided the defendant with the right to obtain any pre-trial statements of prosecution witnesses at trial. The court reasoned that

> the State has no interest in denying the accused access to all evidence that can throw light on issues in the case. . . . To deny flatly any right of production on the grounds 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 fact.[63]

Later decisons established for the defendant the right to inspect his statements to the police,[64] the right to inspect statements of third parties in the hands of the prosecution,[65] the right to inspect photographs,[66] scientific and investigatory reports,[67] and the names and addresses of witnesses.[68] Other states appear to be following hesitantly the trend of the California decisions.[69] In addition others have enacted legislation enabling the defendant to more adequately discover the circumstances and facts of the case against him.[70]

The movement toward broader disclosure requirements effected by the courts in criminal cases has included, to some extent, the prosecution's right to discovery as well. As noted above the defense often has a duty to inform the prosecution of an intended alibi or insanity defense[71] to be raised at trial. In *Schmerber v. California*[72] the Supreme Court of the United States held that physical evidence, specifically, a blood sample

[55] Louisell, *supra* note 23 at 96–7.

[56] *Id.* at 97.

[57] See Moore, *Criminal Discovery*, 19 Hast. L.J. 865, 880 (1968).

[58] The Fifth Amendment to the Constitution provides, in part, that no person "shall be compelled in any criminal case to be a witness against himself. . . ."

[59] See Moore, *supra* note 57, at 899–909.

[60] 373 U.S. 83 (1963).

[61] *Id.* at 87.

[62] 47 Cal. 2d 566, 305 P.2d 1 (1956).

[63] *Id.* at 586, 305 P.2d at 13. *Accord*, People v. Estrada, 54 Cal.2d 713, 716, 7 Cal. Rptr. 897, 899, 355 P.2d 641, 643 (1960); People v. Cartier, 51 Cal.2d 590, 594, 335 P.2d 114, 117 (1959).

[64] Cash v. Superior Court, 53 Cal.2d 72, 346 P.2d 407 (1959); People v. Cartier, *supra* note 63; Funk v. Superior Court, 52 Cal. 2d 423, 340 P.2d 593 (1959); Vance v. Superior Court, 51 Cal.2d 92, 330 P.2d 139 (Dist. Ct. App. 1959).

[65] People v. Garnar, 57 Cal.2d 135, 367 P.2d 680, 18 Cal. Rptr. 40 (1961); People v. Estrada, *supra* note 63; Cash v. Superior Court, *supra* note 64; but see People v. Cooper, 53 Cal.2d 755, 349 P.2d 964, 3 Cal. Rptr. 148 (1960) where the court stated that the defendant must show better cause for discovery "than a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime." *Id.* at 770, 349 P.2d at 973, 3 Cal. Rptr. at 157.

[66] Norton v. Superior Court, 173 Cal. App. 2d 133, 343 P.2d 139 (Dist. Ct. App. 1959).

[67] Brenard v. Superior Court, 172 Cal. App. 2d 314, 341 P.2d 743 (Dist. Ct. App. 1959); Walker v. Superior Court, 155 Cal. App. 2d 134, 317 P.2d 130 (1957); Schindler v. Superior Court, 161 Cal. App. 2d 513, 327 P.2d 68 (1958).

[68] People v. Lopez, 60 Cal.2d 223, 32 Cal. Rptr. 424, 384 P.2d 16 (1963); Norton v. Superior Court, 173 Cal. App.2d 133, 343 P.2d 139 (Dist. Ct. App. 1959).

[69] *See*, e.g., State *ex rel.* Mahoney v. Superior Court, 78 Ariz. 74, 275 P.2d 887 (1954) (inspection of tangible physical evidence allowed); State *ex rel.* Sadler v. Lackey, 379 P.2d 610 (Okla. Crim. 1967) (inspection of FBI report on physical evidence allowed); State v. Johnson, 28 N.J. 133, 145 A.2d 313 (1958) (inspection of defendant's own statement previously given to police allowed); People v. Rosario, 9 N.Y.2d 286, 173 N.E.2d 881 (1961) (inspection by defendant of pre-trial statements of prosecution's witnesses allowed); State v. White, 15 Ohio St. 2d 146, 239 N.E.2d 65 (1968) (inspection of pre-trial statements of prosecution's witnesses where court in *in camera* proceeding discovered inconsistencies allowed); see also Jones v. State, 5 Md. App. 180, 245 A.2d 897 (1968); Vermont v. Mahoney, 122 Vt. 456, 176 A.2d 747 (1961). But see statutes and cases collected in Moore, *Criminal Discovery*, 19 HAST. L.J. 865, 867–8 at n. 18–33 (1968), which have resisted the trend.

[70] *See e.g.*, DEL. SUPER. CT. (CRIM.) Rule 16; FLA. STATS. § 925.05 (Supp. 1969); ILL. REV. STATS. Ch. 38 § 114–10; MD. P. R. 728; TENN. CODE ANN. § 40–2441 (Supp. 1969); 13 VT. STAT. ANN. 6721.

[71] See p. 14 *supra*.

[72] 384 U.S. 757 (1966).

does not fall within the protective confines of a person's right against self incrimination[73] so long, apparently, as the method in which it is obtained does not "shock the conscience" of the court.[74]

In *Jones v. Superior Court*,[75] the Supreme Court of California again demonstrated its desire to broaden criminal discovery by upholding a lower court order requiring that the defendant disclose to the prosecution the names, addresses and reports of all medical experts who will offer testimony to substantiate the defense of impotence in a rape prosecution.[76] A broader discussion of the concept of prosecutorial discovery is presented in the following section of this article.[77]

In summary, there has been some expansion of criminal discovery in recent years, mostly upon the initiative of the courts. However, most states still significantly restrict it.[78] Moreover, the reasons offered by opponents of liberal discovery rules do not appear to be theoretically or practically persuasive.[79]

Prosecutorial Discovery

Since debate began on the issue of discovery in criminal cases, one of the strongest sources of opposition, if not always stated, has been the assumption that it could not be reciprocal; that the Fifth and Fourteenth Amendments would prevent the establishment of any rule requiring disclosure by the defendant.[80] Most prosecutors are opposed to a plan by which they would be required to divulge their evidence while receiving no procedural or evidentiary benefits in return.

Professor Louisell has suggested, however, that disclosure by the defense is constitutionally possible and may be enforced in either of two ways. First, defense disclosure might be obtained by a change in the order of evidence to require the defendant to disclose in advance the witnesses and other evidence which he would produce at the trial. The alternative procedure conditions disclosure by the prosecution upon voluntary disclosures by the defense.[81]

The argument which justifies disclosure by the defendant upon the power to change the order of proof takes its reasoning from statutes requiring the giving of notice of the defenses of alibi and insanity. Such statutes, their proponents have argued, do not violate the right against self-incrimination, but rather

> ... they set up a wholly reasonable rule of pleading which in no manner compels a defendant to give any evidence other than that which he will voluntarily and without compulsion give at trial. Such statutes do not violate the right of a defendant to be forever silent. Rather they say to the accused: If you don't intend to remain silent, if you expect to offer an alibi defense, then advance notice and whereabouts must be forthcoming; but if you personally and your potential witnesses elect to remain silent throughout the trial, we have no desire to break that silence by any requirement of this statute.[82]

Following this suggestion by Professor Louisell, the Supreme Court of California in 1962 innovated general reciprocal discovery. In *Jones v. Superior Court*,[83] the defendant, who was charged with rape, moved for a continuance of his trial in order that he might gather medical evidence to show that he was impotent. The trial court allowed the motion for continuance, but it also granted a prosecution motion for disclosure of the names of all physicians who would testify, the names of all physicians who

[73] *Id.* at 760

[74] Rochin v. California, 342 U.S. 165 (1952). There the Court excluded evidence obtained by forcing the defendant to vomit the contents of his stomach which yielded morphine. *Cf.* Davis v. Mississippi, 394 U.S. 721 (1969).

[75] 58 Cal. 2d 56, 372 P.2d 919; 96 A.L.R.2d 1213 (1962).

[76] *Id.* at 62, 372 P.2d at 922.

[77] See text at p. 14 *supra*. See also Moore, *supra* 57 at 809–909; Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 Calif. L. Rev. 89(1965).

[78] Moore, *supra* note 40, at 871.

[79] See Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967). There the author states that the Vermont statute which allows specifically the taking of depositions of witnesses before trial has been highly successful. He points to his survey which indicates that the right to take depositions has decreased the likelihood that the case will go to trial. In addition his survey indicated little difficulty with the traditional concerns for open discovery: intimidation or coercion of witnesses and greater opportunity for perjury. *Id.* at 733–4.

[80] See, *e.g.*, State v. Rhoades, 81 Ohio St. 397, 424–25, 91 N.E.186, 192 (1910); and United States v. Sermon, 218 F. Supp. 871, 872 (W.D. Mo. 1963).

[81] Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 Calif. L. Rev. 56, 87–90 (1961).

[82] Dean, *Advance Specifications of Defense in Criminal Cases*, 20 A.B.A.J. 435, 440 (1934). Fourteen states have adopted statutes requiring the defendant to give notice of his alibi defense. Most of these provide that the sanction for failure to give such notice shall be exclusion of the proffered alibi evidence. See 76 Harv. L. Rev. 838 (1963).

[83] Jones v. Superior Court, 58 Cal.2d 56, 372 P.2d 919 (1962).

had treated the defendant, and all documents and reports of such physicians. The Supreme Court of California upheld the order as to the names of the physicians who would testify and all documents or reports which the defendant would offer into evidence. Speaking for the court, Chief Justice Traynor stated: "It simply requires petitioner to disclose information that he will shortly reveal anyway. Such information is discoverable."[84]

The "advance notice" theory, which justifies alibi statutes and other pre-trial disclosures by the defense as a mere change in pleading order, has been upheld in all states in which alibi statutes have been questioned.[85] The United States Supreme Court, however, has never ruled on these statutes. The Advisory Committee, in its proposed amendments to the Federal Rules of Criminal Procedure, suggested rule 12.1, which would have required the defendant to give advance notice of an insanity defense.[86] This requirement is common in many states,[87] and is viewed, like the alibi statutes, as a change in the order of presenting evidence. The Supreme Court however declined to adopt the rule, without stating any reason.

The analysis utilized in justifying the "advance notice" disclosure is not without constitutional difficulties. A basic rule of criminal law, now encased in the Constitution, is that the burden is on the prosecution to prove the defendant guilty and that burden is never properly shifted to the defendant to show his innocence.[88] With such an underlying policy, the question of whether and to what extent the defendant must anticipate the prosecutor's evidence and disclose his defense raises practical as well as consitutional problems. In the situation where a person is charged with a crime on the basis of dubious evidence, it is difficult to know whether he should show as an alibi that he was committing another crime elsewhere, or that he was engaged in an activity which is in violation of his parole, while not itself illegal. He may hope that the evidence which the prosecution presents will be insufficient to prove a prima facie case or be so weak that a jury would not convict him in spite of his silence. A pretrial discovery rule or statute based on the "advance notice" theory would in fact force him to either incriminate himself or expose himself to other sanction, possibly needlessly. The uncertainty regarding the "advance notice" theory is not confined to the example given. The defendant may, for other reasons beside surprise, wish to withhold evidence which may not be needed for his defense.

