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Barry Nakell

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CRIMINAL DISCOVERY FOR THE DEFENSE AND THE PROSECUTION—THE DEVELOPING CONSTITUTIONAL CONSIDERATIONS

BARRY NAKELL†

I. DISCOVERY FOR THE DEFENSE

No innovation in civil procedure since the development of the adversary system has so dramatically improved the way in which we try our lawsuits and effect voluntary settlement as has discovery. Its basic aims are equally appropriate for criminal cases. Such aims are to enable each side in a suit to obtain relevant information from the other about the issues in dispute; to safeguard against surprise at trial; to define the issues narrowly and clearly so the parties can focus the evidence on them; to assist in ascertaining truth and detecting perjury; to encourage settlements by educating the parties in advance on the courtroom chances of their claims and defenses; and to assure the availability of probative evidence to the party whom it helps.¹

Nevertheless, the benefits of discovery to the parties and to the adjudicative process result from one of the few judicial procedures generally available to a civil litigant that is not also generally available to a criminal defendant. Despite the success that discovery has had in reforming the civil trial process, discovery in criminal cases is still resisted on the basis of objections claimed to be unique to the criminal process. Those objections are that the mutuality of civil discovery² would not be available in the criminal court because the fifth amendment privilege against self-incrimination bars discovery from the defendant; that supplying criminal defendants with advance information about the evidence against them would enable them to prepare their own perjury, to suborn the perjury of others, or otherwise to fabricate evidence in order to shape a defense to the contours of the prosecution's

†Assistant Professor of Law, University of North Carolina School of Law. This article was prepared in cooperation with the North Carolina Law Center.

¹See generally *Hickman v. Taylor*, 329 U.S. 495 (1947); *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961); W. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* (1968).

²See *Hickman v. Taylor*, 392 U.S. 495, 507 n.8 (1947).

disclosed evidence; and that defendants would intimidate prosecution witnesses into testifying falsely or into making themselves unavailable.³ The objections are asserted to justify fears that criminal defense discovery would destroy the adversary system in criminal law and give an unfair advantage to a person charged with a crime even though he is already well stocked with procedural protections against an unfair conviction. Nevertheless, the modern trend has been toward broadening defense discovery in criminal cases since, to the extent that legitimate policies underlie these objections, it has been found that they are not threatened or may be protected by special procedures.

In every way in which a trend in the development of a new legal procedure can manifest itself, it has done so in connection with discovery in favor of a criminal defendant. The literature overwhelmingly supports broad discovery.⁴ Supreme Court Justice Brennan,⁵ Retired Chief Justice Traynor of California,⁶ the American Bar Association,⁷ the American Law Institute,⁸ Professors Wigmore,⁹ Goldstein,¹⁰ Louisell,¹¹ Pye,¹² and Everett,¹³ and many others have forcefully argued in

³See, e.g., *Williams v. Dutton*, 400 F.2d 797, 800 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969); *United States v. Manhattan Brush Co.*, 38 F.R.D. 4, 7 (S.D.N.Y. 1965); *United States v. Garsson*, 291 F. 646 (S.D.N.Y. 1923); *State v. Tune*, 13 N.J. 203, 209-14, 227, 98 A.2d 881, 884-86, 894 (1953); Flannery, *Prosecutor's Position*, 33 F.R.D. 74, 79, 80 (1963).

⁴*Contra*, Flannery, *supra* note 3, at 74; Grady, *Discovery in Criminal Cases, Discovery Practice in Illinois* (III), 1959 U. ILL. L.F. 827; Panel on Pre-Trial Discovery in Criminal Cases, National District Attorney's Association, New York City, August 21, 1964, 31 BROOKLYN L. REV. 320 (1965).

⁵Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?* 1963 WASH. U.L.Q. 279 [hereinafter cited as Brennan]; Brennan, *Remarks on Discovery*, 33 F.R.D. 56 (1963); *State v. Tune*, 13 N.J. 203, 227-35, 98 A.2d 881, 894-98 (1953) (Brennan, J., dissenting).

⁶Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964) [hereinafter cited as Traynor]; Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U.L. REV. 749 (1964); *People v. Riser*, 47 Cal. 2d 566, 585-86, 305 P.2d 1, 13 (1956) (Traynor, J.).

⁷ALI-ABA JOINT COMM. ON CONTINUING LEGAL EDUC., *THE PROBLEM OF DISCOVERY IN CRIMINAL CASES* (1961) [hereinafter cited as ALI-ABA JOINT COMM.]; ABA ADVISORY COMM. ON PRETRIAL PROCEEDINGS, *STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL* (Tent. Draft, May 1969) [hereinafter cited as ABA ADVISORY COMM.].

⁸ALI-ABA JOINT COMM.

⁹J. WIGMORE, *EVIDENCE* §§ 1850-1855a (3d ed. 1940).

¹⁰Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960) [hereinafter cited as Goldstein].

¹¹Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921 (1961).

¹²Pye, *The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 82 (1963) [hereinafter cited as Pye]; Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*,

favor of defense discovery. Led by the California Supreme Court,¹⁴ several states and the federal government have by judicial decision, statute, or rule enlarged the discovery machinery for the defendant in their jurisdictions.¹⁵ In nearly all of the states and in the federal system, however, the criminal defendant remains weaker in his pretrial access to facts in the possession of his adversary than any civil litigant. The thesis of part I of this article is that constitutional protections are needed, are appropriate, and are developing to extend the benefits of broad discovery in criminal cases throughout the country.

The Prosecution's Investigative Discovery

The prosecutor, for his part, is well equipped with information-gathering devices that include informal investigation by police, formal procedures before trial for compelling evidence from witnesses, and even discovery directly from the accused himself.¹⁶ For much of his information the prosecutor needs to rely upon resources wholly apart from the defendant. Ordinarily he must learn of the occurrence of an offense and of its connection with a particular suspect before he is in a position to command the cooperation of the accused. However, before his investigation has focused on any particular suspect he might on the basis of routine or of a particularized suspicion search out that suspect for information in one form or another. The effectiveness of the informal investigation by the prosecution results chiefly from three factors. First, at least in crimes reported by a victim or witness or in which an undercover operative is serving for the government, the police may be on the scene promptly to begin gathering evidence. Consequently, they have the opportunity to obtain for use in the prosecution whatever physical or testimonial evidence is immediately available and then to pursue their

1970 DUKE L.J. 919, 941.

¹⁴See Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 477.

¹⁵See text accompanying notes 69-75 *infra*.

¹⁶*E.g.*, *People v. Crawford*, 114 Ill. App. 2d 230, 252 N.E.2d 482 (1969); *State v. Superior Court*, 106 N.H. 228, 208 A.2d 832 (1965); *State v. Thompson*, 54 Wash. 2d 100, 338 P.2d 319 (1959); KAN. STAT. ANN. §§ 22-3212 to -3213 (Supp. 1971); MONT. REV. CODES ANN. § 95-1803 (1959); N.C. GEN. STAT. § 15-155.4 (Supp. 1971); TENN. CODE ANN. § 40-2441 (Supp. 1971); TEX. CODE CRIM. PROC. ART. 39.14 (1966); FED. R. CRIM. P. 16; ARIZ. R. CRIM. P. 195; COLO. R. CRIM. P. 16; DEL. SUPER. CT. (CRIM.) R. 16; FLA. R. CRIM. P. 1.220; KY. R. CRIM. P. 5.16(2), 7.24; MD. R.P. 728.

¹⁶See *Louisell*, 49 CALIF. L. REV., *supra* note 11, at 61; *cf.* *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (L. Hand, J.). See generally Goldstein.

investigation until they have sufficiently built up a case against a particular individual to bring charges. Secondly, trained and experienced personnel, laboratory and technical facilities, accumulated intelligence, and cooperation from other law enforcement agencies provide the prosecution with the resources adequately to exploit its opportunities for investigation. Thirdly, the civic duty and general inclination of citizens to cooperate with police authority in the conduct of an investigation permits the prosecution to secure the assistance of most witnesses who do not fear the implication of themselves, their family, or their friends and even the aid of many of those who do.

Principal among the formal pretrial procedures that enable the prosecution to compel testimony and production of documentary or other physical evidence is the grand jury procedure. Although designed to provide a buffer between an accused and the government that seeks to prosecute him, the grand jury in practice is most often employed as an investigative resource by law enforcement.¹⁷ At least while it is in session, the grand jury proceeding is conducted in secret—attended only by the grand jurors, the prosecuting attorney, and whatever witness is testifying at the time.¹⁸ No judge presides and no witness, even if he is the suspect under investigation, may be accompanied by counsel before the grand jury.¹⁹ The importance of the grand jury procedure as an investigative device stems from its power of compulsory judicial process, which can, on threat of punishment for contempt,²⁰ compel the attendance of a witness to give testimony or to produce unprivileged²¹ documentary or other physical evidence so long as it is relevant to the grand

¹⁷Goldstein 1191; Traynor 231.

¹⁸*E.g.*, FED. R. CRIM. P. 6(d), (e).

¹⁹*Id.*; Steele, *Right to Counsel at the Grand Jury Stage of Criminal Proceedings*, 36 MO. L. REV. 193, 194 (1971).

²⁰*Grant v. United States*, 227 U.S. 74 (1913); *Wheeler v. United States*, 226 U.S. 478 (1913).

²¹Corporations and other collective groups and their representatives may not claim the fifth amendment privilege against self-incrimination for the books and records of the organization. *United States v. Kordel*, 397 U.S. 1, 7 n.9 (1970); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 196, 205 (1946); *Essgee Co. v. United States*, 262 U.S. 151, 155 (1923); *Wheeler v. United States*, 226 U.S. 478, 489-90 (1912); *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906). The privilege does not apply to public records or to records required to be kept for regulatory purposes. *California v. Byers*, 402 U.S. 424, 427-28 (1971); *Shapiro v. United States*, 335 U.S. 1 (1948); see *United States v. Sullivan*, 274 U.S. 259 (1927). A claim of the privilege may be defeated by a grant of immunity. *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964); *Ullmann v. United States*, 350 U.S. 422 (1956); *Hale v. Henkel*, 201 U.S. 43 (1906); *Brown v. Walker*, 161 U.S. 591 (1896); *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

jury's inquiry.²² This power to issue subpoenas ad testificandum and duces tecum may be and generally is exercised by the prosecutor and not by the independent citizens sitting as jurors. The prosecution may even arrest and detain in custody a material witness where such is reasonably necessary to secure his appearance before a grand jury.²³ The usefulness of the grand jury procedure is considerably augmented by the facts that no foundation in the form of a quantum of accusatory evidence need be established to call it into service; that no judicial review is made of the prerogatives of the prosecutor except upon challenge by a particular witness, which is limited to a claim of personal privilege or of the irrelevancy of a particular question; and that its investigative character operates only on behalf of the prosecutor: it is unilateral and non-adversary. In essence, the grand jury provides the prosecutor an *ex parte* deposition procedure.

Other formal pretrial procedures for accomplishing the same purpose are less useful because they are either public or adversary. These include the coroner's inquest in homicide cases, the conventional preliminary hearing, and in some jurisdictions a statutory procedure by which the prosecuting authority is given subpoena power to depose witnesses (who may be represented by counsel) in its offices.²⁴

Finally, the prosecution may "discover" evidence from the accused himself in advance of trial. After conforming to appropriate constitutional standards, the prosecution may search the person or property of the accused and seize oral, documentary, or other physical evidence to use in its prosecution against him.²⁵ Under appropriate constitutional safeguards and with the consent of the accused, the prosecution may interrogate him before a grand jury or in the police station.²⁶ The prosecution may gather evidence from within the private enclave of the defendant by electronic eavesdropping and wiretapping²⁷ or by insinuat-

²²Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946); Brown v. United States, 276 U.S. 134, 143 (1928); FTC v. American Tobacco Co., 264 U.S. 298, 306-07 (1923); Hale v. Henkel, 201 U.S. 43, 77 (1906).

²³Stein v. New York, 346 U.S. 156, 184 (1953); Bacon v. United States, 449 F.2d 933, 939, 942-44 (9th Cir. 1971).

²⁴CAL. GOV'T CODE § 11189 (West 1966); Pye 84. See also Williams v. Florida, 399 U.S. 78, 81, 86 (1970).

²⁵E.g., United States v. Harris, 403 U.S. 573 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); 18 U.S.C. §§ 2516-18 (1970).

²⁶Harris v. New York, 401 U.S. 222 (1971); Miranda v. Arizona, 384 U.S. 436 (1966).

²⁷Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).

ing an undercover agent into his confidence.²⁸ The accused may be compelled to exhibit his body, assume poses, and put on or take off clothes for identification in a fairly conducted lineup;²⁹ to provide exemplars of his handwriting for identification;³⁰ to provide fingerprints for identification;³¹ and to speak for voice identification.³² The prosecution may obtain samples of his blood, breath, or urine for scientific analysis.³³ Moreover, the defendant may be compelled in advance of trial in at least some circumstances to specify any affirmative defenses, such as alibi and possibly insanity or impotency, upon which he intends to rely and to provide the prosecution with a list of the witnesses and other evidence that he intends to produce to establish such defenses.³⁴

The Arguments Against Defense Discovery

Consideration of these investigative discovery tools available to the prosecution substantially rebuts the factual assumption in the argument that criminal discovery could be only a one-way street because the fifth amendment privilege against self-incrimination bars all prosecution discovery from the defendant. In fact, such consideration turns the argument upon itself. As long as the defendant is not given access to substantial discovery devices, discovery is a one-way street running in favor of the prosecution with the defendant relegated for the accumulation of the information necessary to his defense to a haphazard investigation, which in most cases he is unable properly to finance and which is without formal sanction or judicial assistance. The realistic effect of the denial of discovery is to permit the prosecution "to monopolize the sources of evidence applicable to the case to use or not as might be deemed most advantageous" to it.³⁵

²⁸United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966). Unlike eavesdropping and wiretapping, the use of an informer need not even be approved by an independent magistrate.

²⁹United States v. Wade, 388 U.S. 218, 221, 223 (1967); Holt v. United States, 218 U.S. 245 (1910).

³⁰Gilbert v. California, 388 U.S. 263, 266-67 (1967).

³¹Davis v. Mississippi, 394 U.S. 721 (1969); United States v. Wade, 388 U.S. 218, 223 (1967).

³²United States v. Wade, 388 U.S. 218, 223 (1967).

³³*Id.* at 222; Schmerber v. California, 384 U.S. 757, 761 (1966).

³⁴Williams v. Florida, 399 U.S. 78 (1970); Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962); ALA. CODE tit. 15, § 423 (1959); CAL. PENAL CODE § 1016 (West 1970); MONT. REV. CODES ANN. § 95-1803(d) (1969); WASH. REV. CODE ANN. § 10.76.020 (1961); WIS. STAT. ANN. § 957.11 (1958); see discussion in Part II *infra*.

³⁵State v. Papa, 32 R.I. 453, 459, 80 A. 12, 15 (1911). See also Giles v. Maryland, 386 U.S. 66, 100-01 (1966) (Fortas, J., concurring).

The failure of the factual foundation for this argument is dramatized in cases in which the denial of defense discovery is juxtaposed with considerable discovery for the prosecution. Such is the case when a defendant is denied discovery of evidence that belongs to him, such as his own statement³⁶ or evidence taken from his home or person by the prosecution pursuant to a search and seizure.³⁷

That is not the only answer to the argument. Even tested on its own terms it does not justify denial of defense discovery. This can best be understood in light of the objective of criminal defense discovery.

The basic purpose of such discovery is to protect the integrity of the fact-finding process in the criminal trial.³⁸ Its objective is to promote the efficiency of the judicial search for truth by giving the defendant access to the evidence that the prosecution intends to use against him, so that he might properly prepare for trial with that evidence in mind, and to evidence that he might use on his own behalf, thus strengthening the defendant in the performance of his adversary responsibility of presenting to the trier of fact all of the relevant, unprivileged, and favorable evidence available. "To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts."³⁹ Confident that he knows the length and breadth of the case against him, the defendant, usually with the advice of counsel, is also in a position intelligently to decide whether plea bargaining is in his best interest.⁴⁰ To the extent that defense discovery enables the innocent defendant to be better prepared to meet the issues and assists the guilty defendant in deciding whether to enter a guilty plea, it serves not only the defendant but also the criminal justice system.

Except in pursuit of abstract symmetry, the discovery that a defendant can get is not logically related to what the prosecution gets. To deny defense discovery because of limitations that the privilege against self-incrimination might impose on prosecution discovery is to trans-

³⁶See *State v. District Court*, 135 Mont. 545, 342 P.2d 1071 (1959).

³⁷See *State v. Tune*, 13 N.J. 203, 227, 98 A.2d 881, 896 (1953) (Brennan, J., dissenting).

³⁸"[T]he day has long since passed when a case is to be tried from ambush." Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113, 1119 (1957).

³⁹*People v. Riser*, 47 Cal. 2d 566, 586, 305 P.2d 1, 13 (1956).

⁴⁰*Williams v. Florida*, 399 U.S. 78, 105-06 (1970) (Burger, C.J., concurring); Brennan 279; Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 318-19 (1960); see text accompanying note 160 *infra*.

form a constitutional protection so important that conditions cannot be imposed on its exercise⁴¹ into an excuse for a diminution of the defendant's chances to get evidence to clear himself.

The undeniably salutary objective of discovery is, nevertheless, resisted by the argument that the information provided will be misused for the purpose of enabling the defendant to prepare perjured testimony or to intimidate potential prosecution witnesses. Wigmore has rendered the most cogent argument against this concern: "The possibility that a dishonest accused will misuse such an opportunity is no reason for committing 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."⁴²

This "misuse" objection was also raised against civil discovery before it became accepted practice.⁴³ Justice Brennan referred to it as "[t]hat old hobgoblin perjury."⁴⁴ When applied to criminal discovery, the objection is invoked indiscriminately to bar discovery of all prosecutorial information without regard to its susceptibility to tampering or to contrived rebuttal. Nonetheless, much evidence by its nature is safe from falsification or perjured contradiction and would be useful to the defendant only because it might support his defense or because knowledge of it might facilitate his demonstration of its innocent or irrelevant character.⁴⁵ This is true of the names and addresses of most potential witnesses whom the prosecution has interviewed and decided not to call; of medical, psychiatric, or hospital records relating to such things as autopsies, post-mortem examinations, examinations of alleged rape victims, and examinations of blood samples; of expert reports such as ballistics reports and results of handwriting, fingerprint, or voice comparisons; of still or motion pictures of persons, places, objects, or events; of tape recordings; of physical evidence that is under the supervision of a custodial officer, including medical specimens, the physical subjects of scientific tests such as handwriting exemplars, and physical objects or writings allegedly used in the commission of the crime such as forged documents, weapons, ammunition, or clothing; of contraband

⁴¹*Spevack v. Klein*, 385 U.S. 511, 514 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

⁴²6 J. WIGMORE, *supra* note 9, § 1863, at 488. *See also* *United States v. Projansky*, 44 F.R.D. 550, 555-57 (S.D.N.Y. 1968).

⁴³*Brennan* 290; *Fletcher*, *supra* note 40, at 308.

⁴⁴*State v. Tune*, 13 N.J. 203, 227, 98 A.2d 881, 894 (1953) (Brennan, J., dissenting).

⁴⁵*United States v. Rich*, 6 Alas. 670, 670-71 (D. Alas. Terr. 1922).

or stolen goods; of information about prior felony convictions or of charges pending against or promises of leniency to prosecution witnesses, whether identified or not; and of background information on the members of a prospective jury panel that the prosecutor is using to assist him in the exercise of his peremptory challenges.⁴⁶

The argument against defense discovery also fails to take account of the circumstances in particular cases. The range of conduct proscribed by the criminal law is so wide that in most situations the danger of violent repercussions against witnesses does not present a significant objection to disclosure of their identity. The spectre of the organized criminal syndicate or the sadistic, mutual-defense motorcycle gang or the vicious defendant with friends on the outside anxious to take revenge on any prosecution witness haunts efforts to provide discovery in criminal cases beyond its realistic incidence, and a protective order may take care of it when in fact it is manifested.⁴⁷ Most defendants today are poor, and many are in custody from arrest to trial.⁴⁸ The danger of perjury is more real, but to allow that danger to control discovery practices "virtually postulates universal guilt [and] also impugns the demonstrated capacity of the judicial process to ferret the truth."⁴⁹ "[A]lthough there is a possibility that a defendant may be acting in bad faith and may be seeking merely to acquire advance knowledge of the details of the prosecution's case with a view to shaping his defense accordingly, such a possibility is subordinate in importance to the danger of convicting the innocent"⁵⁰

These observations are supported by the experience of the courts that permit discovery⁵¹ and by the common informal practice of prosecutors selectively to supply some defense attorneys in some cases with certain information useful to them in the representation of their clients.

⁴⁶See *Hamer v. United States*, 259 F.2d 274 (9th Cir. 1958); *United States v. Costello*, 255 F.2d 876 (2d Cir. 1958).

Special needs in certain cases may provide other examples. In a case in which the regularity of administrative processes is an issue, for instance, discovery of relevant internal agency documents may not involve any risk of misuse. See *United States v. Leichtfuss*, 331 F. Supp. 723, 738-48 (N.D. Ill. 1971).

⁴⁷ABA ADVISORY COMM. 2-3, 37. See discussion of protective orders in text accompanying notes 64-65 *infra*.

⁴⁸Pye 86, 91.

⁴⁹*State v. Johnson*, 28 N.J. 133, 139, 145 A.2d 313, 316 (1958). See also *United States v. Projansky*, 44 F.R.D. 550, 555-56 (S.D.N.Y. 1968).

⁵⁰*Cash v. Superior Court*, 53 Cal. 2d 72, 75, 346 P.2d 407, 408-09 (1959).

⁵¹See Langrock, *Vermont's Experience in Criminal Discovery*, 53 A.B.A.J. 732 (1967).

Generally, the prosecutor will open his file to the defense attorney when he anticipates that the strength of his case will persuade the defendant to plead guilty.⁵² The arguments above are also supported by experiments in the federal courts in the Southern District of California and the District of Kansas with an Omnibus Hearing procedure designed in part to enlarge discovery.⁵³ Moreover, in all jurisdictions there has been considerable de facto discovery in those cases that are retried after mistrials or appellate reversals. Random though the designation of those cases is, no reports have been made of the suggested dangers resulting from the fact of discovery in them, although complaints of prejudice from loss of evidence during the lapse of time have been rife.

The presumption of innocence has a special significance in the area of discovery.⁵⁴ Its primary function is to put the prosecution to its burden of proof, and in that respect it is enforced by the constitutional requirement that a criminal defendant not be convicted except by proof that establishes his guilt beyond a reasonable doubt.⁵⁵ Beyond that standard, however, it speaks to procedural regularity in the judicial processing of a man before he is convicted of crime.⁵⁶ More a procedural than a factual presumption, it should require that in deciding whether to provide defendants the evidentiary means with which to defend themselves, we cannot assume that all defendants are guilty or that all defendants and their attorneys are prone to misuse information supplied to them. In many if not most cases an innocent defendant has a more acute need for discovery than a guilty defendant, who is not likely to need the

⁵²People v. Crawford, 114 Ill. App. 2d 230, 232, 252 N.E.2d 483, 484 (1969); State v. Johnson, 28 N.J. 133, 140, 145 A.2d 313, 317 (1958); People v. Preston, 13 Misc. 2d 802, —, 176 N.Y.S.2d 542, 548 (Kings County Ct. 1958); ABA ADVISORY COMM. 31, 37; Brennan 282; Flannery, *supra* note 3, at 77; ALI-ABA JOINT COMM. 4-6; Panel on Pre-Trial Discovery in Criminal Cases, *supra* note 4, at 329; K. Pye, A Look at North Carolina's Criminal Discovery System, Prepared for the North Carolina Governor's Committee on Law and Order 2-7, November 1970 (unpublished paper in University of North Carolina Institute of Government Library); Traynor 237.