It is no practical solution to say that if the defendant were entitled to disclosure by the prosecution that he would know what he must present to establish reasonable doubt. This would depend upon immeasurable elements of judgment, such as the impact of testimony and other evidence at the trial. It would also depend upon how successful cross-examination may be in casting doubt on the testimony of the witnesses for the prosecution—and no attorney can clearly anticipate this.

Further, defense witnesses are often impeachment witnesses. Whether they are called to testify largely depends upon the testimony of the witnesses for the prosecution. Questions are certain to arise as to whether the defense should have anticipated the testimony by the prosecution witnesses.[89]

The central constitutional question implicit in the "advance notice" theory, then, is whether the constitutional right to remain silent also gives the defendant the right to choose when he may waive this right, if at all. As noted above, the Supreme Court has never ruled on this issue; however, by declining to adopt proposed amendment 12.1, the Court has perhaps suggested that it does.

The second suggested procedure for discovery by the prosecution is that of voluntary exchange of information. If a defendant were to request disclosure of an expert's report, the court might grant the request upon the condition that the defendant himself disclose reports of his expert(s). The choice then becomes a voluntary one for the defendant, who must weigh the anticipated value of the information he seeks against the surprise value or harm of that which he would have to

[84] *Id.* at 62, 372 P.2d at 922.
[85] See 76 Harv. L. Rev., supra note 3, at n. 10.
[86] 34 F.R.D. 411, 418 (1964).
[87] Fletcher, *Pre-trial Discovery in State Criminal Cases*, 12 Stan. L. Rev. 293 (1960).
[88] Malloy v. Hogan, 378 U.S. 1 (1964) incorporating the Fifth Amendment into the Fourteenth Amendment.

[89] Many of these problems, where they occur on the prosecution side, are recognized in states where the prosecution is required to give notice of the witnesses it intends to call. Realizing that the need for witnesses at the trial is not totally predictable, courts have held that the listing of such witnesses does not obligate the prosecution to call all of them, even though the defense has anticipated their being called. See, *e.g.*, People v. Kukulski, 358 Ill. 601, 193 N.E. 504 (1934). Since impeachment testimony is difficult to anticipate, most states also exempt impeachment witnesses from those whom the prosecution must list. See, *e.g.*, Ill. Rev. Stat. ch. 38 § 114-9(c) (1969).

disclose. The voluntary exchange theory appears to be the principal philosophy behind Rule 16(c) of the Federal Rules of Criminal Procedure.

The "voluntary exchange" theory involves constitutional complexities of its own. An important initial observation to be made concerning this theory is that the defendant can not be required to exchange information for disclosures to which he is constitutionally entitled under *Brady v. Maryland*.[90]

Beyond this, however, the defendant will be seeking a governmental benefit: information in the possession of the government. It is by no means certain that, in order to get this benefit, the defendant may be required to give up any portion of the privilege conferred upon him by the Fifth Amendment.

In *Sherbert v. Verner*,[91] the Supreme Court faced the issue of whether the action of South Carolina officials in denying unemployment compensation to a member of the Seventh Day Adventist Church was constitutional. The appellant was discharged by her employer because her religion prevented her from working on Saturdays. She was unable to take other available work for the same reason, but because other work was available, state officials denied her claim for unemployment compensation. The Supreme Court ruled that their action was in violation of the First Amendment, even though unemployment compensation is only a privilege.

> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.[92]

A similar rule would seemingly apply where Fifth Amendment rights are involved. In *Griffin v. California*[93] the Supreme Court held that comment by court and counsel upon the exercise of this privilege is unconstitutional. "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." [94]

The Supreme Court has taken a similarly hostile view toward penalties exacted upon the exercise of Fifth Amendment rights. In *Garrity v. New Jersey*,[95] the Court questioned the voluntariness of a statement by a police officer made under the threat of a New Jersey statute which would have caused him to lose his job if he were to refuse to testify. While the Court was thus only concerned with whether or not the statement was voluntary, the opinion written by Mr. Justice Douglas made the majority's view of the statute clear: "There are rights of constitutional stature whose exercise a State may not condition by the exactions of a price."[96]

These decisions cast doubt on the theory that the court may negotiate an agreement for the abandonment of portions of the defendant's right to remain silent or his right against self-incrimination in return for the privilege of knowing what information the state possesses. The defendant, by exercising his constitutional right, would then fail to meet the conditions imposed upon the privilege. To again use the words of *Griffin v. California*,[97] "It cuts down on the privilege [against self-incrimination] by making its assertion costly."

Discovery and the Constitution

In recent years debates regarding pre-trial discovery have included discussions of the extent

[90] Brady v. Maryland, 373 U.S. 83 (1963).

[91] Sherbert v. Verner, 374 U.S. 398 (1963).

[92] *Id.* at 404. In Speiser v. Randall, 357 U.S. 513 (1958), the Supreme Court said of a tax statute which gave a beneficial exemption which indirectly infringed upon First Amendment privileges that it would "produce a result which the State could not command directly," and was therefore unconstitutional. Courts have also held that loyalty oaths or certificates may not be imposed as a requisite to the use of public facilities. Lawson v. Housing Authority of the City of Milwaukee, 270 Wisc. 269, 70 N.W.2d 605 (1955); Housing Authority of the City of Los Angeles v. Cordova, 130 Cal. app. 2d883, 279 P.2d 215 (Cal. App. 1955), *cert. denied* 350 U.S. 969 (1956); and Chicago Housing Authority v. Blackman, 4 Ill.2d 319, 122 N.E.2d 522 (1954) (public financed housing). Danskin v. San Diego Unified School District, 28 Cal.2d 536, 171 P.2d 885 (1946) (school auditorium).

[93] Griffin v. California, 380 U.S. 609 (1965).

[94] *Id.* at 614. See also, Steinberg v. United States, 163 F. Supp. 590, 592 (Ct. of Claims 1958), in which the Court of Claims said,

> Notwithstanding the plaintiff had no vested or contractual right to his annuity, we believe that Congress in prescribing a punishment for persons who exercised a constitutional right has acted beyond the scope of the Constitution.

[95] Garrity v. New Jersey, 385 U.S. 493 (1967).

[96] *Id.* at 500. This view was confirmed in Gardner v. Broderick, 392 U.S. 273 (1968), in which the Supreme Court ruled that a police officer could not be constitutionally discharged for exercise of his Fifth Amendment rights. See also, Spevack v. Klein, 385 U.S. 511 (1967).

[97] 380 U.S., at 614.

to which the defendant may be entitled to disclosure under the due process clause of the Fourteenth Amendment. One writer has expressed the following viewpoint:

> Certainly the due process clause of the 14th Amendment and similar state constitutional provisions extends to the defendant the right to a trial and implies the right to a fair trial. It is apparent that a defendant cannot have a fair trial unless he is given the opportunity to ascertain the facts. In a criminal case not only must the defendant be given an opportunity to present evidence, but he also has to know the claims of the prosecution so that he will be in a position to meet such claims. If the evidence in the hands of the prosecution is not made available to the accused, certainly he will not be given an opportunity to adequately and fairly defend himself.[98]

The Supreme Court has not accepted this argument. In *Leland v. Oregon*[99] the court ruled that the trial court's refusal to order the prosecution to permit the defendant's attorney to examine the defendant's confession before trial was not a deprivation of due process. The Court did note, however, that it might have been the better practice to have allowed the examination.

In *Cicenia v. Lagay* in 1958[100] the Court reaffirmed *Leland*, which, it said, had ruled "that in the absence of a showing of prejudice to the defendant it was not a violation of due process for a State to deny counsel an opportunity before trial to inspect his client's confession."[101] The Court then went on to say, "we cannot say that the discretionary refusal of the trial judge to permit inspection in this case offended the Fourteenth Amendment."[102] Since permitting the defendant or his attorney to examine the defendant's own confession probably is the least objectionable type of discovery,[103] these cases appear to negate the argument that due process guarantees the defendant an opportunity to prepare his defense with knowledge of the claims of the prosecution, at least in the absence of a showing of actual prejudice.

But when the prosecution has concealed information which might be helpful to the defense, the Court's reaction has been considerably different. This fact is revealed by a review of the Court's decisions in this area over the past forty years.

Mooney v. Holohan,[104] a habeas corpus proceeding in 1935, involved a claim that the state prosecutor had knowingly permitted a prosecution witness to perjure himself without any attempt by the prosecutor to correct the testimony or reveal sources of impeachment to the defense. The Supreme Court ruled that the Fourteenth Amendment requires "fundamental conceptions of justice."

> It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. . . .[105]

The *Mooney* decision was concerned only with the prosecution's use of false evidence. In the 1942 case of *Pyle v. Kansas*,[106] however, the Court expanded its language.

> Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the state authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven,

[98] Garber, *The Growth of Criminal Discovery*, 1 AM. CRIM. L.Q. 3, 12 (1962). *See also* State v. Dorsey, 207 La. 928, 22 So. 2d 273 (1945); Goldstein, *The State and the Accused: Balance of Advantages in Criminal Procedure*, 69 YALE L.J. 1149, 1173-99 (1960); Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1051-63 (1961); Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279.

[99] 343 U.S. 790, 801-02 (1952). The prosecutor had, however, permitted defense counsel to examine the confession during trial and five days before the defense rested.

[100] 357 U.S. 504 (1958).

[101] *Id.* at 511.

[102] *Id.* The primary question in *Cicenia*, however, was whether the refusal of the police to permit the defendant to see his retained counsel, who in turn was demanding to see him, was a violation of due process. The change in the Court's view as indicated in Escobedo v. Illinois, 378 U.S. 478 (1964), may indicate a change in this question.

[103] *See, e.g.*, Dennis v. United States, 384 U.S. 855 (1966); United States v. Nolte, 39 F.R.D. 359 (N.D. Cal. 1965); United States v. Williams, 37 F.R.D. 24 (S.D.N.Y. 1965); United States v. Willis, 33 F.R.D. 510 (S.D.N.Y. 1963); State v. Johnson, 28 N.J. 133, 145 A.2d.313 (1958).

[104] 294 U.S. 103 (1935).

[105] *Id.* at 112.

[106] 317 U.S. 213 (1942).

would entitle petitioner to release from his present custody.[107]

Thus the Court brought under its *Mooney* rule prohibiting the concealment of perjured testimony, the deliberate suppression by the prosecution of evidence favorable to the defense.[108] The meaning of the Court's concept of "suppression" was not obvious from either the Court's opinion or from its recitation of the facts in *Pyle*.

In the lower courts, the prosecutor's duty to disclose evidence favorable to the defendant came to be defined as a duty of disclosure if the evidence is of a type or from a source which in all probability would make it very persuasive to a fair minded jury even though the prosecutor does not believe the testimony.[109] Under this definition the prosecutor was required to disclose the names of eyewitnesses who did not identify the defendant as being at the scene of the crime, even though other eyewitnesses did identify him.[110] Courts of Appeal also have ruled that the prosecution is obligated to disclose favorable, even though questionable and disputed, evidence involving such matters of judgment as whether the defendant was intoxicated at the time of an alleged murder,[111] or whether the defendant was insane when his own expert has judged him not to be.[112]

Fifteen years after *Pyle*, in *Alcorta v. Texas*,[113] the testimony involved was not perjured but was possibly incomplete. The defendant, charged with murdering his wife, was attempting to show that the case fell within the Texas murder-without-malice rule. He testified that he suspected his wife of being unfaithful to him and that when he found her kissing her paramour, he killed her. Before the trial, the paramour admitted to the prosecutor that he had had intercourse with the victim several times. The prosecutor told him not to volunteer any information about the intercourse, but that, if specifically asked about it, he should answer truthfully. At the trial the paramour testified that on the night of the killing he had not kissed the victim, that he had only brought her home from work, that they had never kissed or talked of love, and that they had never had a "date." While nothing indicated that any testimony regarding the night of the killing was false, the Supreme Court reversed the conviction.