⁵³See Miller, *The Omnibus Hearing—An Experiment in Federal Criminal Discovery*, 5 SAN DIEGO L. REV. 293 (1968). The Omnibus Hearing procedure was recommended in ABA ADVISORY COMM. 20-21.

⁵⁴State v. Dorsey, 207 La. 928, 964, 22 So. 2d 273, 285 (1945); State v. Tune, 13 N.J. 203, 234, 98 A.2d 881, 897 (1953) (Brennan, J., dissenting); People v. Quarles, 44 Misc. 2d 955, 255 N.Y.S.2d 599, 606 (Sup. Ct. 1964); Brennan 287; Goldstein 1193; Hall, *Objectives of Federal Criminal Procedure Revision*, 51 YALE L.J. 723, 730 (1942); Pye 82-83; Thode, *Criminal Discovery: Constitutional Minimums and Statutory Grants in Texas*, 1 TEX. TECH L. REV. 183, 188 (1970).

⁵⁵*In re Winship*, 397 U.S. 358 (1970).

⁵⁶H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 161, 167 (1968).

prosecution's help to find out about the evidence against him with which he might be inclined to tamper. If he is guilty he probably knows the identity of the witnesses who might testify against him.⁵⁷ A protective order should be available to the prosecution when the danger of abuse of discovery is sufficiently demonstrated.

Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits.⁵⁸

Courts and law enforcement officers outside of jurisdictions with liberal discovery have not confined their objections in accordance with these distinctions. For example, in *Roviaro v. United States*⁵⁹ the Government refused to disclose before or at trial the name or address of an informer who allegedly participated in the transaction charged, even though it appeared clear that if the defendant was guilty he already possessed that information since he had been riding in the informer's car and several times had telephoned the informer at his home. Justice Clark, in dissent, argued that this fact rendered harmless the prosecution's refusal to disclose the informer's identity. In making that argument, however, he ignored the possibility of the defendant's innocence. Notwithstanding the absence of a legitimate governmental interest in concealing the identity of this informer from the defendant, whether the defendant was guilty or innocent, the Government fought all the way to the United States Supreme Court to avoid disclosure and was upheld in its efforts by the lower courts. The Supreme Court held that it was error to deny disclosure not only at trial but before trial as well.

Similarly, in *United States v. Rose*⁶⁰ the prosecution unsuccessfully resisted an effort by the defendant, who was charged with perjury before a grand jury, to secure the transcript of his own full grand jury testimony in the course of which the perjury had allegedly been committed.⁶¹

⁵⁷Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221, 240-41 (1957); Pye 91.

⁵⁸*People v. Riser*, 47 Cal. 2d 566, 585, 305 P.2d 1, 13 (1956).

⁵⁹353 U.S. 53 (1957).

⁶⁰215 F.2d 617 (3d Cir. 1954).

⁶¹*Id.* The court granted the discovery. Rule 16(a)(3) of the Federal Rules of Criminal Procedure now grants a defendant a right to discovery of his own testimony before a grand jury.

In *United States v. Leichtfuss*,⁶² a prosecution for violation of the Selective Service law, the United States Attorney opposed a request for the names and addresses of potential government witnesses, although it acknowledged that the witnesses would be a selective service employee and an FBI agent. In granting the request for discovery, the court observed: "Certainly there is no apparent threat that disclosure of the identity of these witnesses prior to trial will subject the witness to physical or economic harm or to threats designed to make him unavailable to testify or to influence him to change his testimony."⁶³

Whenever a court finds upon information elicited at an adversary hearing that there is probable cause to believe that a defendant should not be trusted with such evidence because of the danger of intimidation, bribery, or harrassment of witnesses,⁶⁴ the court may be permitted by issuing a protective order to make an exception from the general principle of discovery for that defendant with regard to such evidence only. This would be a much wiser course than to deny all discovery because of the potential for abuse in some cases. The protective order could circumscribe the conditions of discovery by such a defendant—such as by limiting discovery to the defense attorney and forbidding him to make disclosure to his client until necessary to decide upon a course of action;⁶⁵ by deferring discovery until the trial date is so imminent that the defendant would not have time to engage in foul play; by permitting and then supervising the blocking out of identifying information from a witness' statement before it is delivered to defendant; or by providing a deposition with the witness without disclosure of his identity as an alternative to disclosing his name and address—or could completely

⁶²331 F. Supp. 723 (N.D. Ill. 1971).

⁶³*Id.* at 733.

⁶⁴The specificity required should be analogous to that needed in an application for a search warrant. See *United States v. Harris*, 403 U.S. 573 (1971); *Spinelli v. United States*, 394 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Giordenello v. United States*, 357 U.S. 480 (1958). In *People v. Lopez*, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963), the trial court followed such a procedure. In opposing a defense request for the names of witnesses, the prosecution filed an affidavit in conclusory form that defendant might, by himself or through other persons, coerce, intimidate, or threaten the witnesses. The trial court rejected this affidavit, and the prosecutor called a police officer to testify that the two witnesses had told him that they were in fear on the basis of their knowledge of defendant's past conduct. The prosecutor also called defendant's former probation officer to testify that defendant had assaulted another inmate and was considered desperate and a leader of disorder. The trial court postponed discovery until twenty-four hours before trial.

⁶⁵In many cases this compromise may not be feasible because the defense attorney might need the help of his client to take advantage of the discovery.

deny discovery of the vulnerable evidence only if no less drastic alternative were feasible.

The Constitutional Provisions for Defense Discovery

At common law a defendant had no right of discovery.⁶⁶ In most states criminal discovery is still provided grudgingly at best, and in many states it amounts to little or nothing more than the constitutional minimum already established.⁶⁷ The policy against discovery was first modified in this country with regard to documents that the prosecution intended to put into evidence.⁶⁸ California was the first state to begin to develop a system of broad discovery. In that state now, the courts have ordered the prosecutor to provide a defendant with such things as copies of his recorded or written statements to the police;⁶⁹ the names and addresses of witnesses and the statements given to police by those witnesses who are expected to testify at trial;⁷⁰ reports of scientific analyses of evidence,⁷¹ including records and reports of autopsies;⁷² medical specimens for examination by independent experts;⁷³ and photographs of the defendant.⁷⁴ In addition, California provides every felony defendant upon arraignment at no expense to himself a copy of the transcript of the grand jury proceeding or the preliminary hearing in his case.⁷⁵

Many other states have followed suit by judicial decision, statute, or rule.⁷⁶ A handful of states have even gone further and provided a

⁶⁶Rex v. Holland, 4 Term Rep. 691, 100 Eng. Rep. 1248 (K.B. 1792).

⁶⁷*E.g.*, Pass v. State, 227 Ga. 730, —, 182 S.E.2d 779, 786 (1971); Lander v. State, 238 Ind. 680, 686-88, 154 N.E.2d 507, 510-11 (1958); Commonwealth v. Therrien, — Mass. —, —, 269 N.E.2d 687, 692 (1971); State v. Mastrian, 285 Minn. 51, 63-65, 171 N.W.2d 695, 703-04 (1969), *cert. denied*, 397 U.S. 1049 (1970); State v. Nussbaum, — Ore. —, —, 491 P.2d 1013, 1018 (1971). In Louisiana, the defendant gets no discovery except of his own written statement. State v. Mitchell, 258 La. 427, —, —, 246 So. 2d 814, 818-23, *cert. denied*, 92 S. Ct. 561 (1971).

⁶⁸See *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 28-35, 156 N.E. 84, 85-87 (1927).

⁶⁹Vance v. Superior Court, 51 Cal. 2d 92, 93, 330 P.2d 773, 774 (1958); Powell v. Superior Court, 48 Cal. 2d 704, 705, 707, 312 P.2d 698, 699 (1957); Schindler v. Superior Court, 161 Cal. App. 2d 513, —, 327 P.2d 68, 71 (1958).

⁷⁰People v. Cooper, 53 Cal. 2d 755, 769-70, 349 P.2d 964, 973, 3 Cal. Rptr. 148, 157 (1960); Funk v. Superior Court, 52 Cal. 2d 423, 424, 340 P.2d 593, 594 (1959).

⁷¹Walker v. Superior Court, 155 Cal. App. 2d 134, 317 P.2d 130 (1957).

⁷²People v. Vick, 11 Cal. App. 3d 1058, 484 P.2d 1372, 90 Cal. Rptr. 236 (1970); Walker v. Superior Court, 155 Cal. App. 2d 134, 317 P.2d 130 (1957).

⁷³Schindler v. Superior Court, 161 Cal. App. 2d 513, —, 327 P.2d 68, 73 (1958).

⁷⁴Norton v. Superior Court, 173 Cal. App. 2d 133, —, 343 P.2d 139, 141 (1959).

⁷⁵CAL. PENAL CODE § 938.1 (West 1970); CAL. PENAL CODE § 869 (West Supp. 1971).

⁷⁶See note 15 & accompanying text *supra*.

criminal defendant with a right to discovery depositions.⁷⁷ Unquestionably, the oral deposition is the most effective device in civil discovery. It combines all of the benefits of written interrogatories and motions to produce documents with the spontaneity and flexibility of cross-examination. Its only drawback is that it is expensive, since the reporter who transcribes the testimony must be paid. The deposition is, however, available to the prosecution through the grand jury and other procedures. It is essential to effective criminal defense discovery, which in turn is essential to assure defendants a fair trial.

There have been developments on several fronts toward constitutionalization of the standards of broad discovery. In other areas of criminal procedure, the Constitution has been applied to control police investigative practices even when enforcement of the constitutional limits results in the suppression of reliable and probative prosecution evidence and thereby diminishes the fact-finding effectiveness of the criminal trial.⁷⁸ This has properly been done in the pursuit of fundamental values that outweigh the importance of the conviction of any particular law violator. The Constitution has also been applied to protect the right of the defendant to an effective presentation of his defense at trial before a proper tribunal through the right to counsel,⁷⁹ the right of confrontation,⁸⁰ and the right to a jury trial.⁸¹ Equally appropriate for the imposition of constitutional standards is discovery as a procedure for assisting a defendant in the ascertainment of the facts necessary to establish his defense, complete or partial. Several constitutional provisions are well adapted to this purpose. It is constitutionally as important that a defendant be informed of the evidence as it is that he be informed of his rights. As Judge J. Skelly Wright has said,

⁷⁷The first state to provide for criminal discovery depositions was Vermont. VT. STAT. ANN. tit. 13, §§ 6721-26 (Supp. 1971); see *State v. Mahoney*, 122 Vt. 456, 176 A.2d 747 (1961). Since then Florida, Ohio, and Texas have followed suit. FLA. R. CRIM. P. 1.220(f); OHIO REV. CODE ANN. § 2945.50 (Page Supp. 1970); *State ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St. 2d 159, 224 N.E.2d 906 (1967); TEX. CODE CRIM. PROC. arts. 39.02-.07 (1966), *as amended*, (Supp. 1972).

Many states permit a defendant to take evidence depositions, as opposed to discovery depositions, of witnesses whose testimony he would like to present but whose attendance at trial he cannot obtain because of the witnesses' residence outside the jurisdiction or his physical incapacity. See, e.g., KAN. STAT. ANN. § 22-32 (Supp. 1971); N.C. GEN. STAT. § 8-74 (1969); FED. R. CRIM. P. 15; KY. R. CRIM. P. 7.10.

⁷⁸E.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁷⁹*Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁸⁰*Pointer v. Texas*, 380 U.S. 400 (1965).

⁸¹*Duncan v. Louisiana*, 391 U.S. 145 (1968).

These cases point up an anomaly of our criminal process: controlled by rules of law protecting adversary rights and procedures at some stages, the process at other stages is thoroughly unstructured. Beside the carefully safeguarded fairness of the courtroom is a dark no-man's-land of unreviewed bureaucratic and discretionary decision making. Too often, what the process purports to secure in its formal stages can be subverted or diluted in its more informal stages.⁸²

The Due Process Clause. Many authorities have announced without analysis that there is no constitutional right to defense discovery.⁸³ The United States Supreme Court has strongly favored defense discovery,⁸⁴ but the Court's development of constitutional procedures to deliver it has been measured. In 1952 in *Leland v. Oregon*⁸⁵ the Court held that "[w]hile it may be the better practice for the prosecution thus to exhibit a confession,"⁸⁶ defendant suffered no prejudice, since the confession he sought to discover was produced in court five days before he rested his case and the trial judge offered him additional time to prepare to meet it. In *Clewis v. Texas*⁸⁷ the Supreme Court cited *Leland* for the proposition "that in some circumstances it may be a denial of due process for a defendant to be refused any discovery of his statements to

⁸²United States v. Bryant, 439 F.2d 642, 644 (D.C. Cir. 1971).

⁸³E.g., Jones v. Superior Court, 58 Cal. 2d 56, 59, 372 P.2d 919, 921, 22 Cal. Rptr. 879, 881 (1962); State v. Gillespie, 227 So. 2d 550, 553-54, 557 (Fla. App. 1969); State v. Johnson, 28 N.J. 133, 136, 145 A.2d 313, 315 (1958); Traynor 242 n.77.

⁸⁴The Supreme Court has advocated discovery in its supervisory responsibility over the federal courts as well as in its constitutional review function. In *Gordon v. United States*, 344 U.S. 414, 419 (1953), the Court quoted the following language from *People v. Davis*, 52 Mich. 569, 573, 18 N.W. 362, 363 (1884): "[T]he State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons."

In *Jencks v. United States*, 353 U.S. 657 (1957), the Supreme Court held that at trial in federal cases after a prosecution witness has testified the defendant is entitled to inspect pretrial reports made to the government by the witness. At the time of the decision, *Jencks* represented an important breakthrough in criminal discovery, though it applied only at trial. Congress codified its rule in the Jencks Act, 18 U.S.C. § 3500 (1970). See *Campbell v. United States*, 365 U.S. 85 (1961). Later the Court held that the Jencks Act established the outer limits of the nature of documents that the courts could compel the prosecution to disclose to the defendant. *Palermo v. United States*, 360 U.S. 343 (1959). The four concurring justices in *Palermo* said that although *Jencks* did not have to be decided on constitutional grounds, "it would be idle to say that the commands of the Constitution were not close to the surface of the decision . . ." *Id.* at 362-63. Federal discovery has now been expanded by Rule 16 of the Federal Rules of Criminal Procedure.

⁸⁵343 U.S. 790 (1952).

⁸⁶*Id.* at 801.

⁸⁷386 U.S. 707 (1967).

the police."⁸⁸ In the meantime in a series of cases beginning in 1934 and culminating in *Giles v. Maryland* and *Brady v. Maryland*, the Supreme Court developed the principle that it constitutes a violation of due process of law for law enforcement agencies, police or prosecutor, knowingly to present or let stand uncontradicted false evidence or to withhold from the defendant, intentionally or not, material exculpatory evidence of any kind, including evidence useful only for impeachment of the credibility of government witnesses.⁸⁹ The obvious corollary of this constitutional principle is that the police and the prosecutor have a duty to disclose such evidence to a defendant.

The foundation for this duty is the concept that the prosecuting attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."⁹⁰ This concept has stimulated much of the state experimentation with discovery. Nevertheless, on several counts it has not matured into a constitutional right to discovery.

First, the Supreme Court has never pinpointed the time at which the disclosure must be made. Accordingly, the courts have denied motions for pre-trial discovery of all material and exculpatory evidence in the possession of the prosecution on the ground that the prosecutor may

⁸⁸*Id.* at 712 n.8. In *Cicenia v. Lagay*, 357 U.S. 504 (1958), the defendant entered a plea of *non vult contendere* after having been denied pretrial discovery of the confessions he and two friends had given the police. The court held there was no violation of due process in denial of the requested discovery even though in this case, unlike *Leland*, the defendant never was shown the confessions. In *Clewis v. Texas*, 386 U.S. 707 (1967), the Court cited *Cicenia* along with *Leland* for the proposition that denial of discovery of confessions could in some circumstances constitute a denial of due process. The defendants in both *Cicenia* and *Leland* suffered procedural difficulties in raising the discovery due process issue. Had they been able to get their discovery motions before the United States Supreme Court on an interlocutory appeal before they had been tried or entered a prejudicial plea the Court may have been better able to recognize their due process claims. See Traynor 228.

The discovery issue in *Cicenia* was secondary to defendant's claim of a constitutional violation in the taking of his confession while his attorney was asking to see him and while he was asking for his attorney. The Court's holding on this issue was specifically overruled in *Miranda v. Arizona*, 384 U.S. 436, 479 n.48 (1966), and *Escobedo v. Illinois*, 378 U.S. 478, 492 & n.15 (1964).

⁸⁹*Giglio v. United States*, 92 S. Ct. 763 (1972); *Giles v. Maryland*, 386 U.S. 66 (1967); *Miller v. Pate*, 386 U.S. 1 (1967); *Brady v. Maryland*, 373 U.S. 83 (1963); *Wilde v. Wyoming*, 362 U.S. 607 (1960); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *White v. Ragen*, 324 U.S. 760 (1945); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935).

⁹⁰*Berger v. United States*, 295 U.S. 78, 88 (1935).

decide when to disclose such evidence and need not do so before trial.⁹¹ One court explained this position as follows: "The Brady decision must be understood to refer to the application of tests of fairness to the prosecution at trial, and not at an earlier point in the proceedings."⁹² However, in applying the constitutional duty of disclosure, some courts have interpreted it to require that disclosure be made in time for the defendant to capitalize on it.⁹³

Secondly, the principle is limited to evidence that is both material and exculpatory or favorable to defendant, although most courts have declined to impose a further limitation that the evidence be admissible.⁹⁴

Thirdly, the courts have generally been content to leave the initial determination of whether evidence fits within those two categories to the prosecutor,⁹⁵ although some require that evidence about which the prosecutor is doubtful be submitted to *in camera* inspection.⁹⁶ Review of the prosecutor's determination is available only if the defendant should by chance learn of the existence of qualifying evidence⁹⁷ and raise the question during trial or by means of a post-conviction remedy, such as habeas corpus.

Experience with the disclosure duty has confirmed that the prosecutor is not the proper person to charge with this responsibility. Because of the unlikelihood that the defendant will ever learn of undisclosed exculpatory information and because most discovered violations proba-

⁹¹*E.g.*, United States v. Armantrout, 278 F. Supp. 517 (S.D.N.Y. 1968), *aff'd*, 411 F.2d 60 (2d Cir. 1969); United States v. Wolfson, 289 F. Supp. 903, 914-15 (S.D.N.Y. 1968); United States v. Manhattan Brush Co., 38 F.R.D. 4, 6 (S.D.N.Y. 1965); State v. Gillespie, 227 So. 2d 550, 553-54 (Fla. App. 1969).

⁹²United States v. Manhattan Brush Co., 38 F.R.D. 4, 6 (S.D.N.Y. 1965).

⁹³*E.g.*, United States v. Cobb, 271 F. Supp. 159, 163 (S.D.N.Y. 1967); United States v. Gleason, 265 F. Supp. 880, 884-85 (S.D.N.Y. 1967); State *ex rel.* Dooley v. Connall, ___ Ore. ___, 475 P.2d 582, 586 (1970).

⁹⁴*E.g.*, United States v. Jordan, 399 F.2d 610, 615 (2d Cir. 1968), *cert. denied*, 393 U.S. 1005 (1968); United States v. Avella, 395 F.2d 762, 763 (3d Cir. 1968); North Am. Rockwell Corp. v. NLRB, 389 F.2d 866, 873 (10th Cir. 1968); Levin v. Clark, 408 F.2d 1209, 1212 (D.C. Cir. 1967); United States v. Gleason, 265 F. Supp. 880, 886 (S.D.N.Y. 1967).

⁹⁵United States v. Curry, 278 F. Supp. 508, 513 (N.D. Ill. 1967); United States v. Cobb, 271 F. Supp. 159, 164 & n.4 (S.D.N.Y. 1967).

⁹⁶Williams v. Dutton, 400 F.2d 797, 800-01 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969).

⁹⁷The difficulty for defendants in ever learning of the existence of undisclosed exculpatory evidence is illustrated in United States *ex rel.* Hill v. Deegan, 268 F. Supp. 580 (S.D.N.Y. 1967). Other nondisclosure cases do not reveal how the defendant came upon the undisclosed evidence. In *Deegan* a witness who had testified earlier told an assistant prosecutor that he had made a mistake in his testimony. The assistant told the prosecutor, who did nothing. The defendant learned about the incident only when one week later the witness came to trial himself to correct the error. See also Lee v. United States, 388 F.2d 737 (9th Cir. 1968).

bly are remedied at the trial court level, it is reasonable to assume that the reported cases represent only a small fraction of the prosecutions in which such circumstances actually existed, and only a sample of those reported cases is discussed here.

In many cases in which a man has been sentenced to death for murder, the prosecutor has been found to have withheld material evidence that might have exculpated the defendant or at least mitigated the culpability of his involvement. Several cases have involved circumstances in which the defendant was hampered in establishing a claim of self-defense because the prosecutor withheld from him the fact that a weapon, such as a knife, had been found on the person of the victim or in the area where his body was found.⁹⁸ In *State v. Thompson*⁹⁹ the prosecutor withheld from the defendant the fact that shell casings had been found at the scene of the homicide and that laboratory reports showed that the shells were from the gun of defendant's companion rather than that of defendant. This evidence might have tended to absolve defendant of responsibility for the crime because there may not have been a showing of complicity between the two that would render the defendant responsible for the acts of his companion. The killing apparently took place spontaneously when police officers stopped the car in which defendant was a passenger. In another death case, *People v. Murdock*,¹⁰⁰ the defendant admitted that in pursuance of a burglary he had entered through a window the premises where a woman was raped and murdered but denied having committed the rape or murder. Testimony by police that the door to the premises was locked when they arrived at the scene "played . . . a key role in the circumstantial evidence against the defendant."¹⁰¹ Nevertheless, the prosecutor did not tell defendant that a fifteen-year-old girl had informed the police that on the day the body was found she had entered the premises and at that time the door was unlocked.

Several death penalty cases have involved the prosecutor's withholding of evidence that the defendant could use to prove that he had not done the actual killing. In *Brady v. Maryland*¹⁰² the prosecutor exhibited to defendant several statements made by his co-defendant but

⁹⁸Griffin v. United States, 336 U.S. 704 (1949); *State v. Fowler*, 101 Ariz. 561, 422 P.2d 125 (1967).

⁹⁹396 S.W.2d 697 (Mo. 1965).

¹⁰⁰39 Ill. 2d 553, 237 N.E.2d 442 (1968).

¹⁰¹*Id.* at 560, 237 N.E.2d at 446.

¹⁰²373 U.S. 83 (1963). See also *Smith v. Urban*, ____ Ark. ____, 434 S.W.2d 283 (1968).

not one in which the co-defendant named himself as the trigger man. In *United States ex rel. Almeida v. Baldi*,¹⁰³ the prosecutor failed to disclose that a blood-stained bullet had been found near the body of the slain police officer; that the bullet was of a calibre that other police officers at the scene had been using; and that it had not been fired from the gun of the defendant.

In *United States ex rel. Thompson v. Dye*,¹⁰⁴ the defendant tried to establish that because he was intoxicated at the time of the killing, he lacked either the competency required for first degree murder or, at least, the culpability to deserve the death penalty. The prosecutor did not disclose to defendant that the officer who had arrested him within four hours of the crime had told the prosecutor that defendant then appeared to be under the influence of liquor. In *Ashley v. Texas*¹⁰⁵ the prosecutor withheld psychiatric reports that defendant was not competent to stand trial. In *Alcorta v. Texas*¹⁰⁶ the defendant claimed that he killed his wife when he caught her kissing one Castilleja in a parked car late at night. When Castilleja told the prosecutor that he and defendant's wife had had sexual intercourse five or six times, the prosecutor told him not to volunteer that information. The prosecutor never disclosed this evidence to the defendant before trial—not even when Castilleja testified during trial that he and defendant's wife were not in love and had not had any dates.