> If Castilleja's relationship with petitioner's wife had been truthfully portrayed to the jury, it would have, apart from impeaching his credibility, tended to corroborate petitioner's contention that he had found his wife embracing Castilleja.[114]

In *Alcorta*, the Supreme Court seemed to extend the *Mooney* rule. It seemed to say that besides not being allowed to present perjured testimony, the prosecution may not construct an erroneous and misleading impression through narrowly truthful testimony.[115] Second, the decision indicates that the prosecution is constitutionally prohibited from suppressing evidence which only inferentially supports the defendant's cause as well as evidence which would directly support his defense.

Beyond these two additions to the *Mooney* rule, the Supreme Court in *Alcorta* intimated that the use of untrue or misleading evidence would be grounds for reversal of a conviction though the evidence only goes to credibility. Two years later, in *Napue v. Illinois*,[116] the court affirmed this rule. In *Napue* a co-defendant, testifying on behalf of the State, said that he was not promised any reward by the State in return for his testimony.

[107] *Id.* at 215–16.

[108] *See also* Wilde v. Wyoming, 362 U.S. 607 (1960), in which the Supreme Court remanded the case for hearing in the state courts when the defendant alleged that the prosecution had "willfully suppressed the testimony of two eye witnesses to the alleged crime which would have exonerated the petitioner." The Court, in a per curiam decision, held that it would find no no justification for the state court's refusal to hear the claims.

[109] United States *ex rel.* Thompson v. Dye, 221 F.2d 763, 769 (3d Cir.) (Concurring opinion of Judge Hastie) *cert. denied*, 350 U.S. 875 (1955).

[110] United States *ex rel.* Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); Application of Kapatos, 208 F. Supp. 883 (S.D.N.Y. 1962).

[111] 221 F.2d 763 (3rd Cir. 1955).

[112] Ashley v. Texas, 319 F.2d 80 (5th Cir.), *cert. denied*, 375 U.S. 931 (1963). The Court here ruled that the prosecution should have disclosed to the defense that two of the four prosecution experts believed the defendant to be legally insane.

[113] 355 U.S. 28 (1957).

[114] *Id.* at 31–32.

[115] *See also* Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964), in which the court ruled that where prosecution witnesses identified the defendant's gun as looking like the one they saw, it was obligated to disclose laboratory evidence tending to show that it was not the gun used, even though the prosecution did not offer the gun itself into evidence. The court said that the presence of the gun caused an inference that it was the one, even though not introduced into evidence. In United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952), *cert. denied*, 345 U.S. 904 (1953), the court ruled that the prosecution had denied a defendant due process where it allowed an inference that the defendant killed a victim of a robbery to stand when the evidence in its possession tended to show that a police bullet actually caused the death.

[116] 360 U.S. 264 (1959).

In fact, the state's attorney had told the witness, who was then serving a prison term, that he would "do what he could" for the prisoner. The Supreme Court ruled that the *Mooney* decision "does not cease to apply merely because the false testimony goes only to the credibility of the witness."[117]

Napue v. Illinois expressed a logical extension of the rule in *Mooney*. Even where the prosecutor does not solicit false testimony or produce a witness who he knows will perjure himself, if he nevertheless allows false testimony to go uncorrected, the defendant's constitutional rights are violated.[118]

Meanwhile, in federal prosecutions the Supreme Court was showing a similar hostility toward the prosecutorial practice of not revealing facts tending to show perjury or lack of credibility of government witnesses. In *Mesarosh v. United States*,[119] the Solicitor General disclosed to the Court that he had learned that the only witness who had incriminated the defendant had perjured himself in other cases. The Court reversed the defendant's conviction. "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial."[120]

Since constitutional authority was not used by the Court in *Mesarosh*, the decision probably rested upon the Court's supervisory power.[121] This conclusion is supported by the Court's primary reliance upon *Communist Party v. Control Board*,[122] which involved a clear instance of perjury by a government witness. The Court reversed that conviction, relying upon its supervisory powers.

Perhaps the most significant Supreme Court pronouncement in the area of disclosure and due process is *Brady v. Maryland*, decided in 1963.[123] Brady and Boblit were charged with a first degree murder which occurred in the course of a robbery. During the trial Brady's attorney requested that the prosecutor give him copies of statements made by Boblit. The prosecutor gave the attorney copies of all of Boblit's statements except one in which Boblit admitted that he did the killing. There was no indication whether the omission was intentional or whether it was merely an oversight. In his final argument, Brady's attorney admitted that Brady was guilty of first degree murder, but he urged the jury to sentence the defendant to life in prison, rather than death. The Maryland Court of Appeals ruled that the suppression of the statement was a denial of due process to the defendant and ordered a new trial limited to the question of punishment, but not the issue of guilt or innocence.[124]

Before the United States Supreme Court, the state did not oppose the order of a new trial on the issue of punishment. The only issue was whether there should also have been a new trial on the issue of guilt or innocence. The Supreme Court, in an opinion written by Justice Douglas, affirmed the Maryland Court of Appeals, ruling that, while in Maryland the jury is the judge of law as well as fact, the court must judge the admissibility of evidence. The admission to the killing by the co-defendant would not be admissible on the issue of guilt under the felony-murder rule, although it would be admissible on the issue of punishment, which in this case was also a question for the jury.[125]

Although it upheld the Maryland ruling, the Supreme Court took the opportunity to make a broad statement regarding the suppression of evidence. After reviewing *Mooney v. Holohan*[126] and the cases following it, the Court said

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . . Society wins not only when the guilty are convicted but when criminal trials are fair. . . . A prosecution that withholds evidence on demand of an accused which, if made available would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on a defendant. That casts the prosecutor in a role of an architect of a proceeding that does not comport with standards of justice, even though, as in

[117] *Id.* at 269. *See also* Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961).

[118] *See also* United States v. Marchese, 341 F.2d 782 (9th Cir.), *cert. denied*, 382 U.S. 817 (1965).

[119] 352 U.S. 1 (1956).

[120] *Id.* at 9.

[121] *See* McNabb v. United States, 318 U.S. 332 (1943).

[122] 351 U.S. 115, 124 (1956).

[123] 373 U.S. 83 (1963).

[124] Brady v. State, 226 Md. 422, 174 A.2d 167 (1961).

[125] In this regard, the Court was, of course, discussing only Maryland law. In other states the rule might be different. *See, e.g.*, United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3rd Cir. 1952), *cert. denied*, 345 U.S. 904 (1953), which involved a similar problem. In that case the Third Circuit reviewed the question in light of Pennsylvania law and ruled that, under such circumstances, the defendant should receive a new trial, since the evidence would have been admissible aside from the issue of punishment.

[126] 294 U.S. 103.

the present case, his action is not "the result of guile". . . .[127]

The implications involving discovery contained in this decision were noted by Justice White in a concurring opinion:

> I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rule-making or legislative process after full consideration by legislators, bench, and bar.[128]

In *Brady* the Court answered several unresolved questions. It ruled that an unintentional failure to disclose favorable evidence to the defense would in itself amount to a denial of due process.[129] It also went beyond the doctrine of *Mooney v. Holohan*. By reaffirming the duty of the prosecution to disclose evidence material to punishment, the Court appeared to be moving away from the common law view of the adversary process. Basing its reasoning upon the duty of the state to see that justice is done, rather than merely to convict, the Court appears to require that any steps toward assuring that end be taken.

To recapitulate, the Court started with the rule that the prosecution may not seek convictions through evidence which it knows to be misleading. Later a rule evolved that required the prosecution to disclose evidence which, within its judgment, would benefit the defendant with respect to the issue of guilt or innocence. Now the rule probably requires that the prosecutor disclose evidence favorable to the defendant for purposes beyond the mere issue of guilt or innocence. Would it be a long or illogical step to say that such a general purpose, lying beyond the issue of guilt or innocence, might include the preparation to meet the charges of the prosecution?

Furthermore, the judgment of what might benefit the defendant is no longer solely within the discretion of the prosecuting attorney. As the rule now stands, the prosecution probably has an absolute duty to disclose to the defendant anything which, in the court's view, may be of benefit to him for the prescribed purposes. The criterion is not the belief of the prosecutor that the information would be helpful, or even his knowledge that certain information exists, but rather (1) whether the state has information and (2) whether such information might be material.

To avoid reversals for nondisclosure, prosecutors will probably submit evidence raising a disclosure issue to courts for *in camera* inspection and determination.[130] This could create a considerable burden for state trial judges and bring into clearer focus the problem discussed by the Court in *Jencks v. United States*.[131] There the Court noted that the obligation to review the prosecution's evidence for material favorable to the defendant for purposes of impeachment or determination of guilt or punishment may be burdensome to already busy judges and that courts could not be expected to recognize as would the advocate what items might be favorable.[132]

As previously indicated *Brady v. Maryland* contains language which may require that the prosecution make the required disclosures only "upon request" or "on demand." This implies that, where no demand is made by the defendant or his attorney, the prosecution is not obligated to disclose material evidence. When this issue was raised in *Barbee v. Warden*[133] the Court of Appeals for the Fourth Circuit ruled that "[i]n gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel." The court held that failure of defense counsel to demand information did not deny the defendant a right to receive it.[134]

[127] 373 U.S. at 87–88.

[128] *Id.* at 92.

[129] *See, e.g.*, United States *ex rel.* Helwig v. Maroney, 271 F.2d 329 (3rd Cir. 1959), *cert. denied*, 362 U.S. 954 (1960); Gay v. Graham, 269 F.2d 482 (10th Cir. 1959).

[130] See United States *ex rel.* Bund v. LaVallee, 344 F.2d 313 (2d Cir.), *cert. denied*, 382 U.S. 867 (1965), in which, in response to demand for the grand jury testimony of a witness, the prosecutor submitted the transcript for *in camera* inspection by the court to determine that no contradictions in the testimony of the witness existed. This was a New York state proceeding.

[131] 353 U.S. 657 (1957).

[132] In Alderman v. United States, 394 U.S. 165, 183–84 (1969), the Court noted that

> [a]dversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands.

But in Taglianetti v. Unites States, 394 U.S. 316 (1969), it held that resort to adversary proceedings was necessary only when *in camera* proceedings were inadequate to protect the defendant's rights with regard to electronic surveillance.

[133] 331 F.2d at 846.

[134] *See also* United States *ex rel.* Meers v. Wilkins,

The Supreme Court has not elaborated upon the ramifications of its decision in *Brady v. Maryland*. Since 1963 it has avoided making pronouncements defining the limits of the duty to disclose. In *Giles v. Maryland*,[135] however, the Court was forced to great lengths to avoid the *Brady* doctrine. *Giles* involved a 1961 rape charge in which Giles and two others were convicted and sentenced to death.[136] The alleged victim, a sixteen year-old girl, had a history of juvenile charges, emotional illness, and promiscuous behavior. The asserted defense was consent. At the trial the prosecution did not disclose the girl's background, or the fact that after this alleged crime she accused two other men of raping her on another occasion and that she had attempted suicide.