Other murder cases not involving capital punishment have been prolific sources of violation of the prosecutorial disclosure duty. In *Hamric v. Bailey*¹⁰⁷ the defendant, who was alone at home while her husband was out, shot her neighbor. She claimed that he was trying to climb into her house through a window. The prosecution introduced a dying declaration of the victim that he was on his property ten feet from defendant's house when he was shot. The prosecutor did not disclose that a laboratory examination of the victim's shirt showed slivers of wood and glass that arguably indicated that the victim was at the window when shot. In *McMullen v. Maxwell*¹⁰⁸ the prosecutor did not disclose to defendant that before he was arrested the police had recovered from robbers, who were not known to have any connection with

¹⁰³195 F.2d 815 (3d Cir. 1952), *cert. denied*, 345 U.S. 904 (1953).

¹⁰⁴221 F.2d 763 (3d Cir.), *cert. denied*, 350 U.S. 875 (1955).

¹⁰⁵319 F.2d 80 (5th Cir.), *cert. denied*, 375 U.S. 931 (1963).

¹⁰⁶355 U.S. 28 (1957).

¹⁰⁷386 F.2d 390 (4th Cir. 1967).

¹⁰⁸3 Ohio St. 2d 160, 209 N.E.2d 449 (1965).

defendant, a gun, also not shown to have any connection with defendant, that ballistics tests showed had fired one or both of the bullets that killed the man of whose murder defendant was convicted. In *State v. Vigliano*¹⁰⁹ the state withheld the fact that one of its witnesses had been committed to a mental hospital during the pendency of the proceedings. In *In re Kapatos*¹¹⁰ a witness stated to the prosecuting attorney and the grand jury that after hearing "backfiring" he had looked out his window at the scene of the crime and had seen two men, neither of whom was defendant, running and getting into a moving car.

Rape cases provide further experience with the failure of the disclosure duty to protect adequately the defendant's interests. In *United States ex rel. Montgomery v. Ragen*,¹¹¹ the prosecutor did not disclose to defendant that a doctor had examined the prosecutrix and reported that she was still a virgin. In *Giles v. Maryland*¹¹² the two defendants claimed that the prosecutrix had consented to intercourse with one of them and had not had intercourse with the other. The prosecution withheld evidence that the sixteen-year-old girl was on probation; that she later at a party had engaged in sexual relations with two men in circumstances that suggested that she had consented; that she reported that these same two men had raped her and later retracted that charge; that she often had engaged in sexual relations with boys and men, some of whom she did not know; and that she had tried to commit suicide. The prosecution also withheld a police report that quoted her and her boy friend as telling the police that when defendants approached them they were having intercourse in the back of the car. At trial the prosecutor said nothing when the boy friend testified that he had not taken the girl out in order to have sex with her. In *In re Wright*¹¹³ the prosecutor did

¹⁰⁹50 N.J. 51, 232 A.2d 129 (1967). See also *Powell v. Wiman*, 287 F.2d 275 (5th Cir. 1961), in which the prosecutor successfully blocked cross-examination of a prosecution witness about his mental condition, although he knew that the witness had been in mental institutions in three states.

¹¹⁰208 F. Supp. 883 (S.D.N.Y. 1962).

¹¹¹86 F. Supp. 382 (N.D. Ill. 1949).

¹¹²386 U.S. 66 (1967). See also *Smallwood v. Warden*, 205 F. Supp. 325 (D. Md. 1962).

¹¹³282 F. Supp. 999 (W.D. Ark. 1968). See also *Jackson v. Wainwright*, 390 F.2d 288 (5th Cir. 1968). The defendant in that case was a black man who was charged with the rape of a white woman. The prosecutor gave him the name of a witness but did not advise him that the witness had stated that the attacker was not black but light skinned. The prosecutor subpoenaed the witness but did not call her to testify.

In *United States v. Poole*, 379 F.2d 645 (7th Cir. 1967), the defendant was charged with kidnapping. At trial the alleged victim testified that defendant took her across state lines against her will and twice had sexual intercourse with her. A Dr. Stolar had examined the girl and found no evidence of intercourse or injury. The prosecutor gave the defendant a list of witnesses that

not disclose that police had been given a purse that had been taken from the victim's house on the night of the rape and that had been found, along with a ladies' girdle and several rectal syringes, under the house of another person. The purse had been found by the residents of the house, who were the parents of a fugitive suspected of having committed a different rape.

In *People v. Savides*¹¹⁴ the prosecutor, knowing that his witness had been promised leniency in connection with charges then pending against him in return for his testimony at the trial of defendant, failed to disclose this information to defendant and elicited testimony by the witness denying any promise of leniency. In *United States v. Miller*¹¹⁵ the prosecutor did not advise defendant that along with a person he considered an expert in hypnosis, the prosecutor had hypnotized an important witness to try to jog his memory. At the hearing on defendant's challenge to this nondisclosure, there was testimony on defendant's behalf that the hypnosis procedure employed was highly suggestive.

It is entirely appropriate to enlist prosecuting attorneys as advocates for abstract justice who are impartially concerned with exonerating the innocent as well as convicting the guilty and to base substantive principles of prosecutorial conduct on the requirements of such a magnanimous role. These cases demonstrate that it is quite another thing to indulge in assumptions that this noble duty in fact describes the performance of prosecutors. The austere ambivalence that is commanded is beyond the capacity of anyone who is also expected to perform an advocate's role. A judge may be expected to conform to this high standard of impartiality; a prosecutor may be asked only to try his best.

The instances of deliberate prosecutorial presentation of false or perjured evidence,¹¹⁶ though not unsubstantial or innocuous, are not important to us here, for hopefully they are aberrations. Expansive discovery would surely help minimize their occurrence, but our concern

included the name of the FBI Agent to whom Dr. Stolar had reported his finding but not that of Dr. Stolar himself. At the preliminary hearing, the girl erroneously testified that she had been examined by a Dr. Green. Defendant's attorney was unable to locate a Dr. Green. By impeaching the girl's credibility as to the sexual intercourse, Dr. Stolar's testimony might also have raised a doubt about her testimony that she was kidnapped. *See also* *Ingram v. Peyton*, 367 F.2d 933 (4th Cir. 1966).

¹¹⁴1 N.Y.2d 554, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956).

¹¹⁵411 F.2d 825 (2d Cir. 1969).

¹¹⁶*E.g.*, *Miller v. Pate*, 386 U.S. 1 (1967).

should be primarily with the routine case. The elaborate machinery of discovery might be considered unjustifiably cumbersome if its purpose were only to combat infrequent deviations from a due process norm, for protection from which the disclosure duty might render adequate service.

Rather, there are two additional reasons why the administration of defendant's discovery rights should not be entrusted to prosecutors. First, the responsibility of the prosecutor as an advocate is so demanding of his energies and concentration that he cannot be equally attentive to the preparation of his adversary's defense. In most of the foregoing cases, the prosecutor should have been aware of the importance of the undisclosed evidence to the defendant. In some of the cases, the prosecutor tried to justify his nondisclosure on the ground that the withheld evidence would not have been admissible in court. The argument was essentially that the evidence was of no use to the defendant. In other cases the prosecutor may have frankly believed in the defendant's guilt despite the existence of the exculpatory evidence; in none of the cases discussed did the evidence conclusively establish the innocence of the defendant.

Secondly, even if the prosecutor were conscientiously dedicated to ferreting out from all that passes through his files whatever might help the defendant, unless he was initiated into all the nuances of the defense theories he would not be able to recognize much information that could render valuable service for the defendant. The defense may see significance in facts otherwise appearing neutral. Necessarily minimizing the significance of the several bits of inconsistent or contradictory data that commonly accumulate in the course of litigation, the prosecutor will often underestimate or overlook the significance that such data might have in the hands of the defendant's advocate. Often the police do not even present to the prosecutor information in their possession that should be disclosed to the defendant.¹¹⁷ Understandably, the prosecutor is not always as aggressive as a defense attorney might be in pursuing the investigating officers for such information.

In many "negligent nondisclosure" cases, the prosecutor did not make disclosure only because, lacking the insight of an advocate for the defendant, he had reasonably not perceived the usefulness of the evi-

¹¹⁷United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); Luna v. Beto, 391 F.2d 329 (5th Cir. 1967); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); Trimble v. State, 75 N.M. 183, 402 P.2d 162 (1965).

dence to the defendant. The negligent nondisclosure cases illustrate circumstances in which the prosecutor could not be said to have acted unfairly in failing to cull from all the evidence in his file the particular item that defendant, upon somehow later learning of it, was able to show would have been useful to his defense.

In *People v. Whitmore*¹¹⁸ the defendant was convicted of rape. The victim had pulled a button from the coat worn by her attacker. The report of a laboratory analysis of the button and of defendant's coat stated that the buttons on the coat were difference in size, design, and construction from the seized button and that the threads were different in color, diameter, and degree of twist. Nevertheless, the report concluded: "'It was not possible to determine whether or not the Q-1 button had been attached to the K-1 coat.'"¹¹⁹ This conclusion was reasonable since the coat was an old one and the button could have been one sewed on to replace an original button that had been lost. The prosecutor did not disclose the report to defendant because he believed that it was not probative or admissible. Not surprisingly, he was unable to conceive the usefulness of the report to defendant, though defense counsel could have. Its introduction into evidence would have established the scientifically analyzed difference between the seized button and the buttons on the coat. Defense counsel in argument would probably have conceded that these differences did not conclusively establish that the button did not come from defendant's coat. However, he could have gone on to urge that, taken with any other evidence in defendant's favor, the lack of similarity might be another circumstance pointing toward defendant's innocence.

The court agreed that the prosecutor had acted in good faith. Still it held that there had been a violation of due process, reasoning that "[w]hen there is substantial room for doubt the prosecution is not to decide for the court what is admissible or what for the defense may be useful."¹²⁰

*Branch v. State*¹²¹ is another example of negligent nondisclosure. Defendant, who was charged with murder, claimed that he had acted in self-defense when the victim had chased him with a knife. Witnesses testified that the victim did not have a knife. However, a man had

¹¹⁸45 Misc. 2d 506, 257 N.Y.S.2d 787 (Sup. Ct. 1965).

¹¹⁹*Id.* at _____, 257 N.Y.S.2d at 814.

¹²⁰*Id.* at _____, 257 N.Y.S.2d at 811-12.

¹²¹469 S.W.2d 533 (Tenn. Crim. App. 1969).

delivered a knife to the police that he said had been found at the scene of the murder. Understandably, the prosecutor did not credit the evidence because such a post-event finding by a non-law enforcement officer whose connection with defendant was not known, without more, was tenuous at best in terms of establishing that the victim had had the knife at the time he was killed. As the court held, however, "That information could very well have enabled defense counsel to conduct further and possibly fruitful investigation regarding the finding of the knife."¹²²

A final example is *Levin v. Katzenbach*,¹²³ in which defendant was convicted of grand larceny in connection with a conspiracy to fix a trial. Three union officials testified with regard to the manner in which money was obtained from a bank and delivered to defendant for the purpose of bribing the necessary parties. They also testified that defendant kept the money for himself. The testimony of one of the witnesses was inconsistent with that of the other two in connection with the exchanging of one-thousand-dollar bills for twenty-dollar bills at the bank that originally furnished the money. The prosecutor did not disclose to defendant that an officer and a teller of the bank had told him that although they remembered providing the large bills they did not remember having exchanged them for smaller ones. Especially in view of the fact that defendant knew about the bank witnesses and had interviewed them, the prosecutor can certainly be forgiven for not being concerned that defendant be told about them. Nevertheless, this evidence might have been useful to defendant in impeaching at least one of the witnesses against him as to a nonessential part of the illegal transaction that the witness described. With Judge, now Chief Justice, Burger dissenting, the court held that the nondisclosure violated due process.

The teaching of these cases is that for a variety of reasons the prosecutor is not the proper party to entrust with the responsibility for deciding what information in his possession the defendant needs adequately to defend himself. Nor is the disclosure function a proper one for the judge to perform. He is ordinarily even less oriented to the facts in the case and the possible defenses to the charge than is the prosecuting attorney. Requiring him to review the prosecution's files, sensitive to information useful to the defendant, would dangerously tempt him into the thought process of a defense advocate; he would then be an investi-

¹²²*Id.* at 534.

¹²³363 F.2d 287 (D.C. Cir. 1966). See also *People v. Hoffman*, 32 Ill. 2d 96, 203 N.E.2d 873 (1965).

gator for the defendant or he could not adequately discharge the responsibility. This delicate assignment would also distract the judge from his judicial functions. It would necessarily be laborious and time-consuming as long as the prevailing rule continued to make discovery turn on exceptional circumstances.¹²⁴

In addition to the category of material and exculpatory evidence, the United States Supreme Court has held prosecuting attorneys to a duty of disclosure in all cases of certain specific items of evidence, whether exculpatory or not. In *Roviaro v. United States*¹²⁵ the Court held that the prosecution may not claim a privilege to withhold from the defendant the name of an informer who might have information relevant to the question of his guilt or innocence.¹²⁶ The Court said:

Where the disclosure of an informant's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.¹²⁷

Although *Roviaro* was tried in a federal court and although in reaching its decision the Supreme Court may have relied on its supervisory power over the rules of evidence in federal courts,¹²⁸ it did argue that disclosure was necessitated by "the fundamental requirements of fairness."¹²⁹ Defendant had sought disclosure of the informer's name and address in a motion for a bill of particulars before trial¹³⁰ and at trial. The prosecutor had interposed a claim of privilege on both occa-

¹²⁴See *Alderman v. United States*, 394 U.S. 165, 182, 184 (1969); *Dennis v. United States*, 384 U.S. 855, 874 (1966); *United States v. Cobb*, 271 F. Supp. 159, 163 (S.D.N.Y. 1967); *United States v. Gleason*, 265 F. Supp. 880, 885 (S.D.N.Y. 1967).

¹²⁵353 U.S. 53 (1957).

¹²⁶*Cf. McCray v. Illinois*, 386 U.S. 300 (1967).

¹²⁷*Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) (footnotes omitted).

¹²⁸See *McCray v. Illinois*, 386 U.S. 300, 309, 311 (1967).

¹²⁹*Roviaro v. United States*, 353 U.S. 53, 60 (1957).

¹³⁰In *Miller v. Pate*, 386 U.S. 1 (1967), the Supreme Court found a denial of due process in the deliberate misrepresentation by the prosecution of paint on the undershorts that it claimed defendant wore when he committed a sexual murder as blood of the victim's type. The Court said: "Prior to his trial in an Illinois court, his counsel filed a motion for an order permitting a scientific inspection of the physical evidence the prosecution intended to introduce. The motion was resisted by the prosecution and denied by the court." *Id.* at 2 (footnote omitted). The Court did not make further reference to this motion for pretrial discovery, since it went on to hold that there was a violation of the prosecution's disclosure duty. Had the motion been granted, however, the due process problem could have been obviated.

sions. The Court held that defendant was entitled to disclosure at trial and also to pretrial discovery of "John Doe's identity and address."¹³¹

Roviaro involved discovery of the identity of a material witness as to whom the prosecutor presented a special plea for confidentiality based upon an assumed danger to the witness and a governmental need to maintain the informer's cover to protect his serviceability to law enforcement. In the face of this position, the Court recognized that "the fundamental requirements of fairness"¹³² dictate that the defendant's interest in the names of material witnesses outweighs the Government's interest in secrecy. In evaluating the content of fundamental fairness it would be hard to distinguish between an informer and any other material witness in terms of whether his identity or statements should be disclosed to the defendant.

Here, there was not even a requirement that the informant possess exculpatory information; rather, it was required only that he might have material information so that disclosure would be "relevant and helpful to the defense of an accused, or . . . essential to a fair determination of a cause."¹³³ Moreover, *Roviaro* would seem to require disclosure to a defendant in advance of trial of all statements that the witnesses have given to the prosecution. Apparently the Court in *Roviaro* would have required "disclosure of an informant's identity, or of the contents of his communication,"¹³⁴ if the defendant had requested discovery of statements. The discovery requirement should apply to all witnesses' statements. Whether or not *Roviaro* has significance in connection with witnesses other than informers who are in the "employ" of law enforcement, to whatever extent its rule was derived from the Constitution *Roviaro* certainly establishes a constitutional impact on discovery.

The Sixth Amendment. General due process is not the only constitutional provision that is important for discovery. The sixth amendment provides a defendant with the rights "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense." All of these provisions speak to an underlying constitutional policy of broad discovery. Only the right to counsel has so far been developed toward that end.

¹³¹*Roviaro v. United States*, 353 U.S. 53, 65 n.15 (1957).

¹³²*Id.* at 60.

¹³³*Id.* at 60-61.

¹³⁴*Id.* at 60.

The defendant, even if not indigent and not in custody pending trial, does not have the investigative resources of the prosecution. A further important factor that increases the necessity of defense discovery is the indigent character of most criminal defendants. Because of this, most defendants are unable without official backing¹³⁵ to conduct an independent factual investigation of the scope necessary to collect useful evidence. In addition, all defendants are subject to a natural handicap in investigation. By the time that they are called upon to prepare a defense and to engage legal representation, the prosecution has already tried to acquire for itself all of the evidence. The scene, if any, of the crime, has likely been stripped of its evidence. Unless it is a public place or on property belonging to the defendant or his friends, he may not even be allowed to examine it. Witnesses selected for use by the prosecution may be reluctant to talk to him or his lawyer. If there has been a substantial time lapse since the commission of the crime, the memories of these or other witnesses may be stale until refreshed by previous statements. The right to counsel is empty without the means of obtaining information about the strength or weakness of the prosecution's case on the basis of which to advise and defend the client or of obtaining evidence to use to establish the client's innocence, to mitigate his culpability, or to minimize his punishment.

The Supreme Court has not yet pronounced a general right of discovery as part of the right to counsel. On the other hand, in connection with lineup identifications by eyewitnesses, the Court has promulgated a constitutional principle of discovery that adheres to the right to counsel.

In *United States v. Wade*¹³⁶ the Court held that the sixth and fourteenth amendments guarantee a defendant the right to counsel at a lineup. The rationale for the decision was that the lineup is a critical confrontation at which the presence of counsel "is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."¹³⁷ The Court made clear that

¹³⁵Some jurisdictions with public defender systems may provide the public defender with investigative resources. *E.g.*, N.C. GEN. STAT. § 7A-468 (1969): "Each public defender is entitled to the services of one investigator, to be appointed by the defender to serve at his pleasure. The Administrative Officer of the Courts shall fix the compensation of each investigator, and may authorize additional investigators, full-time or part-time, upon a showing of need."

¹³⁶388 U.S. 218 (1967).

¹³⁷*Id.* at 227.

the reason the lineup was a critical stage of the proceeding for counsel's help was that the defendant would be able to obtain information about the procedures employed and any identifications obtained there. Defendant's attorney would be able to gather two kinds of information: information with which to challenge the fairness of the lineup and information with which to cross-examine any witnesses who identify his client as involved in the crime charged. Examples of information that is potentially useful in cross-examination are whether the witness did attend a lineup,¹³⁸ whether the witness identified someone other than the defendant as the culprit, whether the witness gave some indication of uncertainty in his identification of the defendant, and whether there were suggestive influences that tended to cause the defendant to stand out from among the others in the lineup group.¹³⁹ The attorney might even learn of a witness who is unable to identify the defendant as a participant in the crime or who is certain that he was not a participant. Probably, the prosecutor's constitutional duty to disclose to defendant all material and exculpatory information in his possession would require disclosure of all of this information, and particularly the last. In *United States ex rel. Meers v. Wilkins*,¹⁴⁰ however, the prosecutor never disclosed to defendants that two eyewitnesses to the robbery had said after a lineup that one of the defendants positively was not one of the robbers.¹⁴¹

The attorney's ability directly to observe the identification process overcomes the problems inherent in relying upon the prosecutor's determination of what should be disclosed. Of course, the attorney's presence is also designed to detect unfairness that violates due process standards,

¹³⁸In *Ex parte Cherry*, 456 S.W.2d 949 (Tex. Crim. App. 1970), the prosecution did not disclose that a witness had identified defendant in a lineup, even though the witness testified at trial that she had not viewed any lineup.

¹³⁹These suggestive influences may or may not amount to unfairness in violation of due process. Even if they are serious enough to violate that standard, the witness might be allowed to identify defendant in court if he satisfies the trial judge that his identification is based on his having seen the defendant at the time of the crime and is completely independent of the lineup. *United States v. Wade*, 388 U.S. 218, 239-41 (1967). In either event, defense counsel might want to impeach the identification by proving to the jury that it was unreliable because tainted by suggestion.

¹⁴⁰326 F.2d 135 (2d Cir. 1964).

¹⁴¹See *Discovery in Criminal Cases*, 44 F.R.D. 481 (1967). Jon O. Newman, former United States Attorney for Connecticut, reported having asked a large group of state prosecutors at a conference whether they should disclose to the defense the name of a witness who, after viewing the defendant in a lineup, said that he was not the man. Only two prosecutors answered yes. *Id.* at 500.

even though this too should be subject to the duty to disclose. As the Court in *Wade* said, "In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification."¹⁴²

Wade is thus essentially a constitutional discovery case.¹⁴³ It is easy to understand, therefore, why the Court left open the possibility of the presence at the lineup of substitute counsel as sufficient to satisfy the constitutional standard. The Court explained that this might be necessary to avoid delay.¹⁴⁴ It also might be useful since, to the extent the defendant might have to produce independent evidence of the lineup, someone other than himself or the attorney representing him would be in a better position to testify. The lineup is not a time when counsel is needed for the advice he can give or the presentation he can make. The defendant may be required to participate in identification exercises in a lineup, and probably his attorney will not take an active part in the lineup. Counsel is needed at the lineup primarily for the discovery he can obtain.

The lineup can be bifurcated into two phases—one in which the defendant and others are shown to the witness and another, conducted later and separately, in which the witness advises the law enforcement officers whether he was able to identify any of the persons presented to him. If more than one witness to the same or different crimes involving the same or different suspects attends the showup at the same time, the better practice would be to permit no identification to be announced while the witnesses are together. Otherwise, there is a risk of suggestion to the other witnesses if one does make a positive identification. *Wade* did not speak to the question of whether the constitutional right to counsel would apply at the identification as well as the confrontation phase of such a lineup. The Court was aware, however, of the dangers of suggestion in the identification process as well as in the production of the showup and presumably would apply the right to counsel to discovery of both.¹⁴⁵

¹⁴²United States v. Wade, 388 U.S. 218, 231-32 (1967).

¹⁴³See Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?* 17 U.C.L.A. L. REV. 339 (1969).

¹⁴⁴United States v. Wade, 388 U.S. 218, 237 (1967).

¹⁴⁵That was the conclusion reached by the California Supreme Court in *People v. Williams*, 3 Cal. 3d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971), at least where the identification takes place immediately after the show up.

If identification is an issue in a case and if the police have not conducted a lineup, the defendant should be entitled to have one at his request. He may need protection against the suggestive character of an in-court identification while he is sitting conspicuously at counsel table. No greater inconvenience to government witnesses would be caused than by a police-initiated lineup. Unless the witness willingly cooperates, which is particularly unlikely if he was the crime victim, the defendant needs access to compulsory process for this potentially beneficial procedure; he needs the power to compel an identification deposition. *Coleman v. Alabama*¹⁴⁶ holds out promise for this and more.