The case presented the question of whether the prosecution was required to disclose evidence relative to the victim's credibility. The Court, however, could not agree upon the answer to the question. Rather the "plurality"[137] took an unusual step. At the time of the oral arguments, the Court requested copies of police reports which were not a part of the lower court's record. Examining these reports, the Justices discovered several discrepancies between the reports and the testimony of the police officers and the alleged victim at the trial. On the basis of these discrepancies, they decided to remand the case to the Maryland courts with directions to determine whether or not the prosecution had allowed misleading evidence to stand uncorrected.[138] Thus, the plurality avoided the issue of prosecutorial suppression by remanding under the rule of *Napue v. Illinois*.[139]

Justices White and Fortas wrote concurring opinions. Justice White recognized that the case raised the issue of the suppression of evidence but avoided interpretation of *Brady*[140] by ordering remand based upon his view that the suppression possibly violated Maryland Rules of Procedure, Rule 922.[141] Justice Fortas was the sole member of the majority to reach the *Brady* question. He felt that is was unacceptable for the prosecution to suppress information solely because it might not be admissible at trial.[142] He conceded that repetitious information may be suppressed[143] but emphasized that suppression as well as misrepresentation falls under the *Brady* rule:

> I see no reason to make the result turn on the adventitious circumstance of a request. If the defense does not know of the existence of the evidence, it may not be able to request its production.[144]

Justice Harlan, with Justices Black, Clark and Stewart joining, responded specifically to Fortas' interpretation of *Brady*. Mr. Justice Harlan accused Fortas of relying on dictum from *Brady*[145] to unduly extend *Napue*. Mr. Justice Harlan emphasized that this extension was not only without support in the *Brady* holding but was also specifically rejected by Rule 16 of the Federal Rules of Criminal Procedure,[146] which specifically limits discovery to "avoid abuses."[147] Thus, after *Giles v. Maryland* the meaning of *Brady v. Maryland* is uncertain.

In *McCray v. Illinois*[148] the Supreme Court ruled that the Constitution does not require that the prosecution disclose the name of an informer. The full implication of this decision to a discussion of criminal discovery is uncertain, however. The majority opinion distinguished *McCray*, where identity of the informer was important only to the issue of probable cause for arrest and search, from cases where the demanded disclosure relates to the ultimate issue of guilt or innocence.

Another important limitation upon the line of cases which has been traced is that they do not require pre-trial discovery. Thus the *Brady* decision must be understood to refer to the application

326 F.2d 135, 137 (2d Cir. 1964), where the court ruled that "the case before us differs from *Brady* in that the defense counsel here never requested the disclosure of evidence from the prosecution, but we think such a request is not a *sine qua non* to establish a duty on the prosecution's part." *See also* the concurring opinion of Justice Fortas in Giles v. Maryland, 386 U.S. 66 (1967).

[135] 386 U.S. 66, 96 (1967).

[136] The Governor, however, commuted the sentence to life imprisonment.

[137] 386 U.S. at 102.

[138] 386 U.S. at 74.

[139] 360 U.S. at 269.

[140] 386 U.S. at 102.

[141] *Id.* at 94.

[142] *Id.* at 98. In Alderman v. United States, 394 U.S. 165 (1969), the Supreme Court ruled that the prosecution was obliged to disclose to the defense records of electronic surveillance which might have led to the uncovering of evidence. The prosecution, however, conceded the obligation and the only dispute was as to the manner by which disclosure was to be made. The Court did not discuss or cite the *Brady* decision.

[143] 386 U.S. at 98.

[144] *Id.* at 102.

[145] *Id.* at 116.

[146] *Id.* at 117.

[147] *Id.* at 118. United States v. Manhattan Brush Co., 38 F.R.D. 4, 6 (S.D.N.Y. 1965).

[148] 386 U.S. 300 (1967).

of tests of fairness to the prosecution at trial and not at an earlier point in the proceedings.[149] It is true that *Brady* and the Supreme Court cases antedating it were limited to disclosures at any time before the end of the trial. Thus in *Leland v. Oregon*,[150] the Court appeared to place emphasis upon the fact that the defendant had an opportunity to see his own statement before he had rested his case, even though he had no opportunity before the trial.

On the other hand, it would be too simple to say that the reasoning behind *Brady* and its companion cases is limited to disclosure at the trial. A logical argument may be made for the need of fuller disclosure for preparation of the defense, a need which cannot be met by sudden disclosure during the heat of trial. Furthermore, knowledge by the defendant of information favorable to him will affect not only trial strategy, but also the decision to enter a plea of guilty. This latter problem arose in a case before the United States District Court for the Western District of Pennsylvania.[151]

Early in 1947, one Hough, together with two others—Smith and Almeida—robbed a grocery store. Hough, the defendant in this case, went into the store with Almeida while Smith waited in the car. While in the store, Almeida fired the pistol that he was carrying. The defendant did not fire his pistol. As Hough and Almeida left the store, an off-duty police officer stopped beside the car of the robbers. Other police officers arrived at the scene, and an off duty police officer was killed in an exchange of gun fire. Hough, Almeida and Smith left the scene of the robbery; but Hough fell out of the escaping car and was arrested. The other two were not captured for over a year. When Hough was arrested, he was carrying a .45 pistol.

On the advice of counsel Hough decided to plead guilty to first degree murder, thereby hoping to avoid the death penalty. Although his plea was accepted, Hough was nevertheless sentenced to death. After Almeida had also been arrested, tried, and sentenced to death, and while the trial of Smith was in progress, it was learned that the prosecution had evidence which showed that the off-duty police officer had been killed by a .38 bullet. Hough had been carrying a .45 pistol when arrested; and the bullet dug out of a wall in the store, admittedly fired by Almeida, showed that he also was carrying a .45. Smith was carrying a .22 pistol; and witnesses agreed that at the time of the killing he was operating the automobile and could not have fired the weapon. This evidence tended to show that a police bullet had actually caused the death. None of this was disclosed to Hough or his attorney before Hough entered his plea of guilty. Neither was it revealed at the trial of Almeida. In an habeas corpus proceeding, the United States District Court reversed Almeida's conviction.[152] It ruled that the suppression in Hough's case amounted to a deprivation of due process. Further, the court ruled that the reversal was not to be avoided through any distinction between a plea of guilty and a verdict. It considered "Hough's plea of guilty as a conviction, for the entering of a plea of guilty by a defendant to charges as contained in an indictment is in itself a conviction."[153] The court then said that false or suppressed evidence can neither convict nor condemn.[154]

The problem indicated by the *Hough* case is obvious. When a defendant enters a plea of guilty before trial, the prosecution need not present its evidence. Must it, however, present evidence which may be beneficial to the defendant before the court accepts the plea? The United States Supreme Court has not made a definitive statement regarding the duty of the prosecution to make disclosure before a plea of guilty is entered. However, in the 1960 case of *Wilde v. Wyoming*[155] the defendant alleged that his plea of guilty to murder had been induced by lack of counsel and by the fact that the prosecution had "wilfully suppressed the testimony of two eye-witnesses to the alleged crime which would have exonerated the petitioner."[156] The Court, in remanding the case for further hearings, ruled that there was nothing "to justify the denial of hearing on the allegations." The import of this decision is that there apparently is some duty to disclose, even where there is to be no trial because of a forthcoming plea of guilty.

[149] United States *ex rel.* Hough v. Maroney, 247 F. Supp. 767 (W.D. Pa. 1965).
[150] 343 U.S. 790 (1952).
[151] 247 F. Supp. 767.
[152] United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952), *cert. denied*, 345 U.S. 904 (1953). The total reversal of convictions in the cases of Almeida and Hough distinguishes these from the otherwise similar case of *Brady*, in which only the sentence was set aside. The different results, however, are apparently due to differences in state law and procedure, not to different constitutional interpretations.
[153] 247 F. Supp. at 778.
[154] *Id.* at 779.
[155] 362 U.S. 607.
[156] *Id.*

The problems created by the constitutional decisions requiring disclosure may be extensive in many states. Following, as many still do, a strict common law view of the adversary process, the states have no efficient machinery for implementing the constitutional mandates of the Supreme Court. The prosecution, while under an obligation to disclose certain information, has no method for formally disclosing it. Neither side has a recognized procedure for determining which items should or should not be divulged. The result is that, perhaps years later, the defendant may learn that the prosecution had certain information, which the defendant contends should have been revealed, and will initiate a collateral attack on the conviction.

A second problem created by these decisions is one of timing. It would seem obvious that a requirement of disclosure means effective disclosure. To be effective the information must be disclosed at a time when its import may be examined and weighed by the trier and the adversary. A disclosure at the end of a trial of an important but detailed document would not allow the defendant an opportunity to immediately develop the significance of the evidence, if indeed he even has an opportunity to place it in the proper perspective.

To demonstrate this a hypothetical problem may be constructed from the facts in the *Hough* case.[157] If, at the time of the arraignment and immediately before the defendant entered his plea of guilty, the prosecutor were to disclose that the victim had been killed by a .38 bullet and that a .45 bullet was found in the wall of the grocery store being robbed, this would probably not indicate much to either the attorney or his client. Neither knew the caliber of Almeida's pistol and Hough assumed that Almeida had fired the fatal shot. The oft-recognized right to notice would seem reasonably to apply here.[158] Requiring some notice, whether it be strictly "pre-trial" or not, would not be a radical or illogical step.

Discovery in the Federal Rules of Criminal Procedure

Federal courts have not been in the vanguard of the movement to liberalize criminal discovery.[159] This reluctance to innovate may be traceable to the opposition to criminal discovery voiced by such respected jurists as Learned Hand[160] and Benjamin Cardozo.[161] Perhaps it is due to a natural reluctance to embark upon a venture which is clearly inconsistent with the traditional adversary concept of criminal trials. Whatever the reason, clear traces of a broadening federal criminal discovery have been discernible only within the last decade.

The original codification of federal criminal procedure in the Federal Rules of Criminal Procedure appeared to allow the trial court some measure of discretion in ordering discovery. However, these

[157] 247 F. Supp. 767.

[158] *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[159] Several states by decision or statute have more liberal criminal discovery rules. *See, e.g.*, State v. McGhee, 91 Ariz. 101, 370 P.2d 261 (1962); State v. Superior Court, 90 Ariz. 133, 367 P.2d 6 (1961); Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962); People v. Cooper, 53 Cal. 2d 755, 770, 349 P.2d 964, 973 3 Cal. Rptr. 148, 157, (1960); People v. Cartier, 51 Cal. 2d 590, 335 P.2d 114 (1959); State v. Minor, 177 A.2d 215 (Del. Super. Ct. 1962); People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959); People v. Stokes, 24 Misc. 2d 755, 204 N.Y.S.2d 827 (Ct. Gen. Sess. 1960); Fla. Stat. § 225.04 (Supp. 1969); Ill. Rev. Stat. ch. 38, § 114–9.

[160] See, United States v. Violon, 173 F. 501, 502 (S.D.N.Y. 1909), where Judge Hand said in discussing a motion to inspect grand jury minutes,

> I cannot satisfactorily speculate upon the evidence which must have been before the grand jury nor will I either myself inspect or permit another to inspect its minutes;

United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923), where Judge Hand denied a defendant access to a grand jury's minutes by saying that

> [N]o judge of this court had granted it, and I hope none ever will. 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 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;

United States v. Dilliard, 101 F.2d 829, 837, where Judge Hand said,

> The defendants seem to suppose that they had the privilege of roaming about at will among any memoranda made by the prosecution in preparation for trial: that indeed is not an uncommon illusion, but it has nothing whatever to support it.