A recent Supreme Court decision, *Coleman* contains an expansive significance for the role of the right to counsel in the constitutionalization of discovery standards. *Coleman* held that the preliminary hearing is a critical stage of a state's criminal process at which the defendant has a constitutional right to counsel.¹⁴⁷ In reaching that decision, the Court found four functions for which "the guiding hand of counsel at the preliminary hearing is essential."¹⁴⁸ Two of those functions deal with discovery, and the Court described them as follows:

[T]he skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. [Also], trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial.¹⁴⁹

The Court's recognition of the usefulness of the preliminary hearing for discovery, and impliedly of the propriety of using it for that purpose, is significant in itself. State law—including that of Alabama, whose preliminary hearing procedure was under scrutiny in *Coleman*—ordinarily holds that the only purpose of a preliminary hearing is that of screening to determine whether there is sufficient evidence

¹⁴⁶399 U.S. 1 (1970).

¹⁴⁷In *Adams v. Illinois*, 92 S. Ct. 916 (1972), the Supreme Court held that *Coleman* applies only to cases in which a preliminary hearing was conducted after the date *Coleman* was decided.

¹⁴⁸399 U.S. at 9.

¹⁴⁹*Id.* The Court described the other two functions as follows: "[T]he lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. . . . [C]ounsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." *Id.*

against the accused to warrant continuing the criminal proceedings already underway against him.¹⁵⁰ In Alabama it is a prelude to the grand jury proceeding; in other states it is an alternative to the grand jury as a buffer between the State and the accused in the determination of whether to subject him to the expense, inconvenience, and embarrassment of a criminal trial.¹⁵¹ Doctrinally, therefore, it has been thought that it may not be used for discovery. On the other hand, as a matter of practice it is commonplace for defense attorneys to exploit the discovery potential in the preliminary hearing.¹⁵² Until the decision in *Coleman*, this practice was of dubious legality under state law. *Coleman* has sanctioned it out of the constitutional necessity for discovery. The potential impact of *Coleman* can be sensed only upon realizing that it is a first step toward a constitutional right to criminal defense depositions.¹⁵³ It is, however, only one step.

Coleman does not guarantee that a defendant will be provided this discovery opportunity. It does provide that if there is a preliminary hearing, the defendant has a right to be represented at it by counsel, largely so that discovery may be obtained. Many cases have held, however, that no constitutional requirement is contravened if presentation of the case to a grand jury, which is at the option of the prosecution, is substituted for the preliminary hearing.¹⁵⁴ These holdings are, however, based on the assumption that the only function of the preliminary hearing is its buffer function of screening for probable cause—a function that they reason is as well performed by the grand jury. Although

¹⁵⁰*Id.* at 8; *Thompson v. General Fin. Co.*, 205 Kan. 76, 94-95, 468 P.2d 269, 284-85 (1970); *State v. Richardson*, 347 S.W.2d 165, 168-69 (Mo. 1962); *Fugate v. Ronin*, 167 Neb. 70, 77, 91 N.W.2d 240, 244-45 (1958); *Overton v. State*, 78 Nev. 198, 201, 370 P.2d 677, 679 (1962).

¹⁵¹See generally *Steele*, *supra* note 19, at 193-94 n.1.

¹⁵²See *Graham & Letwin, The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 U.C.L.A.L. REV. 916, 920-25 (1971).

¹⁵³In *Roberts v. LaVallee*, 389 U.S. 40 (1967) (per curiam), the Supreme Court held that an indigent defendant has a right to a free transcript of his preliminary hearing.

¹⁵⁴*Sciortino v. Zampano*, 385 F.2d 132, 134 (2d Cir. 1967); *Crump v. Anderson*, 352 F.2d 649, 655-56 (D.C. Cir. 1965); *Dillard v. Bomar*, 342 F.2d 789, 790 (6th Cir. 1965); *Vincent v. United States*, 337 F.2d 891, 896 (8th Cir. 1964); *Odell v. Burke*, 281 F.2d 782, 786 (7th Cir.), *cert. denied*, 364 U.S. 875 (1960); *Barrett v. United States*, 270 F.2d 772, 775-76 (8th Cir. 1959); *Barber v. United States*, 142 F.2d 805, 807 (4th Cir.), *cert. denied*, 322 U.S. 741 (1944); *McDonald v. Hudspeth*, 129 F.2d 196, 199 (10th Cir.), *cert. denied*, 317 U.S. 665 (1942); *Moore v. Aderhold*, 108 F.2d 729, 731 (10th Cir. 1939); *Garrison v. Johnston*, 104 F.2d 128, 130 (9th Cir.), *cert. denied*, 308 U.S. 553 (1939); *State v. Grant*, 9 N.C. App. 704, 705-06, 177 S.E.2d 314, 314-15 (1970). *But cf.* *Ross v. Sirica*, 380 F.2d 557, 559-60 (D.C. Cir. 1967); *Blue v. United States*, 342 F.2d 894, 901 (D.C. Cir.), *cert. denied*, 380 U.S. 944 (1965); *Washington v. Clemmer*, 339 F.2d 715, 717-18 (D.C. Cir. 1964).

Coleman did not take up this issue, its holding that the discovery function of the preliminary hearing is constitutionally protected by a defendant's right to counsel under the sixth and fourteenth amendments surely impairs the validity of the necessary assumption in those cases that all of the protections of the preliminary hearing are provided by the grand jury procedure.

In *Adams v. Illinois*,^{154.1} in which the Supreme Court held that *Coleman* applies prospectively only, the plurality opinion for the Court recognized that there are "limitations upon the use of the preliminary hearing for discovery and impeachment purposes . . ." ^{154.2} The opinion specified two such limitations. First, the court may have authority to terminate the preliminary hearing once probable cause is established; secondly, the evidence gathered by the prosecution and thus subject to discovery at that time may be incomplete. Significantly, the opinion did not acknowledge the availability of the grand jury alternative as a limitation on the discovery usefulness of the preliminary hearing. Although the absence of such a reference may be attributable to the focus of the opinion on limitations arising out of the preliminary hearing procedure itself, in view of the notoriety of the grand jury as an alternative to the preliminary hearing it seems reasonable to read into that opinion a purpose to avoid sanctioning such a denial of discovery opportunities.

Even if the defendant were held to have a right to the transcript of the grand jury proceedings, those proceedings would still not be an adequate vehicle for discovery unless *Coleman* is applied to extend to the defendant a right to counsel in those traditionally secret inquiries. Such an extension would inhibit the investigative role of the grand jury, in which the reasons given for grand jury secrecy are apt if at all. Also, a right to counsel before the grand jury might prove unworkable; each witness could easily be represented, but often the grand jury might not know who the defendant would be until it completed its deliberations.

Without interfering with the investigatory usefulness of the grand jury, *Coleman* could be interpreted to provide a constitutional right to a preliminary hearing¹⁵⁵ or some equally satisfactory deposition procedure. It seems significant that one criminal procedure specified in the

^{154.1}92 S. Ct. 916 (1972).

^{154.2}*Id.* at 919.

¹⁵⁵For discussions of the discovery function of the preliminary hearing in England and Canada see DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 112-16 (1958); Brennan, *supra* note 5, at 284, 293; Louisell, 49 CALIF. L. REV., *supra* note 11, at 65-66; Traynor, *Ground Lost and Found in Criminal Discovery in England*, *supra* note 6.

Bill of Rights that has not been applied to the states through the fourteenth amendment is the fifth amendment's provision for indictment by grand jury.¹⁵⁶ This has left room for the preliminary hearing to develop.

The Constitutional Dimensions of Defense Discovery

Efficient discovery could be delivered by a program that required disclosure to the defendant upon the occasion of his first arraignment of the contents of the files of the investigating and the prosecuting authorities,¹⁵⁷ except for the prosecutor's work product and subject to the prosecutor's right to apply for a protective order. The second phase of the discovery program, at least in prosecutions for serious crimes, should be the preliminary hearing as described in *Coleman* or some alternative procedure for discovery depositions. The disclosure should be made sufficiently in advance of the preliminary hearing or deposition to enable the defense attorney to complete his discovery there by subpoenaing the witnesses he wants to depose and being able to prepare to depose them effectively.¹⁵⁸

There is substantial justification for excepting the prosecutor's work product, properly understood. However, the definition of such work product should be carefully limited to reports, memoranda, or correspondence in which evidence, testimony, or legal research is evaluated or is compiled in summary form for at least one of the following purposes: to serve as a basis for investigation or for the preparation of trial briefs; to plot an overall course of strategy; or to synthesize preliminary or speculative information.

The justification for this exception is twofold. The most important one is that the work-product information, although useful in planning defense strategy, is not essential for the substance of the defense if the defendant is given full discovery of the factual information underlying the reports or memoranda. The defendant is not thereby denied access

¹⁵⁶*Alexander v. Louisiana*, 92 S. Ct. 1221, 1227 (1972); *Lem Woon v. Oregon*, 229 U.S. 586, 590 (1913); *Hurtado v. California*, 110 U.S. 516 (1884).

¹⁵⁷In Israel the defendant in all criminal cases has a right to inspect all the evidence in possession of the prosecution except state or defense secrets, which also cannot then be used against him. Shalgi, *Criminal Discovery in Israel*, 4 AM. CRIM. L.Q. 155 (1966).

¹⁵⁸In *California v. Green*, 399 U.S. 149 (1970), the Supreme Court held that the preliminary hearing testimony of a witness who is unavailable to testify at trial despite good faith efforts to produce him may be admitted in transcript form against the defendant at trial. Therefore, disclosure of the files should be made in advance of the preliminary hearing to protect a defendant's right to prepare a thorough cross-examination of witnesses at that time in case their preliminary hearing testimony is used at trial.

to any factual data that he needs to prepare to meet the prosecution's case or to present his own. Excluding any evaluation or planning by the law enforcement officers, notes taken by the police or prosecutor of the oral statement of a witness should properly be discoverable and not within the work-product exception. The defendant might find in those notes some evidence that he could use in establishing his defense or some information given at the interview with the witness that is in conflict with the witness' trial testimony and that the defendant might use to impeach him. It is a mistake, therefore, to include any such raw investigative data in the work-product exception. The exception should cover only the subjective interpretation or development of such factual data by the police or the prosecutor.

Since no unfairness to the defendant is involved, the second aspect of the justification for this exception is that the prosecution has a legitimate concern for the privacy of its processes of thinking. This concern is materially different from any reasons that the prosecution might advance for maintaining the secrecy of evidence that it has uncovered. In order for the prosecutor to be able to make the most effective use of the evidence, shared now with the defendant, he must be given the freedom to speculate, to ruminate, and to consult without the fear that every chance thought might be disclosed to the defendant. He must not be inhibited in the planning of his case as he ponders and discards unworkable theories, debates the weaknesses in his case, and explores the strengths. Because the definition of work product is narrow and specific and capable of application by one untutored in the defense plans, the prosecutor should not have the difficulties in determining what he may lawfully withhold that he has had in deciding what he must lawfully disclose.

This carefully confined work-product exception should designate the only general category of information in the possession of the prosecution that need not be exhibited to the defendant. Specific information should be denied discovery in specific cases only upon a showing of probable cause to believe that the defendant in the particular case would misuse the particular evidence, but even then only if a less restrictive protective order could not be effectively fashioned. Except to the extent of the judicially recognized privilege to withhold the identity of an informer material only on the issue of probable cause for a search or seizure and not on the issue of guilt or innocence,¹⁵⁹ the prosecution

¹⁵⁹McCray v. Illinois, 386 U.S. 300 (1967).

should be permitted to claim any other privilege not to disclose information and thus protect any interest it has in the secrecy of the information only by dismissing the charges against the defendant, since it may thereby be precluding him from effective preparation of a defense.¹⁶⁰

The trial judge should not be given discretion in this regard. The defendant should have a *right* to discovery. As the United States Supreme Court said in *Dennis v. United States*,¹⁶¹ "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations."

This discovery procedure need not be costly in time or expense. The efficiency of the file-disclosure phase might be enhanced if the prosecutor were routinely to deliver to the defense attorney at the first arraignment of his client photocopies of all the non-work-product documents in his files and in the files of the police and to supplement this periodically as the files are augmented with new information. If the defendant is not indigent, perhaps he could be charged the duplicating costs.

A state might find it convenient to supply an alternative procedure to the preliminary hearing in order to dispense with the attendance of the magistrate. His presence would not be important to the securing of discovery. The crucial attribute of the preliminary hearing for discovery is its subpoena power. Although the prosecutor is not required to present his entire case at the preliminary hearing, the defendant can subpoena any witnesses whom he wants to examine. If this power were provided in a less formal deposition format, as it is in civil cases, the importance of the preliminary hearing for discovery would no longer exist.

The expense of the deposition reporter could also be borne by non-indigent defendants. There would be an expense to the state in providing a reporter for indigent defendants; however, this could be minimized by putting reporters on salary rather than by contracting with them on a piece-work, payment per page basis. In addition, a state might permit the use of written interrogatories by defendants preliminary to or as a substitute for oral depositions.

¹⁶⁰"[I]n criminal causes . . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free" *Jencks v. United States*, 353 U.S. 657, 671 (1957); *accord*, *Roviaro v. United States*, 353 U.S. 53, 61 (1957).

¹⁶¹384 U.S. 855, 873 (1966).

In terms of time the deposition procedure is likely to be demanding on prosecution and defense counsel. Considering that as a matter of practice defense attorneys already use the preliminary hearing for discovery, it would not seem that in the majority of cases there would be a prohibitive increment of time demanded beyond that already devoted to the grand jury, preliminary hearing, and informal investigation, including the interviewing of witnesses. Moreover, a broad discovery procedure might serve the cause of judicial economy by encouraging guilty pleas by guilty defendants who thereby learn the character of the case against them,¹⁶² encouraging dismissal of groundless cases,¹⁶³ streamlining trials,¹⁶⁴ and reducing the difficulty in achieving finality of convictions.¹⁶⁵ It might also facilitate new defense pretrial motions such as for summary judgment.

The Constitutional Justification of Broad Discovery

The President's Commission on Law Enforcement recommended providing defense depositions in criminal cases.¹⁶⁶ On the other hand, the American Bar Association Advisory Committee on Pretrial Proceedings, while otherwise recommending broad criminal defense discovery, has voted not to recommend a right to depositions in criminal cases but to leave the question to the discretion of the trial court.¹⁶⁷ Apparently this was a less than unanimous decision of the Committee, but no dissenting report was published. As its reasons, in addition to the cost to the state, the Committee gave the following: (1) "the need to take depositions might be construed as part of the adequacy of representation required by the constitutional right to counsel";¹⁶⁸ (2) "the imposition on civilian witnesses may discourage their coming forward in criminal

¹⁶²Williams v. Florida, 399 U.S. 78, 105-06 (1970) (Burger, C.J., concurring); United States v. Leichtfuss, 331 F. Supp. 723, 729 (N.D. Ill. 1971); Brennan 282, 283 n.10, 287; Langrock, *supra* note 51 at 733-34; Traynor, *supra* note 6, at 237; Young & Gray, *Trial By Ambush—The Case for Pre-Trial Discovery in Criminal Law*, 25 Nev. St. B.J. 91, 95-96 (1960).

¹⁶³Williams v. Florida, 399 U.S. 78, 105 (1970) (Burger, C.J., concurring); Young & Gray, *supra* note 162.

¹⁶⁴Brennan 283; Young & Gray, *supra* note 162, at 95.

¹⁶⁵ABA ADVISORY COMM., *supra* note 7, at 26-28.

¹⁶⁶UNITED STATES PRESIDENT'S COMMISSION ON LAW ENFORCEMENT, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 139 (1967). The Commission recommended expanded availability of depositions for both sides, recognizing that the prosecution already has considerable deposition rights through grand jury proceedings.

¹⁶⁷ABA ADVISORY COMM. 26-28.

¹⁶⁸*Id.* at 87.

cases";¹⁶⁹ and (3) depositions will not be needed if there is otherwise broad discovery.¹⁷⁰ None of these reasons is persuasive.

The reference to implicating the constitutional question of adequate representation is puzzling. Surely the Committee was not suggesting that it would be unfair to hold an attorney who was representing a man charged with crime to the same standard of competency in connection with his pretrial preparation as his trial presentation; nor was it indicating that the standard is so inflexible as not to allow an attorney, in consultation with a client, to make an intelligent judgment that in a particular case depositions are not needed. It would seem to be entirely fair to hold that a defendant whose attorney deprived him of a defense because he neglected pretrial depositions should be protected.

Discovery depositions would not impose on witnesses any more than their testifying at a preliminary hearing or before a grand jury or in civil pretrial depositions. A flexible deposition procedure could be scheduled in consultation with the witnesses. Even granting that some imposition would be involved, such a small inconvenience to a witness, except in cases meriting a protective order, should not outweigh the fundamental right of a defendant to gather the facts necessary to his defense.

Finally, the Committee's argument that there is no need for criminal depositions is based on the assumption that "the prosecution will ordinarily possess written statements or transcripts of testimony of potential witnesses of such completeness that additional interrogation by the defense attorney, prior to trial, will be of only marginal value in most cases."¹⁷¹ Presumably, when the prosecutor does not have any statements, the trial judge could, though he would not be required to, order depositions.

The facile assumption in this argument is inconsistent with the theory of the adversary system. We might as well ask defendants to rely on the prosecutor to cross-examine his own witnesses at trial as assume that the prosecutor will be sufficiently diligent in his interviews with witnesses and thorough in his summary of them to protect the defendant's interests as well as his own. Moreover, the prosecuting attorney does not always interview his witnesses; often this is done only by investigating officers. It is not fair to force the defendant to rely for the

¹⁶⁹*Id.*

¹⁷⁰*Id.*

¹⁷¹*Id.*

accumulation of evidence necessary to him on the diligence and thoroughness of any police officer who is responsible for a particular case and who may or may not have adequate time to devote to any one case. Some witnesses may be interviewed before the full scope of the facts has become clear to the prosecuting authorities and thus before avenues of inquiry have become known to them. In addition, whoever conducted the interview for the government may not be privy to the defendant's side of the story and thus may not be alert to seemingly unimportant details that deserve to be explored.

Most of the states have unnecessarily limited a defendant's discovery by a variety of doctrines that had their origins in the halting and cautious growth of discovery. The most common of these doctrines holds that the question of whether to grant discovery is in the discretion of the trial court.¹⁷² A second limiting doctrine confines discovery to evidence that would be admissible in court.¹⁷³ Another such doctrine requires the defendant to establish a foundation for discovery by demonstrating a particularized need for the information he requests.¹⁷⁴ Some states surprisingly refuse discovery of evidence about which the defendant already knows on the ground that he has no need of it. For example, this rationale was invoked by Justice Musmanno, concurring in *In re DiJoseph*,¹⁷⁵ to deny discovery of fingerprints on the alleged murder weapon. Justice Musmanno puzzlingly reasoned that defendant "is one person who knows whether she used the weapon or not and, therefore, she is not being denied anything which she needs in the ascertainment of truth."¹⁷⁶ The defendant's predicament in that case was that she needed the fingerprints less to ascertain the truth for herself than to demonstrate it to a jury if she were innocent. In addition, many states deny discovery of particular categories of information—for example, the defendant's confession, the confessions of co-defendants, the state-

¹⁷²*E.g.*, *In re DiJoseph*, 394 Pa. 19, 22-23, 145 A.2d 187, 188 (1958) (C. Jones, C.J., concurring); *State v. Thompson*, 54 Wash. 2d 100, 103, 338 P.2d 319, 321 (1959).

¹⁷³The doctrine derives from Chief Judge Cardozo's opinion in *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 28-29, 156 N.E. 84, 85-86 (1927). New York has by statute eliminated it. N.Y. CODE CRIM. PROC. § 240.20 (McKinney 1971). *See also, e.g.*, *State ex rel. Mahoney v. Superior Court*, 78 Ariz. 74, 78-79, 275 P.2d 887, 890 (1954); N.C. GEN. STAT. § 15-155.4 (Supp. 1971).

¹⁷⁴*E.g.*, *United States v. Zborowski*, 271 F.2d 661, 665 (2d Cir. 1959); *United States v. Cobb*, 271 F. Supp. 159, 161 (S.D.N.Y. 1967); *State v. White*, 15 Ohio St. 2d 146, 158, 239 N.E.2d 65, 74 (1968); *State v. District Court*, 135 Mont. 545, 551, 342 P.2d 1071, 1075 (1959); *State v. Gillespie*, 227 So. 2d 550, 552, 555-56, 559 (Fla. App. 1969).

¹⁷⁵394 Pa. 19, 145 A.2d 187 (1958).

¹⁷⁶*Id.* at 25, 145 A.2d at 189.

ments of prospective witnesses, and the transcript or minutes of grand jury testimony.

Discoverability should not be restricted to evidence that is admissible in court. Admissibility of evidence raises issues not pertinent to the policy of discovery.¹⁷⁷ Even inadmissible evidence may have a variety of uses in the preparation of a defense to criminal charges. Chief among these is its use as a source of leads to admissible evidence. Also ranking high in importance is its use as a background for cross-examination of prosecution witnesses. As Justice Fortas has said, "No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses."¹⁷⁸

Nor should discoverability depend on the defendant's establishing a foundation for it by demonstrating the importance to his case of the information sought. Since the government has no cognizable interest in withholding the evidence, such a requirement would impose difficult, often insuperable, burdens on the defendant without thereby promoting the legitimate ends of justice. There is no persuasive reason why he should not be allowed to go on a "fishing expedition" for information as long as he does not fish for the prosecution's work product. In many cases the defendant—particularly if he is innocent—may have little or no idea what information the prosecution might have.¹⁷⁹ Even if he is able to specify some evidence that he would like to inspect, he may not be able to predict the benefit that his inspection will produce. That is precisely why he needs discovery. It is asking too much of a defendant, and asking it unnecessarily, to require him, for example, to show what inconsistencies might exist in a statement given to the police by a witness as a condition to his obtaining discovery of the statement before he has ever seen the statement and before the witness has testified. When this foundation requirement is imposed, it may force defense attorneys to speculate about their hopes or expectations regarding the information sought. It is not surprising, therefore, that it "leads to . . . sterile, unedifying, and unreal debates . . ." ¹⁸⁰ An additional reason why this process may be prejudicial to a defendant is that in order to respond to it his attorney may have to disclose his work product, his preliminary

¹⁷⁷*Gordon v. United States*, 344 U.S. 414, 418 (1953). See also *Giles v. Maryland*, 386 U.S. 66, 98, 100 (1966) (Fortas, J., concurring).

¹⁷⁸*Giles v. Maryland*, 386 U.S. 66, 98 (1966) (Fortas, J., concurring).

¹⁷⁹Traynor 230.

¹⁸⁰*United States v. Projansky*, 44 F.R.D. 550, 555 (S.D.N.Y. 1968).

or speculative information, his interpretation or evaluation of evidence that he has, his planning of trial strategy, and, perhaps, even privileged evidence¹⁸¹ given to him by his client. At the same time, if the prosecution has information that in fact may aid the defendant, it is difficult to see why its disclosure should depend upon whether the defendant already knows of its existence, can identify its sources, can appraise its potential significance, or can otherwise blueprint its utility. For all of these reasons, the defendant's requests for discovery "should prevail in every case unless the Government shows some special and good reasons why they should not."¹⁸²

No exceptions to discoverability other than upon a showing of particularized cause should be permitted with regard to the statements—including statements given before a grand jury—given to the government by any witnesses, including the defendant himself, any co-defendant, and any prospective prosecution witness. These statements are for the most part the product of prosecution discovery. If the defendant's own statement is incriminating and was validly obtained, he will likely learn its contents before he has to testify when it is introduced in evidence as part of the prosecution's case.¹⁸³ Otherwise, he may still be able to obtain advance discovery of it through a pretrial motion to suppress it because it was given involuntarily¹⁸⁴ or during custodial interrogation without the *Miranda*¹⁸⁵ protections. In *Britt v. North Carolina*¹⁸⁶ the United States Supreme Court during the current term held that by virtue of the equal protection clause of the fourteenth amendment an indigent defendant is entitled to a free transcript of a previous trial against him for his use at a retrial. The Court said that even without allegations of specific need, "it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution wit-

¹⁸¹See discussion of prosecution discovery from the defendant in Part II.

¹⁸²*United States v. Projansky*, 44 F.R.D. 550, 555 (S.D.N.Y. 1968). See also *Dennis v. United States*, 384 U.S. 855, 874 (1966).

¹⁸³*State v. Johnson*, 28 N.J. 133, 137, 145 A.2d 313, 316 (1958).

¹⁸⁴Presumably, even after *Harris v. New York*, 401 U.S. 222 (1971), a coerced confession would still be subject to suppression even against its use to impeach the testimony of the defendant who gave it because of the danger of its untrustworthiness. *Harris* dealt only with a statement obtained in violation of *Miranda*, but since the Court based its decision on unfairness in disarming the prosecution of its defenses against a defendant's perjury, *Harris* casts some doubt over even that coerced confession rule. See *id.* at 225 n.2.

¹⁸⁵See *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁸⁶92 S. Ct. 431 (1971).

nesses.”¹⁸⁷ However, the Court went on to hold that on the specific facts of the case before it and as defendant apparently conceded, defendant had available an adequate alternative substantially equivalent to a transcript. For this finding, the Court relied on the facts that the two trials were only a month apart; that the second trial was before the same judge with the same defense attorney and court reporter; and that the trials took place in a small town where the reporter was friendly with all the local lawyers and “would at any time have read back to counsel his notes of the mistrial, well in advance of the second trial, if counsel had simply made an informal request.”¹⁸⁸ In *Harris v. New York*¹⁸⁹ the Supreme Court held the importance of prior statements of a witness in such high regard that it ruled that the prosecution must be allowed to use such statements in cross-examination of a defendant who testifies in his own behalf, even if they were obtained in violation of the *Miranda* rule and could not, therefore, have been used if the defendant had not testified.

A special word should be said about the transcript or minutes of grand jury testimony. Although the traditionally secret character of its hearings and deliberations is an important attribute of the grand jury proceeding while it is in session or with regard to persons whom it has found insufficient cause to indict, there is no reason to keep the testimony secret once a defendant has been indicted and received notice of the indictment. The only reasons for grand jury secrecy are:

- (1) To prevent the escape of those whose indictment may be contemplated;
- (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
- (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;
- (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
- (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been

¹⁸⁷*Id.* at 434.

In *Williams v. Florida*, 399 U.S. 78 (1970), the prosecution successfully impeached a defense alibi witness with inconsistent statements the witness made in a pretrial interview with the prosecutor. Pursuant to a discovery order, the defendant had given the name of the witness to the prosecutor. The Supreme Court upheld the constitutionality of the discovery order. See discussion in Part II.

¹⁸⁸*Britt v. North Carolina*, 92 S. Ct. 431, 434 (1971).

¹⁸⁹401 U.S. 222 (1971).

under investigation¹⁹⁰

None of these concerns obtain after the witnesses have testified, the grand jury has deliberated, and the indictment has been publicized or the defendant has been apprehended.¹⁹¹ "Witnesses before a grand jury necessarily know that once called by the Government to testify at trial they cannot remain secret informants quite apart from whether their grand jury testimony is discoverable."¹⁹² At this point the defendant's strong interest in obtaining the means with which to absolve himself of the charges or to minimize his culpability outweighs the vanished bases for secrecy. The prosecutor has access to the testimony before the grand jury and routinely uses it to prepare for trial, although the transcript or the minutes do not belong to him any more than they do to the defendant; rather, such minutes belong to the court.¹⁹³ Therefore, the defendant should be accorded the same privilege as that enjoyed by the prosecution.

CONCLUSION ON DISCOVERY FOR THE DEFENSE

In view of recent expressions of opinion by the present members of the Supreme Court, it may appear unlikely that the Court will soon move as boldly in criminal discovery as this article has proposed. Justices Douglas, Brennan, White, and Marshall seem strongly to support *Coleman* and its impact on the constitutional law of discovery; Chief Justice Burger and Justice Blackmun, and probably also Justice Rehnquist, appear to be strongly opposed; Justice Stewart appears to have accepted it reluctantly and Justice Powell has yet to express his opinion.^{193.1} *Coleman*, a threshold decision to constitutional protec-

¹⁹⁰United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954). See also United States v. Procter & Gamble Co., 356 U.S. 677, 681 & n.6 (1958); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 405 (1959) (Brennan, J., dissenting); State v. Faux, 9 Utah 2d 350, 353, 345 P.2d 186, 187 (1959).

¹⁹¹United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233-34 (1940); United States v. Zborowski, 271 F.2d 661, 668 n.3 (2d Cir. 1959); United States v. Rose, 215 F.2d 617, 629 (3d Cir. 1954); State v. Faux, 9 Utah 2d 350, 353, 345 P.2d 186, 187 (1959).

¹⁹²Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 406-07 (1959) (Brennan, J., dissenting).

¹⁹³United States v. Procter & Gamble Co., 356 U.S. 677, 684-85 (1958) (Whitaker, J., concurring).

^{193.1}Chief Justice Burger dissented from the basic holding in *Coleman*. Justice Blackmun did not participate in *Coleman* but indicated in a concurring opinion in *Adams v. Illinois*, 92 S. Ct. 916, 921 (1972), that he felt *Coleman* was wrongly decided. Justice Stewart also dissented in *Coleman*, arguing that because nothing that occurred at the preliminary hearing was used against the defendant at trial, the defendant was not constitutionally prejudiced by the absence of counsel

tion of broad discovery for defendants, will likely encourage further development of discovery by the states. The Supreme Court should, nevertheless, recognize the imperatives of the sixth amendment and of the due process clauses of the fifth and fourteenth amendments to satisfy the constitutionally compelling needs of defendants for broad discovery in the form of file disclosure and depositions.

II. DISCOVERY FOR THE PROSECUTION

The courts have long assumed that prosecution discovery is constitutionally barred by the privilege against self-incrimination.¹⁸⁴ In *Boyd v. United States*,¹⁸⁵ which was decided in 1886, the Supreme Court in discussing the fourth and fifth amendments said: "[A]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government."¹⁸⁶

Recent judicial and legislative activity that supports some formal discovery directly from the defendant to supplement the government's considerable investigative discovery has challenged this doctrinal generalization. Proposals for prosecutorial discovery that have been implemented in some jurisdictions have employed three forms of limitation operating singly or in combination in an effort to accommodate the fifth amendment. These proposals would limit prosecution discovery to: (1) cases in which the defendant has requested and received discovery; (2)

at the preliminary hearing. Unlike the Chief Justice and Justice Blackmun, however, Justice Stewart joined the plurality opinion in *Adams v. Illinois*. The Chief Justice and Justice Blackmun filed separate concurring opinions to note their continuing disagreement with *Coleman*.

In *Adams*, the Supreme Court held that *Coleman*, unlike other right to counsel cases, did not apply prospectively. The plurality opinion was written by Justice Brennan, long an advocate of broad criminal discovery. While reaffirming *Coleman*, Justice Brennan's opinion, in which Justice Stewart joined, argued only that the right to counsel was not as important at the preliminary hearing as at the trial so that on the question of retroactivity it was outweighed by the prior justified reliance of the state on the lack of a requirement of counsel and the impact of retroactivity on the administration of justice.

In *Kirby v. Illinois*, 92 S. Ct. 1877 (1972), however, Justice Rehnquist, along with the Chief Justice and Justice Blackmun, signed the plurality opinion written by Justice Stewart holding that the right to counsel, in connection with lineups, does not attach until formal charges are filed. This case has no direct bearing on criminal defense discovery, which will always follow the filing of formal charges, but may demonstrate that Justice Rehnquist, along with the others with whom he joined in the prevailing opinion, is reluctant to extend the right to counsel at all. Justice Powell filed a one sentence concurring opinion that did not explain his views.

¹⁸⁴See cases cited note 3 *supra*.

¹⁸⁵116 U.S. 616 (1886).

¹⁸⁶*Id.* at 631-32.

documentary and other physical evidence that the defendant intends to produce at trial in support of his own case; or (3) evidence that the defendant intends to produce at trial (including the names of witnesses) in support of affirmative defenses. None provides for compelling the defendant to disclose whether he will testify at trial or the testimony that he would give, except insofar as the nature of his testimony might be surmised from information supplied by witnesses or other evidence that he is required to identify.¹⁹⁷

Although the investigative resources at the command of the prosecution render discovery procedures for it less critical than for the defendant, prosecution discovery could be as productive of fuller and fairer factual presentations at trial as defense discovery. As in civil litigation, the importance of reciprocal ascertainment of the facts argues convincingly for the broadest discovery opportunities for all parties in a criminal trial. Also as in civil litigation, however, each side may claim the benefit of certain evidentiary privileges designed to protect other values that would be jeopardized by unlimited discovery. For example, the prosecutor may claim a privilege against disclosing his work product.¹⁹⁸ He may also claim a privilege to withhold from discovery the identity of an informer who helped to supply probable cause for a search and seizure as long as the informer is not also a material witness to the defendant's guilt or innocence.¹⁹⁹ Arguments for other prosecution privileges which suggested that discovery would imperil the effectiveness of law enforcement have been analyzed above and found wanting, except insofar as they might justify a protective order when applied to a particular fact situation.

On the other hand, the defendant has the privilege against self-incrimination and the attorney-client, doctor-patient, and husband-wife privileges to assert against discovery. Among its other safeguards, the fifth amendment privilege would probably protect a range of information equivalent to that protected for the prosecutor by the work product privilege. Concededly, that privilege alone spreads a wider insulatory

¹⁹⁷Whenever a second trial of the same case is held, after a mistrial or appellate reversal of a conviction, the prosecution has had discovery of the defense that the defendant presented at the original trial, including any testimony that the defendant himself gave. In most cases, this defense evidence will be the same at the retrial. The provision in the fifth amendment that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb" protects against prosecutorial misuse of this procedure merely to achieve a more favorable result at the second trial. *United States v. Jorn*, 400 U.S. 470 (1971); *Ashe v. Swenson*, 397 U.S. 436 (1970).

¹⁹⁸See text following note 158 *supra*.

¹⁹⁹See text accompanying note 159 *supra*.

net than all of the privileges that the prosecutor might claim. Like other evidentiary privileges, the privilege against self-incrimination is not a friend of open inquiry. Its justification lies in a complex of values independent of a search for facts.

The thesis of this Part is that prosecution discovery violates the fifth amendment privilege against self-incrimination. To develop that thesis, the relevant history and policies of the privilege against self-incrimination will first be explored, and then the arguments advanced to sustain the constitutionality of the three proposed forms of prosecution discovery will be discussed. Wherever defects in those arguments are discovered, the question of whether they can be remedied short of a complete denial of prosecutorial discovery will be considered. Finally, the reasons why the arguments in support of the constitutionality of prosecution discovery do not succeed will be explained.

History of the Privilege Against Self-Incrimination

The privilege against self-incrimination is not only enduringly carved into our fundamental Bill of Rights but is also crafted into the fabric of political and religious contentions out of which our country and our polity were woven. Its history is also the history of the Puritan dissenters who, with others, settled our political framework of freedom. Its emotional significance is coalesced into the basic American regard for the privacy of the individual, particularly in his thoughts and in his beliefs; for the limitation of substantive governmental power; and for the importance of procedural regularity as a safeguard against abuse of even legitimate governmental power. A creature of social ferment, the privilege in all its varied functions serves as a standard against repression and against oppression. So well, in fact, has it served its several offices that we easily and often become more conscious of its unavoidable side effect as a shelter for the guilty than of its many benefits, some of which are less immediate or more abstract.

Not accidentally, this most controversial of the provisions of our Bill of Rights is also the provision with the most obscure background in English and colonial history. It first found a place in a nation's charter when our Bill of Rights borrowed it from the constitutions of six of the colonies. It was not part of Magna Charta in 1215, and the English Bill of Rights and Petition of Right—both of which were drafted after the common law courts in England had recognized the privilege as a rule of evidence—did not provide for it.²⁰⁰

²⁰⁰Twining v. New Jersey, 211 U.S. 78, 91-92 (1908); C. McCORMICK, HANDBOOK OF THE

Elizabeth and Whitgift were the villainous names in the history of the privilege; "Free Born"²⁰¹ John Lilburn was the folk hero; and Sir Edward Coke was the legal champion. Parliament, and particularly the House of Commons, vying with the Crown to establish political prerogatives, played a key role as an antagonist of the establishment institutions—the Court of Star Chamber and the Court of High Commission.

Before Elizabeth's ascent to the throne, England's judicial responsibility had been divided between the common law courts, presided over by lay judges, and the ecclesiastical courts, presided over by bishops. During this period jurisdictional disputes between regal power and papal power were not uncommon.²⁰² By the statute *De Articulis Cleri* in the early fourteenth century, the jurisdiction of the ecclesiastical courts over laymen was limited to matrimonial and testamentary matters.²⁰³ Except for about seven years under Edward VI, the church also had the power to punish for heresy.²⁰⁴

After the demise of the ecclesiastical trials by ordeal or by compurgation oath, the church courts instituted a new procedure by which they questioned the accused as to the facts underlying the charge upon his oath to give truthful answers.²⁰⁵ Wigmore has called this oath "inquisitorial" by contrast with the compurgation oath.²⁰⁶

Now that the ecclesiastical courts could obtain information directly from the accused, an important distinction arose based upon the "prob-

LAW OF EVIDENCE § 120, at 255 (1954) [hereinafter cited as McCORMICK]; S. HOOK, *COMMON SENSE AND THE FIFTH AMENDMENT* 24 (1957); Baker, *Self-Incrimination: Is the Privilege an Anachronism?* 42 A.B.A.J. 633 (1956); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 764 (1935) [hereinafter cited as Pittman]; Williams, *Problems of the Fifth Amendment*, 24 FORDHAM L. REV. 19, 20 (1955).

²⁰¹Trial of Lieutenant-Colonel John Lilburne for High Treason, 4 Howell's State Trials 1269, 1270 n.† (1649): "Lilburne, it seems, had obtained the appellation of 'Free Born John.'" Lilburn himself spelled his name without an "e." See *Trial of John Lilburn & John Wharton, for Printing and Publishing Seditious Books*, 3 Howell's State Trials 1315 (1637).

²⁰²J. WIGMORE, *EVIDENCE* 270 (McNaughton rev. 1961) [hereinafter cited as WIGMORE]; Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination*, 10 VAND. L. REV. 485, 486 (1957) [hereinafter cited as Weintraub].

²⁰³5 BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 251 (1827) [hereinafter cited as BENTHAM]; 8 WIGMORE § 2250, at 271; Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, 25 CLEV. B.A.J. 91 (1954).

²⁰⁴McCORMICK § 120, at 253; 8 WIGMORE § 2250, at 277; Moreland, *Historical Background and Implications of the Privilege Against Self-Incrimination*, 44 KY. L.J. 267, 269 (1956); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 5-6 (1949) [hereinafter cited as Morgan].

²⁰⁵McCORMICK § 120, at 252; 8 WIGMORE § 2250, at 273-74; Weintraub 486.

²⁰⁶8 WIGMORE § 2250, at 273.

able cause" that had to exist before an accused could be compelled to take the oath.²⁰⁷ When a party was put to an oath merely by virtue of the official authority of the judge—without justified suspicion of guilt such as that supplied by accusing witnesses or even common report or notorious suspicion—in the hope of extracting a confession, the oath was called an "oath ex officio."²⁰⁸

The earliest inquiries under oath met with authoritative opposition based upon the forced subjection to inquisitional procedures. In the thirteenth century these oaths were conducted by Grosseteste, Bishop of London, "into the conduct and morals of both great and humble in his diocese, thereby causing serious injury to the reputation of many."²⁰⁹ They were successfully opposed by the King and Parliament.²¹⁰ In the fourteenth century the inquiries were conducted by the King's Council in criminal cases.²¹¹ These were also successfully protested by Parliament.²¹²

During Elizabeth's reign she tried to control the spiritual as well as the political leadership of England. Puritan attacks on the Anglican church created great religious divisions in her clergy.²¹³ The Queen regarded these attacks as attacks on her royal supremacy and demanded Anglican conformity.²¹⁴ "The very structure of the Tudor state implied a control of the national church, and basically a denial of the Queen's religious authority implied disobedience, indeed, even treason. No matter how much the Puritans protested their loyalty, their actions contradicted their words."²¹⁵

The House of Commons was sympathetic with the Puritans.²¹⁶ Lord Coke shared this sympathy.²¹⁷ During this important time he was speaker of the Commons, before becoming Chief Justice of the Court of Common Pleas and later of the King's Bench. At the same time, the Commons resented the imposition on their prerogatives of the Queen's

²⁰⁷McCORMICK 253; § WIGMORE § 2250, at 275; Weintraub 486-87.

²⁰⁸§ WIGMORE § 2250, at 275-76; Kemp, *The Background of the Fifth Amendment in English Law: A Study of its Historical Implications*, 1 WM. & MARY L. REV. 247, 249 n.5 (1958) [hereinafter cited as Kemp]; Morgan 1; Weintraub 487.

²⁰⁹Morgan 2.

²¹⁰*Id.* at 1-3.

²¹¹*Id.* at 4.

²¹²*Id.*

²¹³Kemp 254.

²¹⁴*Id.* at 254-55, 257.

²¹⁵*Id.* at 256.

²¹⁶*Id.* at 265.

²¹⁷§ WIGMORE § 2250, at 280; Kemp 274-76, 278.

refusal to allow them any discussion of the religious question. The period was one of constant unrest.

Queen Elizabeth activated the royal prerogative Court of Star Chamber to protect her political flank.²¹⁸ An offshoot of the Privy Council, Star Chamber had first been sanctioned by statute as early as 1487. Since it was a law court with broad statutory powers, including the use of the oath *ex officio*, and with a fluctuating membership that usually included the Chancellor and the two Chief Justices, it functioned for a long period of time without considerable criticism.²¹⁹

To protect her religious flank, Elizabeth established the Court of High Commission, vested in it the ecclesiastical authority over heretics, and constituted it as a court with power to impose sentences of fine, imprisonment, and even death.²²⁰ Like Star Chamber, this extraordinary court employed the oath *ex officio*.²²¹

Until the appointment of Whitgift, Archbishop of Canterbury, as its sixth Commissioner, the Court of High Commission had been lenient with the Puritans.²²² Whitgift, however, "became Elizabeth's trump card in her drive for religious conformity."²²³ Wigmore described Whitgift as "a man of stern Christian zeal, determined to crush heresy wherever its head was raised. He proceeded immediately to examine clergymen and other suspected persons, upon oath, after the extremest 'ex officio' style."²²⁴ Kemp described the use of the oath as follows: "Even where there was but a wisp of suspicion, men were cited before the commission and forced under oath to answer to their religious convictions and their conventicle activities."²²⁵ Wigmore concluded that the oath *ex officio* degenerated "into a merely unlawful process of poking about in the speculation of finding something chargeable."²²⁶

As the chief victims of the proceeding, the Puritans focused an attack on the oath *ex officio*.²²⁷ In response to criticism from them and their supporters, as well as from Parliament, which drew up a series of complaints against Whitgift's Commission, and from the common law

²¹⁸Weintraub 487.

²¹⁹5 BENTHAM 254; 8 WIGMORE § 2250, at 278-79 & n.43; Kemp 251-52.

²²⁰8 WIGMORE § 2250, at 278; Kemp 263; Morgan 7; Weintraub 487.

²²¹Morgan 7.

²²²Kemp 262-63.

²²³*Id.* at 262.

²²⁴8 WIGMORE § 2250, at 279. *See also* Kemp 262-63, 268 n.70.

²²⁵Kemp 263.

²²⁶8 WIGMORE § 2250, at 276.

²²⁷Kemp 263; Pittman 763, 773.

judges, who saw the High Commission impinging on their prerogatives, "Whitgift and the bishops . . . declared that if there were no oath they could not protect the establishment, for how else could they get information about ministers and parishes secretly going Puritan . . ." ²²⁸

The Puritans argued against the oath largely on the basis of freedom of conscience.²²⁹ Legal arguments raised against the oath dealt in the main, however, not with a direct attack against it, but rather with the authority of the Crown and its prerogative courts to use it.²³⁰ Coke's position was that the oath was legal only for the civil courts administered by Parliament, at least insofar as it was used in penal rather than matrimonial or testamentary causes.²³¹ He praised the Star Chamber even though it, too, used the oath *ex officio*.²³²

The scope of concerns responsible for the disrepute ultimately attaching to the oath *ex officio*, as well as the Star Chamber and High Commission themselves, is enmeshed in the revolutionary situation of the time. As a result, the reasons for their elimination are not clear. Although earlier the common law courts refused to interfere with the use of the oath *ex officio*, they later employed Coke's argument—that an ecclesiastical commission had no power to imprison—to justify use of the writ of habeas corpus to free men imprisoned by the High Commission.²³³

After James and then Charles had succeeded Elizabeth, the Court of High Commission, which had absorbed the greatest public condemnation for use of the oath *ex officio*, was abolished by statute in 1641.²³⁴ Another statute was also enacted then to prohibit the administration *ex officio* of a self-incriminating oath by any ecclesiastical authority.²³⁵ At the same time the Star Chamber was abolished,²³⁶ but the continuing controversy of a case that had been before it created the impetus for a general privilege against self-incrimination. Although many Puritans before John Lilburn—including Thomas Cartwright, the "Patriarch of the Puritans"—had refused to take the oath and been punished,²³⁷ the

²²⁸Kemp 265.

²²⁹*Id.* at 269-70, 280-81.

²³⁰*Id.* at 280-81.

²³¹*Id.* at 276-77.

²³²*Id.* at 280-81 & n.117.

²³³8 WIGMORE § 2250, at 280-81; Kemp 275-76; Morgan 7.

²³⁴McCORMICK § 120, at 254; 8 WIGMORE § 2250, at 283.

²³⁵McCORMICK § 120, at 254; 8 WIGMORE § 2250, at 283-84 & n.69.

²³⁶McCORMICK § 120, at 254; 8 WIGMORE § 2250, at 283.

²³⁷Kemp 264-65, 268-69.

timing and tenacity of Lilburn's pursuit of exoneration gave his case notoriety throughout London and all of England and a special historical significance.²³⁸

In 1637 at the age of twenty Lilburn was charged before the Star Chamber with sedition for printing and importing into England from Holland writings against the bishops.²³⁹ Lilburn freely answered questions about his period of residence in Holland and his acquaintanceship there with certain people.²⁴⁰ He also denied having sent any books into England.²⁴¹ Nevertheless, he balked at taking the oath to "make true 'answer to all things that are asked you.'"²⁴² He explained his position to the Court as follows:

I refused upon this ground, because that when I was examined, though I had fully answered all things that belonged to me to answer unto, and had cleared myself of the thing for which I am imprisoned, which was for sending Books out of Holland, yet that would not satisfy and give content, but other things were put unto me, concerning other men, to insnare me, and get further matter against me; which I perceiving refused, being not bound to answer to such things as do not belong unto me.²⁴³

Lilburn also compared the oath to the "High Commission Oath, which Oath I know to be both against the law of God, and the law of the land."²⁴⁴ Specifically invoking a privilege against self-incrimination, he told the Court: "I am unwilling to answer to any impertinent questions, for fear that with my answer I may do myself hurt."²⁴⁵

Unimpressed, the Court sentenced Lilburn to be whipped publicly.²⁴⁶ After the sentence was executed, he was put on the pillory for the rest of the day.²⁴⁷ He told the tip-staff of the Star Chamber: "Paul found more mercy from the heathen Roman Governors, for they would

²³⁸*Miranda v. Arizona*, 384 U.S. 436, 459 (1966); E. GRISWOLD, *THE FIFTH AMENDMENT TODAY* 3 (1955) [hereinafter cited as GRISWOLD]; 8 WIGMORE § 2250, at 282-83; Kemp 283; Morgan 9-10; Pittman 770.