[161] See, People *ex rel.* Lemon v. Supreme Court of New York, 245 N.Y. 24, 32–33, 156 N.E. 84, 86–87 (1927), where Cardozo, C.J., traced the history of resistance to discovery in criminal trial and found that while the

> . . . glimmerings of such a doctrine are to be found, as we have seen in courts other than our own . . . [and indeed allowance of such discovery may be the proper course for the future, nonetheless, under the present state of the law] . . . the defendant, . . . fails to make out her title to the remedy [of discovery].

rules were narrowly construed. Rule 7(f),[162] which permitted the court to order the prosecution to serve a bill of particulars, was interpreted as a restatement of common law powers.[163] Thus, attempts to use Rule 7(f) to obtain evidence were rejected,[164] as were attempts to use the rule to obtain the names of witnesses.[165]

The original rule of criminal procedure which came closest to allowing some form of discovery was Rule 16. This rule reads in part:

> Upon motion of a defendant at any time after the filing of the indictment or information, 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 sought may be material to the preparation of his defense and that the request is reasonable. . . .[166]

[162] Fed. R. Crim. P. 7(f) (old):

> The court for cause may direct the filing of a bill of particulars. Motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires. . . .

as amended, Feb. 28, 1966, effective July 1, 1966, Rule 7(f) now reads:

> The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

See generally Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221 (1957).

[163] See Longsdorf, *The Beginnings and Background of Federal Criminal Procedure*, 4 W. BARRON, FEDERAL PRACTICE AND PROCEDURE 1, 32 (1951), in which the common law authority was traced to Rex v. Hodgson, 2 C. & P. 422, 172 Eng. Rep. 484 (1828).

[164] *See, e.g.*, Wong Tai v. United States, 273 U.S. 77, 82 (1927); Frederick v. United States, 163 F.2d 536, 545–46 (9th Cir. 1947), cert. denied, 332 U.S. 775 (1947), wherein is cited a list of cases holding that absent a clear showing of abuse of discretion, the failure of the court to allow a bill of particulars would not be disturbed on appeal.

[165] United States v. Elliot, 266 F. Supp. 318, 327 (S.D.N.Y. 1967); United States v. Tucker, 262 F. Supp. 305, 307 (S.D.N.Y. 1966); United States v. Bennett, 36 F.R.D. 103, 105 (E.D.S.C. 1964), cert. denied, 385 U.S. 1005; United States v. Lebron, 222 F.2d 531, 535–6 (2d Cir. 1955), cert. denied, 350 U.S. 876; United States v. Malinsky, 19 F.R.D. 426, 428 (S.D.N.Y. 1956).

[166] Fed. R. Crim. P. 16 (old).

This rule, as adopted, was more restrictive than the original draft of Rule 16, which authorized the trial court to order disclosure of any document or object not privileged upon a showing of materiality and reasonableness.[167] As interpreted by the courts, Rule 16 was confined to its explicit language. Courts held that the rule did not entitle the defendant to examine his own confession,[168] that of a co-defendant,[169] investigative reports,[170] or grand jury minutes.[171]

Finally, Rule 17(c) offered some apparent promise as an instrument of discovery.[172] This rule authorized a trial court to order advance produc-

[167] The preliminary draft of the original Rule 16 (then Rule 19) is quoted at BARRON, *supra* note 163, at 124:

> Discovery and Inspection. Upon motion of the defendant at any time after the filing of the indictment or information and after the defendant has been taken into custody the court may order the attorney for the government to permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated books, papers, documents, or tangible objects, not privileged, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable.

[168] United States v. Murray, 297 F.2d 812, 820 (2d Cir.), cert. denied, 369 U.S. 828 (1962); Schaffer v. United States, 221 F.2d 17, 19–20 (5th Cir. 1955); Shores v. United States, 174 F.2d 838, 843–45 (8th Cir. 1949). *Contra* United States v. Peace, 16 F.R.D. 423, 424–25 (S.D.N.Y. 1954).

[169] *E.g.* United States v. Buemfield, 85 F. Supp. 696, 707–08 (W.D. La. 1949); United States v. Carter, 15 F.R.D. 367, 370–71 (D.C. 1954).

[170] United States v. Bentvena, 193 F. Supp. 485, 498 (S.D.N.Y. 1960); United States v. Tirado, 25 F.R.D. 270, 271 (S.D.N.Y. 1958); United States v. Fuentes, 25 F.R.D. 278, 279 (S.D.N.Y. 1958).

[171] In Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 397 (1959), the Court held that the trial court's refusal to make grand jury minutes available to the defendant was not error absent a showing of "particularized need." The Court did not specifically refer to Rule 16, but said that "any disclosure of grand jury minutes is covered by the Federal Rules of Criminal Procedure 6. . . ." It can be inferred that since Rule 6 did not allow discovery, Rule 16 certainly would not allow it either.

[172] FED. R. CRIM. P. 17(c):

> For Production of Documentary Evidence and of Objects, a subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, or objects or portions thereof to be inspected by the parties and their attorneys.

tion of subpoenaed evidence to allow counsel an opportunity to inspect it. Courts, however, ruled that this was designed to avoid delay at the trial and was not to be used as a discovery tool.[173] Documents which were subject to subpoena or at-trial production were not also subject to inspection as a matter of right.[174]

Although the original Federal Rules of Criminal Procedure did not provide for broad or effective discovery, the Supreme Court in the 1950's developed a type of limited trial discovery. In 1953 in *Gordon v. United States*[175] the Court ruled that a criminal defendant is entitled to production of a witness's prior inconsistent statements where the contradictions concern relevant and important matters and where the demand is for production of specific documents and is not merely a fishing expedition. Several years later in the widely publicized *Jencks*[176] case the Court dealt more specifically with the problems raised by the demand for production of inconsistent statements. In *Jencks* the defendant moved to be allowed to examine reports made by two witnesses, undercover agents for the Federal Bureau of Investigation, who had testified against him. The Supreme Court ruled that the trial court should have allowed the defendant to examine the reports because the reports, made contemporaneously with the occurrences to which the witnesses later testified at trial, were reliable instruments with which to check the truthfulness of the witnesses' testimony at the trial. Furthermore, the Court stated that the documents must be made available to the defense for only the defense could adequately determine which statements were effective in discrediting the witness.[177] Thus, the practice which had developed in several courts,[178] of the prosecution's delivering the statements to the trial court for *in camera* inspection to determine if there were contradictions, was found to lack the necessary sensitivity.

Jencks was not ostensibly based on constitutional grounds but rather on the Court's supervisory powers.[179] The Congress, accordingly, was not barred from exercising its Article III powers and passed the Jencks Act[180] in order to limit the unwanted effect of the decision. This provided, in summary, that (a) in Federal criminal prosecutions, no statement or report given to an United States agent by one other than the defendant shall by subject to discovery or inspection until after the witness who gave the statement has testified; (b) after the witness' testimony on direct examination, the court shall, on motion of the defendant, order the prosecution to produce statements made by the witness relating to the subject matter to which he has testified; (c) if the prosecution claims that any statement ordered to be produced contains matters not relating to the subject matter of the witness' testimony, the court is to examine that matter, *in camera*, and to excise portions which do not relate to the testimony of the witness, before delivering the statements to the defendant; (d) the United States may elect not to comply with the order to produce such statement, in which case the court shall order the testimony of the witness

[173] Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951), held that "Rule 17 (c) was not intended to provide an additional means of discovery." Rather, it was intended "... to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials." United States v. Marchisio, 344, F.2d 653, 669 (2d Cir. 1965), held that, "[u]nlike the rule in civil actions, a subpoena duces tecum in a criminal action is not intended for the purpose of discovery...."

[174] See United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952), where the court rejected the defendant's interpretation of Bowman Dairy Co. v. United States, 341 U.S. 214 to the effect that it allowed all documents which are subject to subpoena under Rule 17(c) to also be subject to inspection by the defendant as a matter of right. The court in *Iozia* stated that it did not so construe the authority. It emphasized that any inspection by the defendant under Rule 17(c) was not a matter of right but rather wholly discretionary with the court.

[175] 344 U.S. 414, 418–19 (1953), held that where statements made by a witness

> "... were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters ... [and] ... [t]he demand was for production of these specific documents and did not propose any broad or blind fishing expeditions among documents ... on the chance that something impeaching might turn up ... we think ... that an accused is entitled to the production of such documents.

[176] Jencks v. United States, 353 U.S. 657 (1957). *Jencks* became a national cause célèbre because it involved reversal of a conviction for signing a false noncommunist affidavit. The decision forced the government to choose between producing the demanded documents and possibly divulging state secrets and dismissing the indictment.

[177] 353 U.S. at 668–9.

[178] See, *e.g.*, United States v. Beeckman, 155 F.2d 580, 584 (2d Cir. 1946), United States v. Eheling, 146 F.2d 254, 256 (2d Cir. 1944); United States v. Cohen, 145 F.2d 82, 92 (2d Cir. 1944), *cert. denied*, 323 U.S. 799.

[179] In Scales v. United States, 367 U.S. 203, 258 (1961), the Court stated that "... the procedure required by the decision of this Court in Jencks was not required by the Constitution ...;" Palermo v. United States, 360 U.S. 343, 353 n. 11 (1959).

[180] 18 U.S.C. § 3500 (1964).

stricken or declare mistrial; and (e) statements or reports as covered by the act are defined as written statements made and signed, or otherwise adopted or approved, by the witness, and recordings and transcriptions of recordings which are substantially verbatim recitals of oral statements and recorded contemporaneously with the making of them.

Despite the uproar created by *Jencks v. United States*, the Congress' reaction in the Jencks Act was mild. No attempt was made to bar production of all documents, rather the act re-established the procedure of *in camera* inspection by the trial court. However, under the act the trial court was only to determine the relevance of the documents and not attempt to locate contradictions.

In his concurring opinion in *Palermo v. United States*,[181] Justice Brennan explained what may have been the reason for the Congress' limited response:

> It is true that our holding in *Jencks* was not put on constitutional grounds, for it did not have to be; but it would be idle to say that the commands of the Constitution were not close to the surface of the decision; indeed, the Congress recognized its Constitutional overtones in its debates on the statute.[182]

Justice Frankfurter, speaking for the majority in *Palmero*, stated that the Jencks Act merely put in statutory form what the Court had meant in its decision in *Jencks v. United States*[183] and that the statute was called for after some lower federal courts allowed demands far beyond the holding in the *Jencks* decision.[184] Mr. Justice Frankfurter's interpretation of the purpose and scope of the Jencks Act is reflected in the Court's decision in *Pittsburgh Plate Glass Co. v. United States*.[185] There the Court held that the trial court did not err in denying a defense motion for production of a trial witness' grand jury testimony. The Court supported this decision by arguing that the Jencks Act had defined the limits of the disclosure and that more liberal rules would restrict the effectiveness of the grand jury. However, in 1966, *Dennis v. United States*[186] established the general rule that the grand jury testimony of a trial witness should be disclosed. After citing increased allowance of disclosure in lower federal courts, Justice Fortas, speaking for the majority, said, "These developments are entirely consonant with the growing realization that disclosure rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice." [187]

It should be emphasized that these decisions and legislative enactments have not created a system of pre-trial discovery of any sort; rather, they have authorized at-trial disclosure of information for impeachment purposes. The Jencks Act specifically prohibits pre-trial disclosure of documents covered by the statute.[188]

Actual *pre-trial* discovery in federal courts[189] began with the amendments to the Federal Rules of Criminal Procedure, which became effective in July, 1966.[190] Among these, the important rules for discovery purposes were amended Rule 16 and new Rule 17.1.

Amended Rule 16 provides, in summary, that (a) upon motion of a defendant, the court "may" order the attorney for the government to permit

[181] 360 U.S. 343, 360 (1959) (Brennan, J., joined by Warren, C. J., Black and Douglas, J. J., concurring.)

[182] *Id.* at 362–63. Some writers have suggested that *Jencks* may become a constitutional requirement. See, Fletcher, *Pre-trial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 303 (1960).

[183] 353 U.S. at 345–46.

[184] See, H. R. REP. No. 700, 85th Cong., 1st Sess. (1957), and S. REP. No. 569, 85th Cong., 1st Sess. (1957). *See also* S. REP. No. 981, 85th Cong., 1st Sess. (1957); 103 CONG. REC. 15939-41 (1957).

[185] 360 U.S. 395 (1959).

[186] 384 U.S. 855 (1966).

[187] *Id.* at 870.

[188] 18 U.S.C. § 3500 (a) (1964) provides:

> In any criminal prosecution brought by the United States no statement ... in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

[189] The limited scope of federal criminal discovery under the rules and *Jencks* was criticized by Chief Justice Traynor of the California Supreme Court in 1964:

> The statutory law and the Federal Rules, inadequate not only in themselves but in combination and diluted further by paltry interpretation, have led only to the most rudimentary form of criminal discovery. It ekes out an existence in a still unfavorable enviroment. Judges continue to bar discovery upon the rationalization at odds with the apparent intention of the draftsman of the rules, that failure to authorize discovery is an implied prohibition of it. ... [T]he future of discovery in federal prosecutions looks unpromising so long as the federal courts fail to exercise their inherent power to foster a wholesome intergration of discovery procedures into the judicial process.

Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 239 (1964). This was was written, of course, before Dennis v. United States and before the new Federal Rules of Criminal Procedure were adopted by the Supreme Court.

[190] The rules, together with the dissent of Justice Douglas, are reported at 39 F.R.D. 69, 252 ff.

the defendant to inspect and copy any "relevant" (1) written or recorded statement of the defendant within the control of the government and which is known, "or by the exercise of due diligence may become known" to the prosecution, (2) results of "physical or mental examinations, and of scientific tests or experiments" within the control of the government and which are known "or by the exercise of due diligence may become known" to the prosecution, and (3) the grand jury testimony of the defendant; (b) upon motion of a defendant, the court "may" order the attorney for the government to permit the defendant to inspect and copy "books, papers, documents, tangible objects, buildings or places" within the control of the government upon a showing of "materiality to the preparation of his defense and that the request is reasonable", except that "internal government documents" and statements by government witnesses not falling within the Jencks Act may not be ordered disclosed; (c) if the court orders disclosure under (a) (2) or (b), upon motion of the government, it may "condition its order" by requiring that the defendant permit inspection of "scientific or medical reports, books, papers, documents, tangible objects" or copies of these which he "intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to preparation of the government's case and that the request is reasonable," except internal defense documents and statements of witnesses; (d) in its order, the court may specify the time, place and manner; (e) the court may make protective orders and the prosecution may move for such an order in the form of a written statement for *in camera* inspection by the court; and (g) there is to be a continuing duty to disclose when new material is located, enforced by a second order to disclose, followed by a continuance, order prohibiting introduction into evidence of the withheld material or other order deemed necessary.

At first glance, Rule 16 would seem to still be discretionary with the trial court. Even subsection (a), which authorizes unconditioned discovery of the items covered, contains the "may". It has been suggested, however, that a comparison of subsection (a) with the other subsections and with the earlier Rule 16, dictates a more limited view of the court's discretion.[191] Subsection (a) does not contain the requirement that the demand be shown to be "reasonable" as is required for disclosures under subsections (b) and (c) and as was required under old Rule 16. Because of the apparent liberalization of disclosures, it has been suggested that subsection (a) may be relatively absolute, subject only to protective orders.[192] Several recent decisions, however, have held that disclosure should not be granted routinely upon the defendants' request,[193] and that broad discretion remains with the court.

While subsection (a) requires only that demands for disclosure be "relevant," subsection (b) requires a showing of reasonableness and materiality. However, because the defendant has no power to take depositions or interrogatories on which to base his motions, these requirements of reasonableness and materiality must be given a liberal construction if the subsection is to provide effective discovery.[194]

Another important provision of amended Rule 16 is the authorization for reciprocal discovery. The defendant may move for examination of his own statements and grand jury testimony without showing them to be material or his request reasonable; but when he asks for physical or mental tests or scientific reports under (a) (2) or other evidence under (b), he then gives the court power to condition his request upon his willingness to disclose.

Justice Douglas, in a statement accompanying the new Rules of Criminal Procedure, objected to Rule 16.

> The prosecution's opportunity to discover evidence in the possession of the defense is somewhat limited in the proposal with which we deal in that it is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-incrimination, is it any less a violation if conditioned on the defendant's exercise of the opportunity to discovery evidence? May benefits be conditioned on the abandonment of constitutional rights?[195]

[191] Rezneck, *The New Federal Rules of Criminal Procedure*, 54 GEO L.J. 1276, 1277 (1966).

[192] *Id.*

[193] United States v. Carrean, Inc., 42 F.R.D. 408, 413 (1967); *See also*, United States V. Kaminsky, 275 F. Supp. 365 (1967); and United States v. Diliberto, 264 F. Supp. 181 (S.D.N.Y. 1967).

[194] Rezneck, *supra* note 191, at 1279.

[195] 39 F.R.D. 276, 277.

Despite this possible difficulty, Rule 16 does attempt to meet the fear sometimes expressed that discovery may discourage preparation. Internal documents, reports and memoranda are exempted from discovery in subsections (b) and (c). The exemptions thus provided restrict federal criminal discovery in the same manner that *Hickman v. Taylor*[196] limited federal civil discovery.

A further advantage of new rule 16 is the requirement of due diligence placed on the government attorney. Both subsections (a) (1) and (a) (2) require the government attorney to disclose material which is either known to and controlled by him, or which "by the exercise of due diligence may become known" to him. This provision precludes "convenient ignorance" by the government attorney.

Rule 16 contains several radical innovations in federal criminal discovery. However, the effect of the rule in enlarging the scope of discovery will depend largely upon the willingness of the federal district courts to experiment with it. Whether caution will prevail over experimentation cannot be accurately predicted. Nonetheless, though the accumulated data is insufficient to support firm conclusions, it appears that district courts have often shown an unwillingness to allow discovery to the extent authorized by the law.[197]

Critics of Rule 16 have speculated that subsection (c), which provides for reciprocity, may actually operate to discourage discovery in complicated criminal cases, where discovery is most needed.[198] They have pointed out that the rule does not cover many of the discoverable items which would be most valuable to the defense: names of witnesses in non-capital cases, or the pre-trial disclosure of Jencks Act statements.[199] Neither does Rule 16 provide for disclosures which may be required by the Constitution as interpreted in *Brady v. Maryland*.[200]

The second important change in the Federal Rules of Criminal Procedure is new Rule 17.1, which provides for pre-trial conferences on motion of either party or the court. However, a conference cannot be held where the defendant is not represented by counsel. In order to assure the defense that the pre-trial conference will not be used as a method for obtaining incriminating admissions, the rule provides that no admission made by the defendant or his attorney at the conference may be used against him unless reduced to writing and signed by both the defendant and his attorney. With these limitations, the rule apparently envisions a conference not unlike those in civil cases.[201] The rule provides that the court shall prepare and file a memorandum of the matters agreed upon at the conference.

While informal pre-trial conferences, usually in the form of "plea bargaining" sessions, are not uncommon in criminal cases, Rule 17.1 is novel in giving formal authorization and definition to the process. The rule is still too new for an accurate assessment of its value. Nevertheless, some attorneys are optimistic, based on experience with informal pre-trial conferences in state courts. These attorneys feel that Rule 17.1 may in fact be more valuable in obtaining disclosure than new Rule 16.[202] In addition to promoting disclosure, such conferences may contribute to narrowing the issues at trial.[203] Attorneys also feel that the pre-trial conference may contribute to settlement, or "plea bargaining", in criminal cases. Such a result would, of course, depend upon the willingness of the trial court to permit this to be included in such conferences.[204]

Use of Civil Discovery Tools and Enforcement of Discovery

At present, where discovery is allowed in criminal proceedings, there are few regularized procedures to ensure meaningful disclosure. Unless disclosure is voluntary, discovery is generally by motion in court to order the opposition to disclose specified information.[205]

In most states, discovery is a matter of discretion with the trial court rather than a matter of right.[206] This situation prohibits regularized proce-

[196] 329 U.S. 495 (1947).

[197] Interviews with Assistant State's Attorneys and federal judges, February and May, 1967 (names and further information available from author).

[198] Rezneck, *supra* note 191, at 1289–90.

[199] *Id.*

[200] 373 U.S. 83 (1963). *See also*, concurring opinion of Justice Fortas in Giles v. Maryland, 386 U.S. 66 (1967).

[201] Fed. R. Civ. P. 16.

[202] Interviews, *supra* note 197.

[203] *Id.*

[204] The American Bar Association has recommended that judges not participate in plea disussions. ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty § 3. (Approved Draft, 1968).

[205] For a discussion of the contents of a defendant's motion for discovery, see Garber, *The Growth of Criminal Discovery*, 1 Am. Crim. L.Q. 3, 23–25 (1962). An affidavit is generally necessary to support such a motion.

[206] In most jurisdictions where criminal discovery has been permitted the trial courts have led the way,

dures such as depositions and interrogatories. Since the proper scope of discovery remains undefined courts are forced to determine what shall be disclosed on a case by case basis.[207] It is also possible that the special characteristics of criminal cases will dictate different procedures from those followed in civil cases.[208]

The primary discovery tools in civil cases are depositions and interrogatories. Rules 26, 30, 31, and 33 of the Federal Rules of Civil Procedure empower parties in civil cases to require other parties and third persons to disclose information which they may have regarding the dispute. No jurisdiction has a criminal procedure rule analogous to Civil Rules 30 and 31,[209] which provide for depositions on oral examination and for written interrogatories. California courts, which have broadened other areas of criminal discovery, have specifically declined to allow the defendant to take depositions.[210]

Harris v. Nelson authorizes the use of interrogatories in habeas corpus proceedings instituted by state prisoners so that appropriate facts may be secured.[211] The decision does not apply Rule 33 of the Federal Rules of Civil Procedure which is limited by Rule 81 (a) (2) to apply only to habeas corpus to

> the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions.[212]

But the Court noted that

> in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facia case for relief, may use or authorize the use of suitable discovery procedures, including interrogatories, reasonably fashioned to elicit facts necessary to help the court to 'dispose of the matter as law and justice require.' 28 U.S.C. § 2243.[213]

Thus, in one unique situation the civil discovery procedures have been incorporated into the criminal procedure.