²³⁹*Trial of John Lilburn & John Wharton, for Printing and Publishing Seditious Books*, 3 Howell's State Trials 1315 (1637).

²⁴⁰*Id.* at 1317-18.

²⁴¹*Id.* at 1317-18, 1321, 1324-25.

²⁴²*Id.* at 1317-18; *see id.* at 1325-26.

²⁴³*Id.* at 1321.

²⁴⁴*Id.* at 1323; *see id.* at 1325. *See also id.* at 1321.

²⁴⁵*Id.* at 1318.

²⁴⁶*Id.* at 1326.

²⁴⁷*Id.* at 1328-29.

not put him to an oath to accuse himself"²⁴⁸ At the pillory he sermonized at length against the Papist English Church.²⁴⁹ For that the Star Chamber ordered him imprisoned.²⁵⁰

On November 3, 1640,²⁵¹ Parliament met for the first time in eleven years. On that day Lilburn presented a petition to Parliament, which immediately ordered him set free.²⁵² The House of Commons followed this action with a resolution on May 4, 1641 that Lilburn's sentence was "illegal, and against the Liberty of the subject; and also bloody, cruel, wicked, barbarous, and tyrannical."²⁵³ It further resolved that reparation be paid to Lilburn and that the case be transmitted to the House of Lords.²⁵⁴ No specific legal basis for the resolution was noted.

It was not until four years later that the Commons, involved with other business, upon a new petition from Lilburn transmitted its resolution to the House of Lords.²⁵⁵ The Lords scheduled a hearing, at which Lilburn's attorney argued that the sentence was illegal because it was "contrary to the laws of God, nature, and the kingdom, for any man to be his own accuser."²⁵⁶ The Lords vacated Lilburn's sentence "as illegal, and most unjust, against the liberty of the subject, and law of the land, and Magna Charta"²⁵⁷ and later awarded him reparations, which he had little success in collecting.²⁵⁸

Although the crisis over the oath *ex officio* may have been inevitable in the revolutionary circumstances that existed in England at the time,²⁵⁹ it was in the aftermath of Lilburn's case that the privilege against self-incrimination achieved growing acceptance. By the end of the seventeenth century, "professional opinion apparently settled against the exaction of an answer under any form of procedure, in matters of criminality or forfeiture."²⁶⁰

²⁴⁸*Id.* at 1329.

²⁴⁹*Id.* at 1329-40.

²⁵⁰*Id.* at 1341.

²⁵¹*Id.* at 1342.

²⁵²*Id.*

²⁵³*Id.*

²⁵⁴*Id.*

²⁵⁵*Id.* at 1344-46.

²⁵⁶*Id.* at 1349.

²⁵⁷*Id.* at 1358.

²⁵⁸*Id.* at 1359-68.

²⁵⁹Kemp 284.

²⁶⁰8 WIGMORE § 2250 at 284. See also *Quinn v. United States*, 349 U.S. 155, 161 (1955); *McCORMICK* § 120, at 255; Kemp 285; McNaughton, *The Privilege Against Self-Incrimination*, 51 J. CRIM. L.C. & P.S. 138, 149 (1960); Morgan 9, 10-11; Pittman 774.

During this same period the privilege against self-incrimination won widespread acceptance in our colonies.²⁶¹ The notable exception²⁶² was in the Royal Courts of the Governor and Council,²⁶³ whose "proceedings were very inquisitional and oftentimes overbearing."²⁶⁴ On June 12, 1776, Virginia adopted the Bills of Right drafted by George Mason.²⁶⁵ Section eight provided among other procedural rights in capital or criminal prosecutions the right of a man not to "be compelled to give evidence against himself."²⁶⁶ North Carolina, Pennsylvania, and Vermont adopted the Virginia language.²⁶⁷ Maryland did too but added a power in the legislature to modify it.²⁶⁸ Massachusetts and New Hampshire adopted the following format: "No subject shall be . . . compelled to accuse or furnish evidence against himself."²⁶⁹ In the fifth amendment²⁷⁰ the equivalent provision reads as follows: "No person . . . shall be compelled in any criminal case to be a witness against himself."

Policies of the Privilege Against Self-Incrimination

In seventeenth century England the most cogent legal argument available to nullify the oath *ex officio*—no fifth amendment equivalent then existing—was Coke's argument that it was being exercised beyond the powers of the Court of High Commission because the jurisdiction of that tribunal was limited to matrimonial and testamentary affairs and did not include inquiries into heresy. However, it would be a mistake to think that such was the full extent of the dissatisfaction with the oath.²⁷¹ That argument was not so effective against the Star Chamber,²⁷²

²⁶¹McCORMICK § 120, at 255; 8 WIGMORE § 2250, at 293-95; Morgan 19; Pittman 775-81.

²⁶²The privilege against self-incrimination was also not recognized in the Salem witch trials of the 1690's. "Many of the accused persons claimed their privilege not to accuse themselves but every human right and privilege became valueless before the driveling victims of mob insanity." Pittman 782-83.

²⁶³Pittman 783-85.

²⁶⁴*Id.* at 783-84.

²⁶⁵*Id.* at 787.

²⁶⁶*Id.*

²⁶⁷GRISWOLD 6; Morgan 22 & n.86; Pittman 788.

²⁶⁸Pittman 788.

²⁶⁹*Id.*

²⁷⁰The fifth amendment applies to the states through the fourteenth amendment. *Malloy v. Hogan*, 378 U.S. 1, 3, 6 (1964).

²⁷¹8 WIGMORE § 2250, at 271, 289; Morgan 5; see Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 694 (1951) [hereinafter cited as Meltzer].

²⁷²8 WIGMORE § 2250, at 281.

and it was in that infamous political court that the oath *ex officio* met its match in John Lilburn. In evaluating the odium for the oath, we must look not only to the relative technicality urged by Coke and the jealousy that motivated Parliament but also to the views of its Puritan victims, whose contribution to the struggle against the oath and the extraordinary courts that took advantage of it was crucial to the victory.²⁷³ Moreover, the relatively routine way in which the privilege against self-incrimination became a part of the law of the common law courts soon after the demise of Star Chamber and High Commission evidences a broader concern with the evils of the oath *ex officio* than merely its *ultra vires* exercise.²⁷⁴

No doubt, there was some confusion between the attack on the power of the spiritual courts even to entertain certain causes and its power to institute proceedings by the *ex officio* oath. But there can equally be no doubt that to the common lawyers a system which required a person to furnish his own indictment from his own lips under oath was repugnant to the law of the land.²⁷⁵

The constitutional privilege against self-incrimination is certainly not confined by its history. "[I]t is as broad as the mischief against which it seeks to guard."²⁷⁶ Since the privilege represents a complex of

²⁷³Kemp 266-67.

²⁷⁴"The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand." *Brown v. Walker*, 161 U.S. 591, 597 (1896); cf. 5 BENTHAM 241-44; 8 WIGMORE § 2250, at 291-92.

Bentham explained the development of the privilege in the common law courts as follows: In a state of things like this, what could be more natural than that, by a people infants as yet in reason, giants in passion, every distinguishable feature of a system of procedure directed to such ends should be condemned in the lump, should be involved in one undistinguishing mass of odium and abhorrence; more especially any particular instrument or feature, from which the system was seen to operate with a particular degree of efficiency towards such abominable ends? If, then, in the ordinary courts of law, the practice with respect to the admission of this sort of information was wavering, or the opinion of the profession hesitating, nothing could be more natural than that the observation of the enormous mass of mischief and oppression to which it was continually made subservient, should turn the scale.

5 BENTHAM 244.

Bentham characterized that development as follows: "Whatever Titius did was wrong: but this is among the things that Titius did; therefore this is wrong: such is the logic from which this sophism is deduced." *Id.* at 241.

²⁷⁵Morgan 9.

²⁷⁶*Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). See also *Miranda v. Arizona*, 384 U.S. 436, 459 (1966).

fundamental values, analysis of its applicability to a particular situation is incomplete if it isolates one or more such values and studies the extent to which they are furthered in that context.²⁷⁷ Its narrow and its broad objectives must be given wide berth since "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure."²⁷⁸ Its effectiveness depends on its enforcement not only by the United States Supreme Court, which might be able to draw fine distinctions based on variations in fact patterns developed before it, but also by the full panoply of judicial, legislative, administrative, and police caretakers dispersed throughout the country, each with more or less of a discerning eye for the subtleties of careful distinctions and more or less of a sensitivity to the broadly conceived values underlying the privilege.

The Interrogation Policy. The historical development of the privilege holds a special lesson for prosecution discovery. The more that the oath *ex officio* was relied upon for discovery of incriminating information—that is, the less evidence the inquiring tribunal had independently gathered against the accused—the greater was the resentment that it deserved. Thus, the fifth amendment serves no greater value than when it operates in the investigatory or discovery stage of a criminal trial. With the increasing sophistication of the privilege against self-incrimination in our criminal procedure, its importance as "a barrier to the 'drag-net' philosophy of law enforcement"²⁷⁹ has only increased.

One danger in criminal discovery by the prosecution is that the government would be thereby equipped to interrogate citizens about their activities more or less at will. "We want no official issuing 'show cause' orders forcing citizens to justify themselves or go to jail."²⁸⁰ The

²⁷⁷Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, 56 n.5 (1964); 8 WIGMORE § 2251, at 296.

²⁷⁸Boyd v. United States, 116 U.S. 616, 635 (1886).

²⁷⁹Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CAL. L. REV. 89, 98 (1965).

²⁸⁰*Id.* On two counts this constitutional concern is not inconsistent with the view that the prosecution may raise no cognizable objection to a defense fishing expedition through its files. First, no policy equivalent to the privilege against self-incrimination protects prosecutorial privacy. Second, the defendant's position in a criminal case differs from that of the prosecution in that he has not initiated the action. Since the defendant is the involuntary focus of the proceeding, the legitimacy of his interest in the relevant files of the prosecutor is manifest. He is not searching at random for information in order to harass or embarrass the government. By bringing its prosecutorial forces to bear on the defendant, the government, on the other hand, necessarily concedes the propriety of his interest in its files. When the government is doing the fishing, it is not responding to a charge of the defendant. It has unilaterally determined that it has an interest in information in the possession of the defendant.

fifth amendment applies before trial both to procedures that ordinarily precede a criminal trial—such as police investigations,²⁸¹ grand jury proceedings, and preliminary hearings²⁸²—and to procedures that are not ordinarily associated with criminal trials but may supply evidence for use in such trials if incriminating testimony is elicited during their course—such as legislative²⁸³ or administrative²⁸⁴ hearings or civil trials.²⁸⁵ It is important that it also apply to discovery.

A requirement that the prosecution establish probable cause to believe that the defendant committed a crime and a limitation on discovery to information regarding that suspected crime would narrow the scope of the government's investigation. It would not, however, preclude a general search for evidence. The formulas for probable cause afford no assurance that without the privilege against self-incrimination the government would curtail its employment of discovery to those cases in which it already had substantial evidence; these are the cases in which, by hypothesis, the government stands least in need of discovery, except arguably for information about affirmative defenses. "History teaches that too ready availability of the accused as the source of the evidence against him inevitably tempts the state to intrude too much."²⁸⁶

We are far from free of such temptations in our criminal as well as in our legislative²⁸⁷ or administrative²⁸⁸ inquiries. Combatting police custodial interrogation techniques that involve psychological as well as physical coercion has been an important business of our courts, culminating in *Miranda v. Arizona*²⁸⁹ in the application of the fifth amendment prophylactic. Informers to report or ferret out evidence of crimes, often crimes not yet committed or perhaps not even contemplated upon dispatch of the informers, are employed by law enforcement agencies

²⁸¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁸²*E.g.*, *Stevens v. Mark*, 383 U.S. 234 (1966).

²⁸³*Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Emspak v. United States*, 349 U.S. 190 (1955); *Quinn v. United States*, 349 U.S. 155 (1955).

²⁸⁴*E.g.*, *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965); *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

²⁸⁵8 WIGMORE §§ 2268-69, at 402-05, 411-13.

²⁸⁶*Goldstein*, *supra* note 10, at 1197.

²⁸⁷*See Emspak v. United States*, 349 U.S. 190 (1955); *Hoffman v. United States*, 341 U.S. 479 (1951).

²⁸⁸*Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Boudin*, *The Constitutional Privilege in Operation*, 12 LAW. GUILD REV. 128, 129, 149 (1952); *Fortas*, *supra* note 203, at 101.

²⁸⁹384 U.S. 436 (1966).

without meeting any preliminary conditions—not even the minimal requirement of probable cause.²⁹⁰ Despite the fifth amendment protections afforded to criminal suspects in announced police investigations,²⁹¹ no opportunity to claim the privilege against self-incrimination is given to the subjects of undercover surveillance.²⁹²

The grand jury, guided by the government's prosecutor, necessarily undertakes its investigations without first satisfying itself or any judicial tribunal that there is cause to do so. When the grand jury is inquiring into the improprieties of its witnesses themselves, it is employing a form of the oath *ex officio*. Such witnesses are guaranteed the privilege against self-incrimination, which they can exercise if they are aware that the grand jury is probing their activities or are reasonably concerned that it might be. The grand jury proceeding is conducted in the absence of any judge, however, and the closest that the witness may have his attorney is outside the door to the grand jury chamber. In order to secure the advice of counsel concerning the potentially incriminating character of questions propounded to him, the witness must regularly report secondhand the proceedings to the attorney.

The "First Amendment" Policy. Another important impression from the historical development of the privilege against self-incrimination must be of the close connection between the original need for the privilege and the struggle for political and religious freedom. Although the first amendment supplies most of our protection for freedom of conscience, it is complemented by the fifth amendment.²⁹³ The first amendment does not purport to prohibit all inquiry into beliefs. "There is no solid tradition of official self-restraint in the 'anti-belief' area and no established privilege not to disclose matters related closely to religious, political and moral beliefs and activities."²⁹⁴ Nor does the fifth amendment block all inquiry into belief. It bars such inquiry only when it would have a tendency to elicit incriminating responses.²⁹⁵

Although the privilege against self-incrimination applies to crimi-

²⁹⁰United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966). Bentham believed that the privilege against self-incrimination was responsible for the law-enforcement need for informers. 5 BENTHAM 219-20.

²⁹¹Miranda v. Arizona, 384 U.S. 436 (1966).

²⁹²See cases cited note 290 *supra*. But cf. Massiah v. United States, 377 U.S. 201 (1964).

²⁹³WIGMORE § 2251, at 313-14; Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CINN. L. REV. 671, 696 (1968) [hereinafter cited as Friendly]; McKay, Book Review, 35 N.Y.U.L. REV. 1097, 1100-01 (1960); McNaughton 149 n.50.

²⁹⁴WIGMORE § 2251, at 314. See also Boudin, *supra* note 288, at 149.

²⁹⁵Judge Friendly has written: "The trouble in this area is not that the privilege is too broad

nal cases generally, it is most useful in the category of criminal cases that involve inquiry into speech, religion, and association. As Dean, now Solicitor General, Griswold has written,

Where matters of a man's belief or opinions or political views are essential elements in the charge, it may be most difficult to get evidence from sources other than the suspected or accused person himself. Hence, the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offenses as heresy or political crimes.²⁹⁶

The Privacy Policy. Like the fourth amendment and other provisions of the Bill of Rights,²⁹⁷ the fifth amendment also provides important protection for the privacy of the individual and thus helps to delineate "the proper scope of governmental power over the citizen."²⁹⁸ In *Griswold v. Connecticut*²⁹⁹ the Supreme Court said: "The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment." Judge Frank has said that the privilege against self-incrimination affords an individual a substantive "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy."³⁰⁰ After quoting that language and confirming its concept, the Supreme Court in *Miranda v. Arizona*³⁰¹ said:

All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual

but that it is not broad enough. Why should resistance to governmental prying into a man's ideological views require him to make a claim, often farfetched and possibly beyond what he can conscientiously do, that an answer would tend to incriminate him?" Friendly 696.

²⁹⁶GRISWOLD 8-9. See also Boudin, *supra* note 288, at 128-29.

²⁹⁷See *Griswold v. Connecticut*, 381 U.S. 479, 482-86 (1965).

²⁹⁸*Miranda v. Arizona*, 384 U.S. 436, 460 (1966). See also *United States v. Wade*, 388 U.S. 218, 260-61 (1967) (Fortas, J., concurring and dissenting).

²⁹⁹381 U.S. 479, 484 (1965).

³⁰⁰*United States v. Grunewald*, 233 F.2d 566, 581-82 (2d Cir. 1956) (dissenting opinion), *rev'd*, 353 U.S. 391 (1957). See also *Tehan v. Shott*, 382 U.S. 406, 415-16 (1966); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964); 8 WIGMORE § 2251, at 317; Fortas 97-98; McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 210-14; Louisell, *supra* note 279, at 95.

³⁰¹384 U.S. 436, 460 (1966).

produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. . . . In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will."

Other purposes of the privilege³⁰² are less relevant in discovery than in other contexts and need not be discussed here. Since discovery would be accomplished through formal procedures, there should be no concern, for example, about torture, overbearing, or bullying, against which the fifth amendment protects.³⁰³

Discovery and the Privilege Against Self-Incrimination

Because subject to judicial supervision, the developments in prose-

³⁰²See generally *Griffin v. California*, 380 U.S. 609, 613 (1965); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964); 8 WIGMORE § 2251.

³⁰³See 8 WIGMORE § 2251, at 315-16. If prosecution discovery is constitutional, it can be enforced by allowing comment to the jury on a defendant's failure to comply with a proper order. See *Griffin v. California*, 380 U.S. 609 (1965); *People v. Ellis*, 65 Cal. 2d 529, 539, 421 P.2d 393, 399, 55 Cal. Rptr. 385, 391 (1966); Meltzer, *supra* note 271, at 692. In addition, the defendant or his attorney might be punished for contempt. See *In re Marcario*, 2 Cal. 3d 329, 466 P.2d 679, 85 Cal. Rptr. 135 (1970); *Rodriguez v. Superior Court*, 9 Cal. App. 3d 493, —, 88 Cal. Rptr. 154, 157 (1970). Other remedies for noncompliance, such as precluding the defendant from raising a defense or from utilizing at trial nondisclosed evidence, raise additional constitutional problems. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 206 n.36 (1946), discussing *Boyd v. United States*, 116 U.S. 616 (1886): "The vitiating element [in *Boyd*] lay in the incriminating character of the unusual provision for enforcement. The statute provided that failure to produce might be taken as a confession of whatever might be alleged in the motion for production." The statute permitted the prosecuting attorney to argue that had the document been produced it would have provided what he claimed it would. *Boyd v. United States*, 116 U.S. 616, 621-22 (1886).

The remedy provided by the Florida statute was that any evidence other than defendant's own testimony offered to prove the alibi could be excluded. *Williams v. Florida*, 399 U.S. 78, 80, 104-05 (1970). In *Williams* the defendant did make disclosure so the question of a penalty for his failing to do so did not arise. *Id.* at 83 n.14.

See also *State ex rel. Simos v. Burke*, 41 Wis. 2d 129, 163 N.W.2d 177 (1968). In that case even the defendant was not allowed to testify regarding his alibi defense for failure to give pretrial notice of his intention to do so.

Rule 16(g) of the Federal Rules of Criminal Procedure makes the following provision for violation of a discovery order by either the prosecutor or the defendant:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, 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.

It would be hard to accept a concept by which an innocent man might be convicted of a serious crime only because a less serious refusal to comply with a procedural order barred proof of his defense, at least where alternatives for enforcement of the order were available.

cutorial discovery differ markedly from such procedures as custodial interrogation. Although nothing in fifth amendment analysis turns on the presence of such supervision and although a judge no more than a police officer, a grand juror, a legislator, or an administrative officer may compel a defendant to incriminate himself, judicial supervision may be an important factor because the distinctions drawn by the suggested provisions for discovery from the defendant, if they succeed in avoiding conflict with the fifth amendment at all, may require judicial determination of close questions. The trend toward such prosecutorial discovery has just survived its first scrutiny by the United States Supreme Court in *Williams v. Florida*,³⁰⁴ and that success is sure to spur increasing interest by the states in provisions for discovery from the defendant.³⁰⁵

Rule 16(c) of the Federal Rules of Criminal Procedure is a model³⁰⁶ for broad prosecutorial discovery.³⁰⁷ In an attempt to prevent overreaching of the prosecution discovery into the realm protected by the privilege against self-incrimination, rule 16(c) invests prosecutorial discovery with a reciprocal or conditional character by making it available only when the defendant himself successfully seeks discovery.³⁰⁸

³⁰⁴399 U.S. 78 (1970).

³⁰⁵The American Bar Association Advisory Committee on Pretrial Proceedings originally rejected prosecution discovery for non-constitutional reasons; after the decision in *Williams*, it changed its position. ABA ADVISORY COMM. 3-6 (Supp. Oct. 1970).

³⁰⁶Some of the states have already followed the federal model. *E.g.*, DEL. SUPER. CT. (CRIM.) R. 16(c); FLA. R. CRIM. P. 1.220(c).

³⁰⁷FED. R. CRIM. P. 16(a)(2), (b) provide for defense discovery of the results or reports of physical or mental examinations or scientific tests or experiments made in connection with the case and other material books, papers, documents, or tangible objects, buildings, or places. Paragraphs (a)(1) and (3) of rule 16 provide for defense discovery of defendant's statements, including his recorded testimony before a grand jury.

³⁰⁸FED. R. CRIM. P. 16(c) provides as follows:

If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorney or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

In dissenting statements to the transmittal of the amendment to the Federal Rules of Criminal

The reciprocity does not, however, limit prosecution discovery to the subject matter of the defense discovery. The rule also limits the thrust of a discovery order to documentary and other physical evidence that the defendant intends to produce at the trial. In addition, the rule authorizes discovery only when the prosecution's request is reasonable and for material information. It does not provide for discovery of the names of witnesses other than those revealed in the discoverable evidence and specifically excludes from discovery witnesses' statements and the defense attorney's work product.

Although the Supreme Court has not yet passed upon the constitutionality of rule 16(c), its recent decision in *Williams v. Florida*³⁰⁰ offers guidance in resolving the questions of whether prosecutorial discovery can be fashioned to avoid conflict with the fifth amendment and whether rule 16(c) has done so. In *Williams* the Supreme Court sustained the constitutionality of a Florida law requiring "a defendant, on written demand of the prosecuting attorney, to give notice in advance of trial if the defendant intends to claim an alibi, and to furnish the prosecuting attorney with information as to the place he claims to have been and with the names and addresses of the alibi witnesses he intends to use."³¹⁰ The reasoning that the Court used to uphold this statute against a fifth amendment challenge followed closely that employed by Chief Justice Traynor for the California Supreme Court in *Jones v. Superior Court*.³¹¹ *Jones* dealt with an impotency defense to a rape charge rather than an alibi defense. It arose after the defendant had disclosed his intent to rely on impotency as a defense in a motion for a continuance to gather necessary medical evidence. The *Jones* discovery order was limited to the identities, reports, and Xrays of doctors. In all other factual respects, *Williams* and *Jones* are identical.³¹²

Procedure that included this rule 16(c), Justices Black and Douglas said that the rule raises a serious question under the fifth amendment privilege against self-incrimination. Amendments to the Rules of Criminal Procedure, 39 F.R.D. 69, 272, 276, 278 (1966). Justice Douglas pointed out that the rule was approved by a narrow majority. *Id.* at 279.