As was pointed out earlier, the prosecution generally has more effective means to obtain relevant information from witnesses than does the defense. If unable to obtain information voluntarily, the prosecution has the power to subpoena recalcitrant witnesses to appear before a grand jury or other investigatory body.[214] As long as grand jury testimony continues to be unavailable

but in California the appellate courts seem to have taken the initiative. See Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF L. REV. 56 (1961) and discussion supra at page 16. Although many trial courts have been reversed on appeal for allowing discovery in a criminal case, many appellate courts are encouraging the lower courts to exercise their discretion. State *ex rel.* Mahoney v. Superior Court, 78 Ariz. 74, 275 P.2d 887 (1954); People v. Johnson, 365 Mich. 619, 97 N.W.2d 739 (1959); Layman v. State, 335 P.2d 444 (Okla. Crim. 1960). The federal courts, on the other hand, allow discovery only in isolated cases where the moving party is able to particularize a need or interest. United States v. Procter & Gamble Co., 356 U.S. 677 (1958). The Court in Palermo v. United States, 360 U.S. 343, 354 (1959), said that "[I]t would indeed defeat . . . [the Jencks Act's] design to hold that the defense may see statements in order to argue whether it should be allowed to see them."

[207] See Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 245 (1964). *See, e.g.*, ILL. REV. STAT., ch. 38, §§ 114-10 to 114-13 (1967); DEL SUPER. CT. (CRIM.) R. 16, MD. R. P., R. 728.

[208] For example, since the defendant has the right not to incriminate himself, it may be necessary to restrict the extent of discovery in a criminal case. Also, differences from the civil practice may be necessary since in a criminal proceeding one side, the state, has greater means for fact finding.

[209] A number of jurisdictions have statutes or court rules authorizing the taking of depositions, at least by the defendant. These are, however, similar to Federal Rule 15 (a), in that they are designed to preserve testimony, but not discover it. *But see supra* note 79.

[210] Clark v. Superior Court, 190 Cal. App. 2d 739, 12 Cal. Rptr. 191 (1961).

[211] 394 U.S. 286 (1969).

[212] FED. R. CIV. P., 81(a) (2).

[213] Harris v. Nelson, 394 U.S. 286, 290 (1969).

[214] Only rarely can a defendant obtain a copy of the grand jury testimony before the trial. Rule 6 (e) of the Federal Rules of Criminal Procedure provides for disclosure of grand jury minutes to government attorneys, but makes disclosure to the defendant dependent upon the discretion of the court. The Supreme Court in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959), has said that such discretion should be exercised only upon a showing of "particularized need." There are two recognized needs at present: 1) A defendant's testimony to the grand jury is disclosable where the charge is that the defendant perjured himself by that testimony, United States v. Rose, 215 F.2d 617 (3d Cir. 1954); and 2) disclosure is sometimes permitted upon a motion to dismiss the indictment, though only where the grounds for dismissal are specified and the facts set forth with particularity, United States v. Nasser, 301 F.2d 243 (7th Cir.), *cert. denied*, 370 U.S. 923 (1962). The main reason for the Supreme Court rule against discovery of grand jury testimony is that the effective operation of the grand jury requires secret proceedings. See United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958). This reasoning is perhaps specious in light of the prosecution's ready access to the grand jury proceedings and the tendency by the prosecution to use these proceedings as a deposition. *Sherry, Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962).

to the defense, at least before trial, the prosecution will prefer to obtain its evidence in this manner rather than by the taking of a deposition at which the defense may be present.

The right to depose witnesses would be valuable to the defendant since otherwise state witnesses may be unwilling to talk to him or his attorney.[215] In the deposition of an unwilling witness in a civil case a proper motion by the deponent will permit him to treat such a person as a hostile witness and question the witness as on cross-examination.[216] This procedure could be extremely valuable to the defense in a criminal case.

There probably is no valid objection to permitting the defendant to depose an eyewitness to the crime.[217] This procedure would give the defendant adequate time in which to appraise the prosecution's evidence and to prepare a defense based on such evidence. Depositions, however, also would give certain defendants the necessary opportunity and information to create a false defense which is one danger motivating those who oppose extended discovery. Opponents of liberalized discovery also note that law enforcement officials and technicians could not be deposed without the risk of revealing the prosecution's full case. Despite these problems it is clear that the maintenance of the status quo with its grave inequity for the defendant is not a final nor a desirable answer.

[215] Those who oppose pretrial discovery generally fear that it would give the defendant an undue advantage since his privilege against self-incrimination would still substantially insulate him from discovery, he might resort to perjury and witness-tampering. See State v. Tuner, 13 N.J. 203, 98 A.2d 881 (1953). This advantage is perhaps countered by the prosecution's broad power of investigation. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960). But in either case there are not enough facts on which to base a meaningful judgment. That is, the fear of the defendant's abusing pretrial discovery seems to be more a priori than anything based in experience. See Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH L. Q. 279.

[216] FED. R. CIV. P. 26 (c).

[217] *But see* Traynor, *supra* note 189, at 245, in which he justifies the refusal of California courts to allow depositions of witnesses:

> The prosecutor is directly involved in the conduct of the action and is therefore subject at all times to the inherent power of the court to regulate the proceedings before it. Independent witnesses on the other hand, may be strangers to the litigation except when testifying, and the courts are understandably slow to invoke their inherent power to expand compulsory process against such witnesses.

The question arises, however, whether witnesses in civil cases, where they are subject to subpoenas for depositions are also "strangers to the litigation."

There also is no policy or constitutional objection to discovery depositions of third parties by the prosecution, unless the depositions are to be used at the trial in the absence of the witness.[218] This may violate the constitutional guaranty that a defendant is to be confronted by the witnesses against him.[219]

Rule 34 of the Federal Rules of Civil Procedure provides for production of documents and things for inspection by the oposing party. A similar procedure is provided in Rule 16 of the Federal Criminal Rules,[220] which allows pretrial inspection and copying of documents and other tangible objects in a few situations. Since Rule 34 depends upon court order, its adaptation to criminal discovery, which also proceeds upon court order, would not necessitate serious revision in the administration of the criminal law.

Rule 35 of the Federal Rules of Civil Procedure authorizes the court to order a party to submit to physical or mental examination. Similarly statutes or rules may require the defendant to submit to certain tests and examinations. Statutes which require the defendant to submit to a blood alcohol test have been ruled constitutional.[221] The defendant may be required to submit to a mental examination if he claims to have been insane at the time of the crime or incompetent to stand trial.[222] At present, the defendant has no power to require another, such as a witness or an alleged victim, to submit to physical or mental examination. Since by the nature of a criminal proceeding any person to be examined by the defense would be someone other than a party, the courts or legislatures may be reluctant to extend this power to the defense despite its possible usefulness in

[218] 4 BARRON, FEDERAL PRACTICE AND PROCEDURES § 2021 (1951).

[219] U.S. CONST. amend. VI; Pointer v. Texas, 380 U.S. 400 (1965); *cf.* 60 J. CRIM. L.C. & P.S. 195 (1969).

[220] Rule 16 is the only Federal Rule of Criminal Procedure for discovery, Bowman Dairy Co. v. United States, 341 U.S. 214 (1951), but it is hampered by the proviso that the items sought must have belonged to or have been obtained from the defendant, or have been obtained from others by seizure or by process. Hence, the purpose of Rule 16 is to protect the defendant's property right in his own goods and to insure his access to documents that the prosecution seizes from third persons by subpoena. It does not facilitate the defendant's discovery of documents important to his defense. See United States v. Murray, 297 F.2d 812 (2d Cir.), *cert. denied*, 369 U.S. 828 (1962).

[221] Schmerber v. California, 384 U.S. 757 (1966).

[222] For a list of state statutes requiring examination, see State v. Whitlow, 45 N.J. 3, 11–14, 210 A.2d 763, 767, n.1 (1965).

determining the extent of a victim's injury or the credibility of a witness.

Civil Rule 36, which is rarely invoked in civil cases, authorizes a party to request admissions of fact or opinions on the genuineness of documents.[223] In criminal procedure a similar rule would be of little practical value since the only sanction for violation is the imposition of the costs of proving the fact on the party unwilling to cooperate. A monetary sanction would not influence either the prosecution or the defense, especially where the defendant is indigent since the expense of proof probably will be borne by the government. Of course, no sanction should induce the defendant to ease the prosecutor's burden of coming forward with the evidence.

Another procedure used in civil cases which may be adaptable to criminal cases is the pretrial conference.[224] Rule 17.1 of the Federal Rules of Criminal Procedure allows the pretrial conference in criminal procedure. Although there has been little experience under Rule 17.1, it may become an extremely useful device in criminal law. At the conference the issues of the case are narrowed and consequently, the element of surprise at the trial is reduced. Most attorneys believe the conferences helpful in effecting disclosure between the parties.[225] Pleas of guilty also are frequently prompted by such conferences.[226] Instead of being limited to disclosure as required in a specific court order, as is the practice now,[227] the pretrial conference allows greater flexibility because the parties can negotiate disclosure without imposed restriction.

Some writers have suggested that the rules of criminal procedure should incorporate the procedures allowed in the civil rules.[228] But full application is impossible because the problems incident to discovery in criminal cases are different from those in civil suits. For example, while at first thought depositions may seem useful additions to criminal discovery, two different standards would be required: one for the prosecution depositions and one for the defense depositions. The dual standards follow from the dictates of the Fifth Amendment[229] and from the unequal ability of the parties in obtaining relevant information. These problems could limit the usefulness of interrogatories and depositions. The work product concept also would require redefinition for use in the criminal law since most evidence that the defendant would want to inspect arises out of the prosecution's investigation.

Most disclosure is made by the prosecution and it is enforced by the same methods as are other procedural or due process requirements.[230] Federal Rule 16 (g) provides that if any party fails to comply with a discovery order

> the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.[231]

If the prosecution's failure to disclose is uncovered after the trial, the conviction may be vacated and a new trial ordered.[232]

Enforcing the prosecutor's discovery of defense evidence is more difficult. Some states require disclosure of an alibi and most authorize the trial court to refuse to permit the introduction of evidence to establish a surprise alibi.[233] This sanction could be expanded to cover other required disclosures. Many feel that such a rule may be unnecessarily harsh, even if constitutional. Critics suggest that courts would be hesitant to use this sanction and would rely on less stringent means of enforcement.[234] Other procedures to aid the prosecution if the defendant refuses to disclose include granting a prosecution's motion for a continuance until the defendant complies or permitting comment in the presence of the jury upon the defend-

[223] Striegel, *Request for Admissions—The Neglected Tool of Discovery*, 5 WASHBURN L.J. 47 (1965).

[224] FED. R. CRIM. P. 37

[225] Interviews, February to May, 1967, with United States' Attorneys and federal district court judges (further information available from author).

[226] *Id. See also* Brennan, *Remarks on Discovery*, 33 F.R.D. 56 (1963).

[227] FED. R. CIV. P. 16.

[228] *See* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1192–97 (1960); 51 CALIF. L. REV. 135, 141–44 (1963).

[229] It is clear that the prosecution would be put at a greater disadvantage were depositions allowed. His witnesses would have to respond to the defendant's questions while the defendant could invoke his privilege against self-incrimination.

[230] *See*, 18 U.S.C. § 3500 (1957), the "Jencks act", in which a witness for the prosecution may not testify, or his testimony may be stricken, if his prior statements are not disclosed.

[231] FED. R. CRIM. P. 16 (g).

[232] *See e.g.*, Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963), *cert. denied*, 375 U.S. 931 (1963).

[233] *See* 76 HARV. L. REV. 838, 839 (1963).