A proposed amendment to rule 16 suggests eliminating the conditional character of prosecution discovery and providing a right to such discovery independent of any request for discovery by the defendant. Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, 48 F.R.D. 547, 591, 596 (1970).

³⁰⁰399 U.S. 78 (1970).

³¹⁰399 U.S. at 79 (footnote omitted).

³¹¹58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

³¹²In *Williams* the discovery order was based on a statute; in *Jones* it was not. The dissenting justices in *Jones* argued that prosecution discovery should at least await legislative action, but they did not suggest that this factor was of fifth amendment significance. *Id.* at 68-69, 372 P.2d at 926-

Both cases involved discovery orders that were narrower in one respect and broader in another than those permitted by rule 16(c). They were narrower in that each limited the required production to evidence relating to one particular defense. They were broader in that both included the identity of witnesses within their scope. Whether those differences are material should appear from an examination of the reasoning in favor of the constitutionality of the *Williams* and *Jones* discovery orders.

The *Jones* rationale emphasized two factors in the case: first, that defendant was required to disclose only information relating to an affirmative defense; second, that defendant was required to disclose only information that he intended to produce at trial anyway. In consequence of both of these factors, the court reasoned that the discovery order did not compel defendant to disclose anything; it merely regulated the timing of a disclosure that he was already planning to make by accelerating it from the time he would be called upon to present his defense at trial to the pre-trial stage. As Chief Justice Traynor later explained, "Neither the privilege against self-incrimination nor the due process requirements of a fair trial fix the time when the prosecution has presented its evidence at the trial as the only procedural hour at which the defendant can be required to make his decision whether to remain silent or present his defense."³¹³

The significance of the fact that only an affirmative defense is involved would seem to be that by disclosing information material only to such a defense, presumably the defendant does not risk supplying evidence useful to the prosecutor in the presentation of his case-in-chief. Thus, the value of the disclosure to the prosecutor is not that it enables him to build his case against the defendant but only that it enables him to prepare to meet defenses that the defendant has the responsibility to raise. In this context, an affirmative defense³¹⁴ should be defined in terms of two considerations extrapolated from these cases: first, it should be a defense in which the burden of going forward with the evidence is on the defendant; secondly, it should be a defense that estab-

27, 22 Cal. Rptr. at 886-87. One of the dissenters, Justice Peters, also disagreed with the majority that there was not a fifth amendment violation in the order. *Id.* at 62-68, 372 P.2d at 922-26, 22 Cal. Rptr. at 882-86.

³¹³Traynor, *supra* note 6, at 248.

³¹⁴The *Williams* opinion did not talk in terms of affirmative defenses, though it did involve one that meets the definition in the text. The *Jones* opinion did use that language. 58 Cal. 2d at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882. It is helpful to begin a discussion of both of those cases with an assumption that only affirmative defenses are involved.

lishes facts other than those occurring at the time and place of the crime to affect inferentially the determination of what did then and there take place. The impotency and alibi defenses qualify under both aspects of this definition. In order to survive a defense motion for judgment of acquittal, the prosecutor need not prove that the defendant was sexually competent or that he was not every place else in the world except the crime scene at the time of the crime. For the purposes of his case-in-chief, he amply establishes the related elements of the offense if he presents the victim's testimony that she was raped, in *Jones*, or eyewitness or other evidence placing the defendant at the scene of the crime, in *Williams*. His initial presentation is not significantly enhanced by additional evidence that the defendant was not impotent or that he was not at home, not at Barney's saloon, or not any place other than the crime scene.

If this is true, then as long as the defendant is required to disclose only evidence that he intends to produce at trial himself, *Williams* and *Jones* argue that the discovery order does not require him to supply the prosecution evidence tending itself to establish some element of defendant's guilt or to furnish leads to such evidence. Under this analysis the discovery order does compel the defendant to incriminate himself in the broad sense of helping the prosecution to convict him. It does not, however, compel him to incriminate himself in the direct sense of accusing or serving as the source of the evidence against himself. Whatever self-incrimination might inhere in the assistance supplied the prosecutor's preparation is no different from what is routinely available to the prosecutor through a combination of the defendant presenting his evidence in defense at trial and the court at that time granting a prosecution motion for a continuance to prepare its rebuttal. No violation of the privilege against self-incrimination is therefore involved; instead, there is only a procedural adjustment to avoid delay in the trial that in no way impairs or burdens the defendant's right to remain silent. Thus viewed, the real advantage of discovery is not to the prosecutor but to the orderly processes of trial.

In *Williams* the Court further argued that the discovery order did not interfere with the defendant's right to await the close of the prosecution's case before electing whether to rely on his affirmative defense or to abandon it in light of developments at trial or among his witnesses. By disclosing an alibi defense to the prosecution, the defendant does not commit himself to using it. As long as the prosecution does not engage in conduct such as promising the jury in opening argument that the defendant will raise a particular affirmative defense, which should for

this reason be considered improper argument,³¹⁵ the defendant is still free to defend or remain silent when his turn comes in the trial procedure.

Certainly it is true that if prosecution discovery is permitted the defendant might lose some incidental advantages from withholding his affirmative defense until trial. For example, during the interim between arrest and trial rebuttal evidence might otherwise become unavailable or more difficult to discover or locate, or a prosecutor might not request a continuance because of the inconvenience to jurors. However, protection of these kinds of advantages does not comport with any policy of the privilege against self-incrimination.

That is the argument in favor of the constitutionality of prosecution discovery. The critical element in this analysis clearly is its conclusion that the procedure for advance disclosure of affirmative defenses does not involve the defendant in providing evidence that is useful for the prosecutor's case-in-chief.³¹⁶ In *Williams* the Supreme Court did not specifically argue that the evidence subject to discovery was not incriminating. Instead, it argued that there was no compulsion within the meaning of the fifth amendment because only the same pressures that operate on a defendant to present a defense at trial operate on him to provide pretrial discovery. The validity of this argument is, however, a function of whether the evidence disclosed carries incriminating information. If it does, then the defendant is being compelled to help the prosecution

³¹⁵In the course of its argument on this question, the Court in *Williams* said: "Nothing in such a rule requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice." 399 U.S. at 84-85. In a footnote the Court pointed out that nothing occurred in the case before it to force the defendant into presenting an affirmative defense. The Court said:

On these facts, then, we simply are not confronted with the question of whether a defendant can be compelled in advance of trial to select a defense from which he can no longer deviate. We do not mean to suggest, though, that such a procedure must necessarily raise serious constitutional problems. See *State ex rel. Simos v. Burke*, 41 Wis. 2d 129, 137, 163 N.W.2d 177, 181 (1968) ("[i]f we are discussing the right of a defendant to defer until the moment of his testifying the election between alternative and inconsistent alibis, we have left the conception of the trial as a search for truth far behind").

Id. at 84-85 n.15. See also *State v. Cocco*, 73 Ohio App. 182, ___, 55 N.E.2d 430, 432 (1943). The suggested result would ignore the circumstance that the government has no legitimate interest in locking a defendant into a defense before trial. Its interest in expediting the judicial process may justify advance disclosure of contemplated affirmative defenses so that the prosecutor may be prepared to meet them, if he can, at trial without the necessity of a continuance. That interest is served without depriving the defendant of flexibility of response to developments.

³¹⁶See *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 326, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970).

prepare its case-in-chief—something the defendant does not do by presenting a defense. In this way the defendant may even be required to give the prosecution evidence essential to establish a case strong enough to survive a motion for judgment of acquittal or a directed verdict, or strong enough to put pressure on the defendant to present a defense that he might otherwise have decided was unnecessary. Thus, even analyzed from the requirement of compulsion as discussed by the majority in *Williams*, the crucial question in considering the constitutionality of prosecution discovery is whether the demanded evidence could tend to incriminate the defendant. If the disclosure compelled by the court's discovery order carries damaging evidence, more than a procedural adjustment is involved. The defendant would then be the source of part of the prosecution's case.

The Limitation to Evidence the Defendant Intends to Produce at Trial. On this basis, the argument is defective. It is not difficult to imagine circumstances in which the *Williams* and *Jones* discovery orders might compel a defendant to divulge other than wholly exculpatory evidence. An alibi witness, for example, might be able to confirm the defendant's innocent whereabouts for most of the time surrounding the occurrence of the crime. If, however, during the critical time frame there is a lag during which the defendant and his witness were separated, the witness might become a source of government evidence of the defendant's availability to commit the crime, thus serving to support evidence placing him at the scene. Such a circumstance would be consistent with the innocence of the defendant. For example, if the defendant is charged with a Monday-night murder in his neighborhood, he might have an alibi defense with friends prepared to testify that they were watching a televised football game with the defendant during the hours in which the crime occurred. If the defendant, however, left the house on an errand during half-time and, perhaps, even returned late for the second half, he will know that the testimony of his alibi witnesses may damage him as far as the period of time of his absence is concerned. He will decide whether to risk the ambiguity of his defense depending upon the strength of the case against him developed at trial. If his failure to disclose his alibi and supporting witnesses to the prosecution before trial will foreclose him from raising it at trial, to protect his option he may be compelled to supply evidence that the prosecution itself could utilize. In this circumstance the defendant may be forced either to incriminate himself or to abandon his alibi defense for fear of harming himself by disclosing it before he has had a chance to take the measure of the evidence against him. This dilemma may be more cruel to the innocent

accused, who will likely assume a weak prosecution case and more readily decline to bolster it with evidence susceptible of incriminating interpretation even if it means foregoing a defense. "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."³¹⁷

Although the discovery order in *Jones* necessitated a disclosure only of medical evidence, it was also capable of compelling disclosure of directly incriminating evidence. If the alleged impotency had been psychological in origin, medical reports might have contained a discussion of defendant's psychiatric history, possibly including aggressive emotional disorders from which an inference of his predisposition to violent crime might have been drawn. *Jones* likely did not present any such possibility; the defendant in that case was apparently relying on physical impotency caused by injuries he had suffered earlier, although the implication of consequent psychological impediments was not precluded.

Direct incrimination is even a more likely consequence of a discovery order that is broader than the affirmative-defense limitation, even if it applies only to evidence that the defendant intends to produce on his own behalf. In *Grunewald v. United States*³¹⁸ defendant had claimed the fifth amendment before a grand jury and later at his trial answered in a manner consistent with his innocence the same questions that the grand jury had asked. In holding that it was improper for the prosecuting attorney to try to impeach defendant with his prior claim that his answers might tend to incriminate him, the Supreme Court observed:

Had he answered the questions put to him before the grand jury in the same way he subsequently answered them at trial, this nevertheless would have provided the Government with incriminating evidence from his own mouth. For example, had he stated to the grand jury that he knew Grunewald, the admission would have constituted a link between him and a criminal conspiracy, and this would be true even though he was entirely innocent and even though his friendship with Grunewald was above reproach.³¹⁹

The following are examples of innocent disclosures that might establish factual elements of the prosecution's case: evidence that the

³¹⁷*Slochower v. Board of Higher Educ.*, 350 U.S. 551, 557-58 (1956). See also *Grunewald v. United States*, 353 U.S. 391, 421 (1957).

³¹⁸353 U.S. 391 (1957).

³¹⁹*Id.* at 421-22.

defendant was acting under a mistake of fact; evidence that he was acting in self-defense; evidence that he was merely a bystander; or evidence that he lacked the required mens rea. Although defenses such as mistake-of-fact and self-defense might be considered affirmative defenses because the defendant has the burden of going forward with the evidence, they do not meet the second element of an affirmative defense as defined for present purposes because they will ordinarily depend on facts occurring at the scene of the crime. For example, a witness who can testify that the victim was threatening the defendant when he was killed ordinarily will also be able to testify that the defendant committed the homicide or at least that he was in a position to do so. If the identity of this witness is disclosed to the prosecution before trial, he might become the prosecution's sole eyewitness to the alleged homicide and substantially strengthen a circumstantial case.³²⁰ The defendant might also be compelled to bolster the prosecution's prima facie case if he is required to disclose evidence he intends to use only as a last resort to establish that he was responsible for only a lesser included offense.³²¹

Arguably, the problems raised by these and other possibilities could be obviated by a protective-order procedure. Even if prosecution discovery orders were routinely granted, the defendant might be permitted specially to plead the privilege against self-incrimination as a bar to discovery from him if he asserts that unusual circumstances in his case would result in compulsory disclosure of incriminating evidence.³²² The defendant's invocation of the special plea would be subject to judicial review when he later produced the evidence at trial. If he never did, the government would have lost nothing in its trial preparation by not having been apprised of the evidence.

The Limitation to Cases in which the Defendant Has Received Discovery. The presence of defense discovery is a factor common to rule 16(c), *Williams*, and *Jones*. This factor takes a slightly different form in each. Rule 16(c) expressly makes prosecutorial discovery a condition of defense discovery and provides a broad discovery procedure that a defendant may invoke. In *Williams* the Florida statute required a prosecuting attorney who had received alibi discovery from a defendant to

³²⁰See *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 327, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970); *GRISWOLD* 9.

³²¹*Prudhomme v. Superior Court*, 2 Cal. 3d 320, 327, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970).

³²²*Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 195, 208-09 (1946); see *United States v. Sullivan*, 274 U.S. 259, 263 (1927); *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

disclose to the defendant the names and addresses of his rebuttal witnesses to the alibi defense.³²³ Florida also provides a defendant with broad discovery independent of the alibi defense,³²⁴ and the Court noted that defendant had utilized those discovery provisions.³²⁵ In a footnote disclaiming any opinion on the constitutionality of notice-of-alibi rules in states other than Florida, the Court said: “[T]hat conclusion must await a specific context and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the State.”³²⁶ *Jones* arose in the context of California’s system of broad discovery. The California Supreme Court did not specifically rely on this factor in reaching its decision, but Chief Justice Traynor, in later discussing that decision, argued that the defendant “can hardly demand pretrial discovery and still insist on reserving his own surprises for the trial.”³²⁷

According to one possible evaluation of the relationship between defense discovery and the defendant’s privilege against self-incrimination, the defendant, as a condition of requesting and receiving discovery, may be required to waive his right to assert the fifth amendment privilege against prosecution discovery. This evaluation fits the scheme of rule 16(c) better than it does the *Williams* and *Jones* cases. Rule 16(c) provides prosecution discovery only upon the granting of a defense discovery motion. Consequently, the defendant retains control over whether the prosecution has access to his information. By contrast, the initiative for discovery in *Williams* and *Jones* may be with the prosecution; its right to discovery does not necessarily depend upon the defendant’s actually seeking discovery himself. In *Williams* the Court discussed Florida’s liberal discovery provisions and, also, the discovery obligation of the prosecution as a condition of its—not defendant’s—receiving discovery. The Court did so in the context of its argument that the notice-of-alibi provision did not violate general due process—not in its fifth amendment discussion. Nor did the court in *Jones* rely on California’s defense discovery law in rejecting the fifth amendment challenge.

Even as applied to rule 16(c), the waiver reasoning cannot succeed.

³²³399 U.S. at 80.

³²⁴FLA. R. CRIM. P. 1.220.

³²⁵399 U.S. at 81 n.9.

³²⁶*Id.* at 82 n.11. In surveying other notice-of-alibi statutes, a California court observed that only those of Florida and New Jersey explicitly provide for reciprocal discovery. *Rodriguez v. Superior Court*, 9 Cal. App. 3d 493, 496-97, 88 Cal. Rptr. 154, 155-56 (1970).

³²⁷Traynor 248.

"There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."³²⁸ The fifth amendment privilege against self-incrimination is such a right.³²⁹ Professor Pye likened conditional discovery to telling a defendant, "Basically we have an unfair system here. If you want a fair system, then waive your privilege against self-incrimination."³³⁰ To the extent that the defendant's discovery rights are of a constitutional character, conditional discovery plays one constitutional right against another. For example, a defendant's refusal to supply discovery would certainly not justify a prosecutor's refusal to disclose material exculpatory evidence in his possession.³³¹

If the fact of defense discovery is to have some meaning for the legality of prosecution discovery, it must lie in a different perspective. Chief Justice Traynor, explaining his opinion in *Jones*, said that a defendant could fairly "be required to make his decision whether to remain silent or to present his defense . . . before trial if he is given discovery of the prosecution's case before trial."³³² In this context, defense discovery serves as the basis of a reply to the argument—relied upon by the dissenters in *Williams*³³³ and *Jones*³³⁴—that the privilege against self-incrimination not only protects the defendant from compulsion to participate in the preparation of the case against himself, but also inde-

³²⁸*Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *accord*, *United States v. Jackson*, 390 U.S. 570, 572, 582 (1968); *Spevack v. Klein*, 385 U.S. 511, 514 (1967); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

³²⁹*United States v. Jackson*, 390 U.S. 570 (1968); *Griffin v. California*, 380 U.S. 609, 614 (1965).

³³⁰Pye, *supra* note 12, at 98. The American Bar Association Advisory Committee on Pretrial Proceedings made the following arguments:

If disclosures to the accused promote finality, orderliness, and efficiency in prosecutions generally, these gains should not depend upon the possibly capricious willingness of the accused to make reciprocal disclosures. Indeed, there is considerable doubt whether, in practice, the imposition of a condition will accomplish anything but denial of disclosures to the accused. Certainly, the usual reasons for denying disclosures to the accused—dangers of "perjury or intimidation of witnesses—are not alleviated by forcing the defendant to make discovery, nor are they heightened by his failure to disclose."

ABA ADVISORY COMM. 45, quoting *United States v. Fratello*, 44 F.R.D. 444, 448 (S.D.N.Y. 1968).

³³¹See text accompanying note 89 *supra*.

³³²Traynor 248-49. Chief Justice Traynor also argued: "He can hardly demand pretrial discovery and still insist on reserving his own surprises for the trial. The good coin of discovery gains in value when it is fairly exchanged at the appropriate procedural hours." *Id.* at 248.

³³³399 U.S. at 111-13 (Black & Douglas, JJ., dissenting).

³³⁴58 Cal. 2d at 62-69, 372 P.2d at 922-27, 22 Cal. Rptr. at 882-87 (Peters & Dooling, JJ., dissenting).

pendently assures him a right to take no part in the criminal case, to remain silent and impassive, until the prosecution has made out a legally sufficient case against him. Thus, the purpose served by defense discovery in the rationale for the constitutionality of prosecution discovery is that it arguably provides the defendant with a preview of the prosecution's case sufficient to enable him to make his defense decisions in advance of trial with, as nearly as possible, as much information to guide him as he would have when the prosecution rests.

However, the discovery available under rule 16 and in Florida and California is still inadequate to accomplish that end. Unless the defendant may depose all of the adverse witnesses as well as inspect all of the adverse physical evidence, he is at a considerable disadvantage in evaluating the case he must meet before it is presented. Writing in dissent in *Williams*, Justice Black, joined by Justice Douglas, argued that even this might not be enough: "[R]egardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about."³³⁵ The dissenting justices reasoned that before trial the defendant does not know what the strength of the prosecution case is—only what it might be.³³⁶ Their argument is that "the pressures on defendants to plead an alibi created by this procedure are not only quite different than the pressures operating at the trial itself, but are in fact significantly greater."³³⁷ At trial the pressure comes only from the actual strength of the prosecution's case; pretrial, the pressure comes from consideration of the strongest possible case that the prosecution could present in order not to foreclose the alibi option if the prosecutor should in fact have that good a case.

Broad defense discovery, including file disclosure and depositions, would minimize the force of this argument. In addition, assuming that no incriminating information is disclosed by prosecution discovery, it remains to be explained what prejudice the defendant suffers or what policy of the privilege against self-incrimination is violated if the defendant is forced to divulge a non-incriminating defense that he may never use.

Even if the presence of adequate defense discovery could balance the loss of the defendant's otherwise unrestricted right not to do anything until the prosecution has presented its case, it does not satisfy the

³³⁵399 U.S. at 109.

³³⁶*Id.*

³³⁷*Id.* at 110.

objection that a discovery order against a defendant might force him to disclose evidence rightly or wrongly susceptible of an incriminating interpretation. This objection can be answered only by a mandate to judges to deny discovery upon a claim of such danger. The availability of reciprocal defense discovery may enhance the serviceability of this protective-order procedure by funneling to the defendant information useful to him in assessing the incriminatory character of his evidence that is within the scope of a discovery motion and thus the need for him to enter a special plea of the privilege in opposition to the motion. Nevertheless, the protective-order procedure is not sufficient to shield prosecution discovery from constitutional objection.

For two reasons prosecution discovery, even as thus restricted, is incompatible with the privilege against self-incrimination. The first is that it would encourage law enforcement officers to pursue otherwise weak cases at least to the discovery stage and thereby subject the defendant to a greater risk of prosecution and thus of conviction.³³⁸

The protective-order procedure was designed in the course of the foregoing discussion as a response to the argument that a particular discovery order might elicit an incriminating response. But can it give protection co-extensive with the privilege against self-incrimination? The privilege protects against compelled disclosure not only of unequivocally damaging or conclusively incriminating evidence but also of any link in the chain of such evidence.

The Supreme Court has given wide berth to the category of incriminating information to guard against any invasion of the privileged domain and to avoid a natural impatience with the withholding of any relevant information in a fact-finding proceeding. "The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence" or clues to such evidence.³³⁹ The defendant's apprehension of danger from an answer must be reasonable, and the danger of incrimination must be real and appreciable—not merely ima-

³³⁸As Justice White, author of the *Williams* opinion, has written, the privilege against self-incrimination "protects a witness from being compelled to furnish evidence that could result in his being subjected to a criminal sanction . . . if, but only if, after the disclosure the witness will be in greater danger of prosecution and conviction." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 100 (1964) (White & Stewart, JJ., concurring).

³³⁹*Hoffman v. United States*, 341 U.S. 479, 486 (1951). See also *Leary v. United States*, 395 U.S. 6, 16, 18 (1969); *Marchetti v. United States*, 390 U.S. 39, 48, 52 (1968); *Emspak v. United States*, 349 U.S. 190, 204-05 (1955); *Blau v. United States*, 340 U.S. 159, 161 (1950); *Mason v. United States*, 244 U.S. 362 (1917).

ginary.³⁴⁰ If prosecution for an offense is barred by the statute of limitations or by a grant of immunity, for example, information relating to that offense would not be incriminating and its disclosure may be compelled.³⁴¹ The privilege also does not protect disclosures that would subject the witness only to disgrace or loss of his job.³⁴²

A determination by a witness that a disclosure might tend to incriminate him does not conclusively establish its privileged status; rather, a judge must pass on whether invocation of the privilege is justified.³⁴³ The judge may not require the witness to prove the hazard, as that would compel him "to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."³⁴⁴ Consequently, the judge may not overrule the claim of privilege unless he determines that it was "'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate."³⁴⁵

While the "link-in-the-chain" analysis is appropriate for determining whether an ordinary witness may be required to serve as the source of information, it is not adequate to protect a defendant.³⁴⁶ Therefore, "[f]or the party defendant in a criminal case, the privilege has been construed to permit him to refuse to answer any question whatever in the cause. . . ."³⁴⁷ Accordingly, the defendant may not even be called to the witness stand.³⁴⁸ In connection with prosecution discovery, sound

³⁴⁰Brown v. Walker, 161 U.S. 591, 599-600 (1896).

³⁴¹Hale v. Henkel, 201 U.S. 43, 67 (1906).