[234] Rezneck, *The New Federal Rules of Criminal Procedure*, 54 GEORGETOWN L.J. 1276 (1966).

ant's refusal. Both of these remedies, however, are of uncertain value.

Also, refusal to obey discovery orders may be punished through the court's contempt power.[235] This might be effective in many cases, although some defendants may prefer punishment for contempt rather than make damaging disclosures in a serious felony prosecution.

Disciplinary power over the defense attorney might also be an effective means to enforce discovery.[236] Obviously, this sanction would be of limited value. The defendant's attorney may not know the information to be disclosed. This enforcement procedure would complicate the attorney-client relationship. For example, the client may refuse to allow disclosure but the attorney still may be unable to withdraw from the case.[237]

To avoid such enforcement problems, California decisions rely principally upon voluntary exchange of information.[238] Thus, the defendant would be discouraged from refusing to disclose evidence primarily by being barred from receiving disclosures from the prosecution. Similarly, in order to enforce the requirement of continuing discovery, the drafters of Federal Rule 16 were forced to provide a continuing obligation of discovery where under a conditional order the defendant has already received the information sought from the government and has not revealed matter ordered to be provided.[239]

Conclusion

We have seen that the early and adamant common law opposition to criminal discovery has been modified both in England and in several American jurisdictions. Indeed, many of the arguments advanced in support of strict restraints on criminal discovery are not sound. In particular, they conflict with the presumption of innocence which is fundamental to the Anglo-American system of justice. While Lord Kenyon stated that criminal discovery would subvert the whole system of criminal law by allowing more defendants to escape conviction, it appears that discovery is more significant in the preparation of the case of an innocent accused than that of one who is guilty.

Those American jurisdictions that have recognized the weakness in arguments against criminal discovery asserted that fairness to the defendant demanded that he be allowed access to certain information. In response, several states and the federal government enacted statutes providing for limited discovery.[240]

The Supreme Court spoke on the matter in *Brady v. Maryland*[241] providing the furthest extension of the defendant's rights to criminal discovery. That decision established a defendant's right to all evidence in the possession of the prosecution that is material to his guilt or punishment. Yet, most states have not provided adequate and effective means for a defendant to assert his right to discovery in response to the *Brady* decision.

The American Bar Association has drafted a set of standards for pre-trial discovery in view of the states' failure to codify a defendant's discovery rights.[242] The Bar committee noted:

> In order to bring potential constitutional issues to the fore at the earliest practical time, and to make for appropriate and enduring dispositions, it seemed essential that defense counsel receive as much information about the case as feasible before trial or other disposition.[243]

There are two significant concepts implicit in this statement of purpose. First, it recognizes that inadequate pre-trial discovery violates due process. Secondly, it underscores the policy behind expanded post conviction relief which is to rectify constitutional errors regardless of when they are raised.[244]

[235] *See, e.g.*, Fed. R. Crim. P. 16 (g).

[236] *See generally*, Fed R. Crim. P. 16 (g).

[237] This would be analogous to the ethical problem of permitting a criminal defendant to give perjured testimony. See Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966).

[238] Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919 (1962).

[239] The Note of Advisory Committee on Rules in 18 U.S.C.A. Rule 16 (g) provides that there is a continuing obligation on a party subject to a discovery order with respect to material discovered after initial compliance. The note also states that the rule gives wide discretion to the court in dealing with the failure of either party to comply with a discovery order. "Such discretion will permit the court to consider the reasons why disclosure was not made, the extent of other prejudice, if any, to the opposing party; the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances."

[240] *See, supra* notes 172 and 207.

[241] *See* p. 22 *supra* and note 123.

[242] American Bar Association Project on Minimum Standards for Criminal Justice Discovery and Procedure Before Trial (Tentative Draft May, 1969) [hereinafter cited as ABA Standards].

[243] *Id.* at 2.

[244] Kaufman v. United States, 394 U.S. 217 (1969); *cf.* 61 J. Crim. L., C. & P.S. 51 (1970).

Finality and efficiency in criminal law administration require full and fair disclosure as early as possible in a criminal prosecution. This requirement for discovery is expressed in Section 1.2 which states the general policy that "discovery prior to trial should be as full and free as possible consistent with protection of person, effective law enforcement, the adversary system, and national security."[245] In order to effectuate this policy, the rules outline a broad range of procedures imposing obligations of disclosure upon prosecution and defense.[246] The obligations reveal the intent of the Committee to encourage voluntary pre-trial exchange of relevant information in order to avoid time consuming recourse to the courts.[247]

The disclosures that may be required of the defendant under standard 3.1 are non-testimonial in character. They include provisions for appearance in a line up, speech for identification by witnesses, fingerprinting, and photographs. A defendant might also be called upon to try on articles of clothing, permit the taking of specimens of material from under the fingernails, give handwriting specimens, allow for access to samples of blood or hair, and submit to reasonable physical or medical inspection of his body.

The Committee asserted:

> Although this standard [3.1] deals with matters customarily regarded as investigative procedures rather than pretrial discovery, both conceptually and practically there is no reason why they should be viewed in such limited fashion. In the sense that the procedure involves the acquisition of material and information before trial other than by exchanges between opposing counsel, it is no different from the taking of depositions, which has long been the heart of pretrial discovery in civil cases.[248]

Prosecuting authorities will be aided by the proposal's precise statement of what the prosecution can demand of a defendant since section 3.1 contemplates the creation of an enforceable legal right to such disclosures. Courts will be empowered to enforce compliance through traditional contempt sanctions.[249] Contempt will also be available against defense attorneys who advise their clients not to cooperate in the required disclosures.

Standard 3.2 provides:

> Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other reports or statements of experts which defense counsel intends to use at a hearing or trial.[250]

This standard was adapted from Rule 16(c) of the Federal Rules of Criminal Procedure. It would operate on the premise that the defendant may be required to disclose before trial that which he would usually reveal later at trial. The Committee argued that "to the extent material or information does not originate with the accused, there is no constitutional impediment to its disclosure.[251] The report conceded, however, that there is some doubt about the constitutionality of what has been termed the "advanced notice" theory.

These standards place no conditions on the discovery powers as outlined. The prosecution is entitled to the information allowed it whether or not the defendant also seeks discovery. Similarly, the defendant's right to disclosure is not conditioned upon his own willingness to divulge information. In this regard, the proposals are quite different from the discovery authorized by Rule 16 of the Federal Rules of Criminal Procedure, or from that authorized by judicial decision in California.[252]

On the other hand, standard 2.1 requires of the prosecutor, subject to certain limitations, disclosure of the names and addresses of persons whom the prosecuting attorney intends to call as witnesses, together with their relevant written or recorded statements. The proposals also demand that the prosecution provide statements made by the accused or a co-defendant, the grand jury testimony of the accused, and the relevant portions of the testimony of witnesses whom the prosecution intends to call. Reports of experts on physical, mental, and scientific tests; documents, photographs and tangible objects which belong to the

[245] ABA STANDARDS § 1.2.
[246] *Id.* parts II & III (Introduction).
[247] *Id.* at 54 (Commentary), § 2.1.
[248] *Id.* § 3.1 (Commentary).
[249] *Id.* § 4.7 and Commentary.
[250] *Id.* § 3.2.
[251] *Id.* § 3.2 (Commentary).
[252] See Jones v. Superior Court, 58 Cal.2d 56, 372 P.2d 919 (1962).

defendant or which the prosecution intends to use in a trial or hearing; and the prior criminal records of witnesses may also be solicited.

Furthermore, section (b) of Standard 2.1 requires the prosecution to notify the defense whether any evidence was provided by an informant, if there was relevant grand jury testimony which has not been transcribed, and if there has been any electronic surveillance of the premises of the accused or of conversations to which he was party. This subsection aids the defendant in resolving the issue of the propriety of the prosecution's evidence before trial.

An additional requirement under subsection (c) of 2.1 must be noted. The prosecution is compelled to reveal material "which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefore." That provision covers the type of disclosure required under *Brady v. Maryland*.[253] There is an extension of *Brady* here only in that 2.1(c) would require pretrial disclosure, while the Supreme Court there was concerned specifically with disclosure at trial.

A defendant's rights of discovery under 2.1 go beyond those items actually in the possession of the prosecutor. Subsection (d) extends the disclosure obligation to matters in the possession of "members of his staff" or others who have participated in the investigation or evaluation of the case and who either regularly report . . . or have reported to his office." This will necessitate the adoption of procedures by which law enforcement agencies which have reported or who normally report to the prosecutor will inform him of all information which must be disclosed, as well as information necessary for successful prosecution. Responsibility for creating and maintaining such procedures rests with the prosecuting attorney.

Disclosures mentioned under Standard 2.1 are mandatory and do not depend upon a request from the defense. Standard 2.3, however, lists additional disclosures which are mandatory upon the prosecutor only in response to a specific request by the defendant or his attorney. Information regarding searches and seizures, the acquisition of specified statements from the accused, and the relationship of specified persons to the prosecuting authority fall within that category.

The Advisory Committee contemplated that mandatory disclosures by the prosecution under 2.1 and 2.3 would normally require no judicial action. Knowing what he is required to release to the defendant's attorney, the prosecutor would be required to reveal the information as a matter of course. Should the prosecutor object to the release of any matter, he can seek a protective order under Standard 4.4.

In accordance with Standard 2.2(a), the prosecution must make mandatory disclosures as soon as practicable after the filing of charges. Subsection (b) of that provision permits performance of the obligation in any manner mutually agreeable with the defense counsel. With those matters that must be disclosed independent of a defense request, the information is to be made available for inspection, copying, or testing at reasonable times upon notice to the defense attorney.

A radical departure from traditional concepts of criminal discovery is found in section 2.5. It provides that the court in its discretion may demand the disclosure of information which is not otherwise covered if the defendant can show that the information sought is material to the preparation of his defense. This discretionary authority accorded the trial court is broad enough to permit discovery of evidence in the possession of persons who are not employed by or in contact with the prosecutor's office.[254] Where such evidence is involved, the court may permit the taking of depositions.[255]

The Advisory Committee drew heavily on Rule 16(b) of the Federal Rules of Criminal Procedure in imposing the requirement in 2.5 that the defense make a showing of materiality. The section may prove unworkable in light of that requirement. The defendant will often have difficulty establishing materiality in the absence of a general deposition power.[256]

These standards represent far reaching proposals in the area of criminal discovery. They have been put to a practical test in a two year experiment by the United States District Court for the Southern District of California. The experiment tends to show the viability of the Standards:

> Although the collection of conclusive data has not been possible, in the opinion of the judges and of many lawyers involved, the new procedures and the expanded discovery appear to be working well and fulfilling the objectives sought: increasing the efficiency of the judges

[253] 373 U.S. 83 (1963).

[254] ABA STANDARDS, § 2.5 (Commentary).

[255] *Id.*

[256] Rezneck, *The New Federal Rules of Criminal Procedure*, 54 GEO. L. J. 1276 (1966).

and lawyers, speeding up the process, improving the performance of defense counsel, eliminating a substantial amount of paperwork, making trials shorter and more to the point, and increasing the number of guilty pleas—all apparently without any sacrifice of the interests of the government or the defendant. It is too early, perhaps, to evaluate the impact of these procedures upon the finality of convictions, but it is believed that all constitutional issues which can be anticipated have been considered.[257]

The full implementation of these or similar proposals would seem to be a feasible means for protecting the innocent defendant from a wrongful conviction.

[257] ABA STANDARDS, Part III (Introduction).