³⁴²Ullman v. United States, 350 U.S. 422, 430-31 (1956); Hale v. Henkel, 201 U.S. 43, 66 (1906); Brown v. Walker, 161 U.S. 591, 608 (1896).

³⁴³Hoffman v. United States, 341 U.S. 479, 486 (1951); Mason v. United States, 244 U.S. 362, 365 (1917).

³⁴⁴Hoffman v. United States, 341 U.S. 479, 486-87 (1951).

³⁴⁵*Id.* at 488, quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881), which was cited with approval in Counselman v. Hitchcock, 142 U.S. 547, 579-80 (1892) (emphasis in original).

³⁴⁶"A question which might appear at first sight a very innocent one might, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering." Mason v. United States, 244 U.S. 362, 365 (1917), quoting The Queen v. Boyes, 121 Eng. Rep. 730 (K.B. 1861). See also Malloy v. Hogan, 378 U.S. 1, 13-14 (1964).

³⁴⁷See Prudhomme v. Superior Court, 2 Cal. 3d 320, 326, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970).

³⁴⁸§ WIGMORE § 2268, at 406 (emphasis in original).

³⁴⁹*Id.*

reasons justify this special treatment for a defendant; in his access to the privilege against self-incrimination, he should not have to hurdle even the "link-in-the-chain" test of incrimination. The Supreme Court has held that if an official inquiry is directed at a person in "a highly selective group inherently suspect of criminal activities,"³⁴⁹ the party may not be put in the position of choosing which of the requests for information he is privileged not to answer, considering all of the uncertainties that are involved; he may refuse to respond to any of them.³⁵⁰ It is purely conjectural for any court to attempt to foresee all the results and consequences that may follow from requiring discovery in any given case.

The prosecutor may find comfort in the fruits of a discovery order in his favor beyond what would be available to him if the defendant were allowed to await the ordinary course of trial to present his case. This is true whether the defendant complies by producing evidence, asserts that he has no evidence to produce, or interposes a special plea in bar of the motion. Justice Peters, in a characteristically vigorous dissent in *Jones*, pointed out one source of such comfort: "[T]he compelled revelation by the defendant that he may have only a weak defense may itself be self-incriminating."³⁵¹ In addition, the very invocation of a special plea by the defendant may communicate to the prosecution a valuable insight into the defendant's case. If the prosecution can thus learn either that the defendant has a weak defense or that some evidence disclosed by the defendant will likely help the prosecution's case, it will be more inclined to initiate a doubtful prosecution or to pursue a weak case to trial. As long as the prosecution can establish a prima facie case, it will learn in advance whether it can depend on a boost, or at least no substantial opposition, from the defendant at trial. That alone might make the difference in its calculations of whether or not to abandon a prosecution. In this way prosecutorial discovery serves the very "poking about" function that the privilege against self-incrimination is designed to prevent.

Recognizing this, the California Supreme Court has now backed off from its experiment with discovery, though it has not backed away

³⁴⁹*Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965).

³⁵⁰*Leary v. United States*, 395 U.S. 6, 18 (1969); *Haynes v. United States*, 390 U.S. 85, 96-97 (1968); *Marchetti v. United States*, 390 U.S. 39, 44-54 (1968); *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 78-79 (1965). See also *California v. Byers*, 402 U.S. 424, 429-30 (1971).

³⁵¹*Jones v. Superior Court*, 58 Cal. 2d 56, 66, 372 P.2d 919, 925, 22 Cal. Rptr. 879, 885. See also *Counselman v. Hitchcock*, 142 U.S. 547, 564, 585, 586 (1892).

from *Jones*. In 1970 in *Prudhomme v. Superior Court*³⁵² that court was asked to sustain a discovery order that compelled defendant's attorney "to disclose to the prosecution the names, addresses and expected testimony of the witnesses [defendant] intends to call at trial."³⁵³ The court recoiled at this extension of its narrow ruling in *Jones* beyond the affirmative-defense limitation and beyond even the rule 16(c) restriction to documentary and other physical evidence. It held the order invalid because "it does not clearly appear from the face of the order or from the record below that the information demanded from [defendant] cannot possibly have a tendency to incriminate her."³⁵⁴

The second reason that the protective-order procedure is not adequate to the anticipated mischief is the potential elasticity of such an exception to an unpopular constitutional privilege.³⁵⁵ This tendency to expand is already apparent in the prosecution discovery area. The *Jones* reasoning was expressed in terms of affirmative defenses; *Williams* dealt with an affirmative defense, but its language was not confined to that situation; and rule 16(c) applies to all defenses. The dissenters in *Williams*³⁵⁶ and *Jones*³⁵⁷ foretold a broadening of the comparatively narrow application of discovery in those cases.³⁵⁸

Moreover, neither *Williams* nor *Jones* even provided for the

³⁵² Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970). See also *Bradshaw v. Superior Court*, 2 Cal. 3d 332, 466 P.2d 680, 85 Cal. Rptr. 136 (1970).

³⁵³ *Id.* at 322, 85 Cal. Rptr. at 130, 466 P.2d at 674.

³⁵⁴ *Id.*

³⁵⁵ See *Shapiro v. United States*, 335 U.S. 1, 70 (1948) (Jackson, J., dissenting).

³⁵⁶ 399 U.S. at 107-08, 114-16 (Black & Douglas, JJ., dissenting).

³⁵⁷ 58 Cal. 2d at 65-66, 372 P.2d at 924-25, 22 Cal. Rptr. at 884-85 (Peters, J., dissenting).

³⁵⁸ In *State v. Grove*, 65 Wash. 2d 525, 398 P.2d 170 (1965), the Washington Supreme Court held that the privilege was not violated by a court order requiring defendant's attorney to deliver to the prosecutor an apparently incriminating letter that was in the possession of the attorney and had been written by defendant to his wife. Nothing in the court's opinion suggested that defendant intended to use the letter in evidence. The letter had been sent by defendant from jail and had been read by jail authorities pursuant to routine censorship procedures. The prosecution learned of the existence of the letter when a friend of defendant's wife told an investigator that the wife had shown her the letter. The court's opinion did not explain how the attorney obtained the letter. It is unlikely that defendant delivered it to him since defendant gave up possession of the letter when he mailed it through jail authorities. If the wife had supplied the attorney the letter, she may not have been acting on behalf of defendant; he was charged with the murder of her mother.

The court made no effort to explain why the privilege against self-incrimination did not apply. It merely quoted from *Jones* that "absent the privilege against self-incrimination or other privileges provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access to evidence that can throw light on issues in the case." *Id.* at 529, 398 P.2d at 173.

If the wife, not acting as her husband's agent, had given the letter to the attorney, the privilege against self-incrimination and the attorney-client privilege probably would not apply. Nevertheless,

protective-order procedure that this discussion has shown should be crucial to their affirmative-defense discovery provisions and to any extension of them. Rule 16(e) provides for protective orders, apparently for either the prosecution or the defense. It does not, however, specify the grounds for a protective order running in favor of either party and does not mention the fifth amendment; it makes a protective order available only "[u]pon a sufficient showing" without specifying what must be shown.³⁵⁹

The Limitation to Documentary or Other Physical Evidence. Rule 16(c) provides another limitation in an attempt to accommodate the fifth amendment; it limits prosecution discovery to documentary or other physical evidence. It does not provide, however, that the discovery order must specifically identify the item of evidence to be disclosed. Limiting discovery to evidence that the defendant intends to produce at trial was designed to avoid requiring production of incriminating evidence on the assumption that if the defendant intends to use the evidence it must be wholly favorable to him. The validity of this assumption might be enhanced by the further limitation to documentary or other physical evidence. Arguably, the full effect of such evidence

the court did not clarify the facts.

In *State ex rel. Sowers v. Olwell*, 64 Wash. 2d 828, 394 P.2d 681 (1964), the Washington Supreme Court had served notice one year before *Grove* that it thought that it could compel the attorney for a defendant to produce, with or without a request, "criminal evidence (such as a knife, other weapons, stolen property, etc.), which in itself has little, if any, material value for the purposes of aiding counsel in the preparation of his client's case." *Id.* at 833, 394 P.2d at 684. In *Sowers* the court held that a subpoena duces tecum served on the attorney for a coroner's inquest was improper because in addition to requiring disclosure of physical evidence, it was tantamount to requiring the attorney to testify against his client.

See also *Bouschor v. United States*, 316 F.2d 451 (8th Cir. 1963) (Blackmun, J.); *In re Ryder*, 263 F. Supp. 360, 365-67 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967); *cf.* *Grant v. United States*, 227 U.S. 74, 79-80 (1912); *United States v. Judson*, 322 F.2d 460, 466-67 (9th Cir. 1963). If evidence privileged in the possession of the defendant loses its privileged character when the defendant turns it over to his attorney, a defendant will be reluctant to give and his attorney will be reluctant to accept incriminating evidence; thus the defendant's ability to cooperate with his attorney would be interfered with. *McMullen v. Superior Court*, 6 Cal. App. 3d 224, 229, 85 Cal. Rptr. 729, 733 (1970); Moore, *Criminal Discovery*, 19 HAST. L.J. 865, 905-06 (1968).

³⁵⁹FED. R. CRIM. P. 16(e) provides in full as follows:

Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*, the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

may be analyzed before the defendant decides whether to introduce it. By contrast, defense disclosure of the name of a witness might risk the vagaries of providing the government with subjective information that may be potentially incriminating.

There is authority for a position that documentary or other physical evidence, at least in some circumstances,³⁶⁰ should be discoverable from a defendant notwithstanding the fifth amendment. Unlike testimony, such evidence is subject to seizure by the government without the consent of the accused by means of a reasonable search. A discovery order for documentary or physical evidence could serve the same function as a search warrant, as long as it is subject to the same limitations. In the course of Bentham's classic criticism of the privilege against self-incrimination, he saw irony in its application to prevent a request for physical evidence:

You know of such or such a paper; tell us where it may be found. A request thus simple, your tenderness shudders at the thoughts of putting to a man: his answer might lead to the execution of that justice, which you are looking out for pretences to defeat. This request, you abhor the thoughts of putting to him: but what you scruple not to do (and why should you scruple to do it?) is, to dispatch your emissaries in the dead of night to his house, to that house which you call his castle, to break it open, and seize the documents by force.³⁶¹

Special rules for books and records already do exist in fifth amendment law.³⁶² An officer or agent of a corporation or other organization to which the privilege does not apply may be compelled to deliver books and records of the corporation in his possession, even if they would tend to incriminate him personally,³⁶³ but cannot be compelled to testify orally about the location or subject matter of those books and records.³⁶⁴ The fifth amendment may not successfully be interposed

³⁶⁰The Supreme Court has held that the fifth amendment does apply to documentary or physical evidence in general. *United States v. White*, 322 U.S. 694, 699 (1944); *Boyd v. United States*, 116 U.S. 616, 629, 633-35 (1886).

³⁶¹5 BENTHAM, *supra* note 203, at 232.

³⁶²Meltzer has written that "[w]here documentary evidence is involved, the inroads on the privilege have been so sweeping as to challenge the basis of the general rule of protection." Meltzer, *supra* note 271, at 688; *see id.* at 699-700. Judge Friendly has argued that the fifth amendment should not apply to production of documents. Friendly, *supra* note 293, at 682-83, 701-03.

³⁶³*See* cases cited note 21 *supra*. Even though the fifth amendment privilege against self-incrimination does not apply to a corporation, the limitations of the fourth amendment do. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 205-06 (1946); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

³⁶⁴*United States v. Korde*, 397 U.S. 1, 7-8 (1970); *Curcio v. United States*, 354 U.S. 118,

against an order to produce "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established," whether kept by private individuals or organizations.³⁶⁵ This rule does not apply to oral testimony regarding the same matters.³⁶⁶ The custodian of public or governmental records similarly may not invoke the privilege against self-incrimination in defiance of an order to produce those records.³⁶⁷ A bankrupt may be required to turn over to a trustee in bankruptcy incriminating books of account.³⁶⁸ He may not, however, be compelled to testify about his assets.³⁶⁹

The nature of the books and records excepted from the privilege against self-incrimination may suggest that the distinction is between business privacy and personal privacy.³⁷⁰ If personal documentary or other physical evidence is to be subject to prosecution discovery, it must be because it is non-testimonial evidence in the same sense as is appearing in a lineup for identification, submitting to a blood test, or yielding handwriting or voice specimens for identification comparisons.³⁷¹ Testimonial character has been attributed to the surrender of requested docu-

128 (1957); *Wilson v. United States*, 221 U.S. 361, 384-86 (1911).

³⁶⁵*Wilson v. United States*, 221 U.S. 361, 380 (1911); see *Shapiro v. United States*, 335 U.S. 1, 17, 33 (1948).

"The same reasoning applies to statutes requiring articles to be retained in custody, which may turn out to be evidence of a crime, e.g., the hide of cattle killed, a brand on the hide being possibly evidence that the animal killed was stolen by the killer." 8 WIGMORE § 2259c, at 367.

³⁶⁶*Shapiro v. United States*, 335 U.S. 1, 27 (1948). But see *California v. Byers*, 402 U.S. 424 (1971).

³⁶⁷*Shapiro v. United States*, 335 U.S. 1, 54, 56 (1948) (Frankfurter, J., dissenting).

³⁶⁸*Johnson v. United States*, 228 U.S. 457, 458-59 (1913); *In re Harris*, 221 U.S. 274, 279-80 (1911); *McCarthy v. Arndstein*, 266 U.S. 34, 41 (1924); *Ex parte Fuller*, 262 U.S. 91, 93-94 (1923).

³⁶⁹*McCarthy v. Arndstein*, 266 U.S. 34, 41 (1924).

³⁷⁰*Shapiro v. United States*, 335 U.S. 1, 70 (1948) (Jackson, J., dissenting); Meltzer, *supra* note 271, at 715. In *United States v. White*, 322 U.S. 694, 700 (1944), the Supreme Court said: "The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations."

In writing against application of the fifth amendment to books and records, Judge Friendly said: "The writings typically sought to be produced are not the outpourings of an individual's soul, for which first amendment protection against subpoena may be in order, but rather the books and records of an enterprise that is criminal . . ." Friendly 703. This language suggests that a distinction between business privacy and personal privacy in application of the fifth amendment to physical evidence could be accommodated with his views.

³⁷¹*Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *Schmerber v. California*, 384 U.S. 757 (1966); *Holt v. United States*, 218 U.S. 245 (1910).

mentary or physical evidence on the theory that the defendant is constructively testifying at least that these tangible objects are in fact those described in the request.³⁷² On this basis compelled production of tangible evidence may be distinguished from a search and seizure that does not call for the cooperation of the accused. Yet, the distinction may be dissipated if in fact the government establishes a foundation for the evidence independent of assistance provided by the defendant in its production.³⁷³

From a fifth amendment perspective, the discovery of documents is not free of the incriminatory impact of the encouragement to prosecution by disclosure of the weakness of the defense or, by a special plea, of the potentially incriminating nature of some of the defense evidence. Writings and records could also be ambiguous.³⁷⁴ The dangers of prosecution discovery are aggravated in a case in which the beliefs or ideas of the defendant may be involved, particularly when the subjects of discovery are the "books, papers, [and] documents" included in rule 16(c). If the defendant were summoned before a police officer or a grand jury and compelled to submit all documentary and other physical evidence that demonstrated his innocence of criminal activity suspected of him, surely such a broad invasion of his private enclave would readily be recognized as a violation by his government of its relations with one of its citizens. Is the situation materially different if before the request is made the defendant is charged with a crime and put to his defense? Or even if before the request is made the defendant is also given full discovery of the prosecution's files and witnesses? The invitation that this raises to a general search by a prosecutor instituting criminal charges to test the defense by discovery does not comport with the fundamental policies of the privilege against self-incrimination.

The fifth amendment is complemented in this area by the fourth amendment. These two provisions of the Bill of Rights protect often overlapping zones of privacy.³⁷⁵ A discovery order for documentary or other physical evidence must satisfy the fourth as well as the fifth amendment.³⁷⁶ The contribution of the fourth amendment for present

³⁷²WIGMORE § 2264, at 380.

³⁷³Friendly 702; Meltzer 700.

³⁷⁴In *United States v. Fratello*, 44 F.R.D. 444, 449 (S.D.N.Y. 1968), the government, in moving for discovery under Federal Rule 16(c), alleged that it needed the documents sought as part of its prima facie case.

³⁷⁵*Schmerber v. California*, 384 U.S. 757, 767 (1966).

³⁷⁶*Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 195, 202, 205, 208-09 (1945); *Boyd v. United States*, 116 U.S. 616, 629, 631-32, 633 (1886); Meltzer 701. See also *Marchetti v.*

purposes, in addition to the requirement that the government establish probable cause to believe that the defendant has committed a crime and does have in his possession evidence relating to that crime, is the requirement that the order specifically describe the things to be seized.³⁷⁷ As a safeguard against the general search condemned by the fourth and fifth amendments, this requirement must be considered essential if a discovery order for tangible objects is to survive constitutional scrutiny.

The fourth amendment thus requires the prosecution to learn through its own sources of the defendant's possession of the evidence to be seized. Rule 16(c) can pass this fourth amendment test only if its limitation to material documentary or other physical evidence "which the defendant intends to produce at the trial and which are within his possession, custody or control" is a sufficiently specific description of the evidence to be produced. That language from the rule may often be parroted by the prosecution in seeking an order under it; the rule does not seem to contemplate that the court need individually identify each item within the order. Certainly an order so worded could not meet the specificity requirement for a search warrant. An officer executing a search warrant or a judge scrutinizing the breadth of the search would be ill equipped to ascertain whether particular documents meet the description in the order. When the defendant or his attorney—not a law enforcement officer—is to conduct the search, the language of the statute may be sufficiently specific to apprise him of what evidence is within the reach of the order. It is not, however, sufficiently specific to preclude a general search. It admits of a search for, or discovery of, evidence that the government has no probable cause to believe exists. Under fourth amendment analysis, it would seem to be immaterial that the evidence sought is presumably non-incriminating.³⁷⁸ The essence of the fourth amendment is a protection of privacy, regardless of whether or not an invasion of it would yield damaging evidence.

CONCLUSION

As Justice White, author of the *Williams* opinion, wrote on an

United States, 390 U.S. 39, 57 (1968).

³⁷⁷Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1945); Hale v. Henkel, 201 U.S. 43, 76 (1906).

³⁷⁸One reason often cited for the privilege against self-incrimination is that it recognizes "the practical limits of governmental power; truthful self-incriminating answers cannot be compelled, so why try." 8 WIGMORE § 2251, at 311; accord, Meltzer 701. If the discovery order applies only to documentary or other physical evidence the defendant intends to produce at trial, it may be more susceptible to compulsion than if it commanded the production of incriminating testimony.

earlier occasion,

The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. . . . Our interest in not convicting the innocent permits counsel to put the State to its proof. . . .³⁷⁹

It can be only speculative for a court to conclude that disclosure of evidence that it has not seen may be compelled from a defendant without risking violation of his privilege against self-incrimination. This is true even if the evidence belongs to a category in which directly incriminating information is unlikely to repose. At the same time denial of discovery will not cripple or seriously cramp the prosecutorial function. In realistic perspective the prosecution still does have a powerful arsenal of discovery;³⁸⁰ it is being deprived of only one tool, and that in the interest of insuring protection of fundamental rights valuable to all citizens. "The Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedure to be followed in criminal trials."³⁸¹

Vigilance must be broader than the actual threats of abuse and nearly as broad as their possible scope. Because circumstances in which the application of the privilege against self-incrimination seems extravagant are therefore easy to find, the privilege is a common focus of majoritarian frustration. For this reason the important work of the privilege needs the sanctity of a fundamental charter and a strong tradition of liberal interpretation. Being too often unpopular, it cannot

³⁷⁹United States v. Wade, 388 U.S. 218, 257-58 (1967) (dissenting & concurring opinion).

³⁸⁰The former United States Attorney for the Southern District of California while in office wrote that the prosecution can ordinarily anticipate affirmative defenses and does not need discovery of them. Miller, *supra* note 53, at 317-20.

³⁸¹Williams v. Florida, 399 U.S. 78, 111-12 (1970) (Black, J., dissenting). Justice Black continued:

All of these rights are designed to shield the defendant against state power. None are designed to make convictions easier and taken together they clearly indicate that in our system the entire burden of proving criminal activity rests on the State. The defendant, under our Constitution, need not do anything at all to defend himself, and certainly he cannot be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources.

Id. at 112.

with-stand niggardly enforcement or cautious interpretation based on academically narrow distinctions. Otherwise, the fate of this important privilege would be in the hands of every judge before whom it appeared or at the mercy of every epoch of ideological crisis ever to divide our citizenry.

The fifth amendment helps ensure a compatibility of government and individual freedom. Respect for that balance discourages sniper attacks picking off the privilege a forward piece at a time as well as direct frontal assaults upon it.³⁸²

³⁸²In *Brooks v. Tennessee*, 92 S. Ct. 1891 (1972), the Supreme Court held that a rule requiring that a criminal defendant testify first for the defense or not at all violated the defendant's fifth amendment privilege against self-incrimination. The Court said:

Although a defendant will usually have some idea of the strength of his evidence, he cannot be absolutely certain that his witnesses will testify as expected or that they will be effective on the stand. They may collapse under skillful and persistent cross-examination, and through no fault of their own they may fail to impress the jury as honest and reliable witnesses. In addition, a defendant is sometimes compelled to call a hostile prosecution witness as his own. Unless the State provides for discovery depositions of prosecution witnesses, which Tennessee apparently does not, the defendant is unlikely to know whether this testimony will prove entirely favorable.

Because of these uncertainties, a defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause. Rather than risk the dangers of taking the stand, he might prefer to remain silent at that point, putting off his testimony until its value can be realistically assessed. Yet, under the Tennessee rule, he cannot make that choice "in the unfettered exercise of his own will." Section 40-2403 exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first. This, we think, casts a heavy burden on a defendant's otherwise unconditional right not to take the stand. The rule, in other words, "cuts down on the privilege [to remain silent] by making its assertion costly."

Id. at 1893-94, quoting *Griffin v. California*, 380 U.S. 609, 614 (1965).

Brooks is similar to *Williams v. Florida*, 399 U.S. 78 (1970), in that it arguably involves only a procedural adjustment in the timing of the defendant's disclosure of his evidence. The uncertainty confronting the defendant in *Brooks* at the time he was required to take the stand was even more aggravated in *Williams* because he not only has not had a chance to see his own case unfold, but also is even more uncertain about the strengths and weaknesses of the prosecution's case. Thus doubt is cast on the continuing validity of *Williams*.

Arguably, *Brooks* may be distinguished from *Williams* on three grounds. First, *Brooks* was not limited to disclosure of affirmative defenses. This factor seems insignificant, however, since the defendant was not required to make disclosure until the prosecution has presented its case-in-chief and so could not capitalize on defendant's testimony for his own case. Secondly, *Brooks* involved a requirement that the defendant divulge his own testimony. The Florida statute involved in *Williams* specifically provided that the defendant could not be precluded from testifying himself even if he did not comply with the alibi disclosure rule. 399 U.S. at 104. Even so, the penalty in *Williams* of precluding the defendant from presenting any evidence other than his own testimony certainly exacts a price for the defendant's silence. The final distinction between the two cases is that in *Brooks* the defendant was actually prevented from testifying by operation of the challenged rule. In *Williams*, on the other hand, the question of penalty did not arise because the defendant did comply with the disclosure requirements. This fortuitous circumstance, not necessarily characteristic of other cases presenting either the *Brooks* or the *Williams* problem, cannot be considered an important factor. The compulsion was successful in *Williams*, and that is sufficient to constitute a violation of the privilege against self-incrimination.