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A Proposal for Prosecutorial Discovery Depositions in California

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Law Note

A PROPOSAL FOR PROSECUTORIAL DISCOVERY DEPOSITIONS IN CALIFORNIA

INTRODUCTION

> A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. The current tendency in the criminal law is in the direction of discovery of the facts before trial and elimination of surprise at trial.[1]

Few people would question the soundness of this proposition. It is surprising, therefore, to learn that the California criminal system does not provide a pre-trial procedure for compelling a witness to divulge information. Although a California court may ordinarily not prevent a witness from being interviewed,[2] it may not order the taking of depositions by the prosecution for discovery purposes.[3] Often the oral testimony of a witness is the primary evidence of a criminal act. To deny the prosecution access to such information is to deny the judicial process its full potential for the ascertainment of truth.

California is not unique in disallowing the use of prosecutorial discovery depositions in criminal proceedings. Federal courts[4] and

1. Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966), *aff'd on remand*, 410 F.2d 1016 (D.C. Cir.), *cert. denied*, 396 U.S. 865 (1969). *See In re* Ferguson, 5 Cal. 3d 525, 531, 487 P.2d 1234, 1238, 96 Cal. Rptr. 594, 598 (1971).

2. *See* People v. Mersino, 237 Cal. App. 2d 265, 268-69, 46 Cal. Rptr. 821, 824 (1965); Walker v. Superior Court, 155 Cal. App. 2d 134, 140, 317 P.2d 130, 134 (1957). An interview is an informal meeting between a party and a witness. The party has no right to compel a witness to submit to an interview; neither is the interview a court proceeding.

3. 4 J. DEMEO, CALIFORNIA DEPOSITION AND DISCOVERY PRACTICE ¶ 16.03(9) (1971) [hereinafter cited as DEMEO]; Shatz, *California Criminal Discovery: Eliminating Anachronistic Limitations Imposed on the Defendant*, 9 U.S.F. L. REV. 259, 263 (1974) [hereinafter cited as Shatz].

4. FED. R. CRIM. P. 15.

a vast majority of states[5] have similar rules. Historically, the early common law forbade discovery, including depositions, by either party in a criminal prosecution.[6] It was thought that such cooperation between the parties would destroy the adversarial nature of the court proceeding.[7] Later, a number of states enacted statutes allowing conditional examinations, not for discovery,[8] but for the limited purpose of preserving the testimony of a witness expected to be unavailable for trial.[9]

A recently emerging trend in criminal practice is the use of depositions as a discovery device for the defendant.[10] Although this

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5. Vermont is the only state which permits prosecutorial discovery depositions. VT. R. CRIM. P. 15 (1974).

6. *E.g.*, The King v. Holland, 100 Eng. Rep. 1248, 1248 (K.B. 1792). *See* People v. Bowen, 22 Cal. App. 3d 267, 278, 99 Cal. Rptr. 498, 504 (1971); Clark v. Superior Court, 190 Cal. App. 2d 739, 741, 12 Cal. Rptr. 191, 193 (1961); State v. Goldberg, 261 N.C. 181, 191, 134 S.E.2d 334, 340 (1964); Jackman v. Court of Common Pleas, 6 Ohio App. 2d 182, 184, 217 N.E.2d 251, 253 (1966), *rev'd on other grounds*, State v. Court of Common Pleas, 9 Ohio St. 2d 159, 224 N.E.2d 906 (1967).

7. Hewitt & Bell, *Beyond Rule 16: The Inherent Power of the Federal Court to Order Pretrial Discovery in Criminal Cases*, 7 U.S.F.L. REV. 233, 233 (1973).

8. DEMEO, *supra* note 3, at ¶ 16.03(9); Comment, *Depositions as a Means of Criminal Discovery*, 7 U.S.F.L. REV. 245, 246 n.2 (1973) [hereinafter cited as *Depositions*].

9. *See, e.g.*, ALA. CODE tit. 15, § 297 (1958); ARIZ. REV. STAT. § 13-1881-85 (1956); ARK. STAT. ANN. § 43-2011.1 (Supp. 1975); CAL. PENAL CODE §§ 1335-1345 (West 1970); COLO. CONST. art. 2, § 17; CONN. GEN. STAT. ANN. §§ 54-86 (West Supp. 1976); ILL. ANN. STAT. ch. 110A, § 414 (Smith-Hurd 1976); KY. R. CRIM. P. 7.10 (Baldwin 1969); PA. STAT. ANN. tit. 19, § 611 (Purdon 1964); UTAH CODE ANN. § 77-46-1 (Supp. 1976).

The key provisions of the California Penal Code read:

> § 1335. [Cases in which conditional examination may be had]
> When a defendant has been charged with a public offense triable in any court, he in all cases, and the people in cases other than those for which the punishment may be death, may, if the defendant has been fully informed of his right to counsel as provided by law, have witnesses examined conditionally in his or their behalf, as prescribed in this chapter.
>
> § 1336. [Grounds for application]
> When a material witness for the defendant, or for the people, is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehension that he will be unable to attend the trial, the defendant or the people may apply for an order that the witness be examined conditionally.

CAL. PENAL CODE §§ 1335 & 1336 (West 1970). "Unavailable as a witness" is defined in CAL. EVID. CODE § 240 (West 1966).

10. *See* FLA. R. CRIM. P. 3.220(d) (West 1975). *See also* No. 147, § 1, 1961

system allows the criminal defendant to use the civil deposition procedures, the prosecutor may not use depositions for discovery. The recent California court of appeal case, *People v. Municipal Court (Runyan)*,[11] approved this system for California.[12] Vermont, however, is the only state which clearly allows the use of discovery depositions for both the prosecution and the defense.[13]

The purpose of this Note is to advocate the full use of discovery depositions of non-party witnesses in California for the prosecution.[14] By examining the reluctance of the California courts to implement prosecutorial depositions, possible federal constitutional barriers, and the policy arguments for and against such criminal discovery procedures, this Note will demonstrate the necessity for curative legislation.

Reasons for California's Refusal to Permit Prosecutorial Depositions

California's Penal Code sections 1335-1345 provide for conditional examinations, but add the additional qualification that the state may not conduct the examination if the defendant is charged with a crime punishable by death.[15] Because California's criminal discovery procedures are largely a creation of the courts, not the legislature,[16] the limited statutory provisions for the use of depositions in California are understandable. Under this judicial guidance California has become a leader in criminal discovery[17] and is among

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Vt. Acts 314, which was repealed in 1973 and replaced by Vt. R. Crim. P. 15 (1974), which allows discovery depositions by both the prosecution and the defense.

11. 63 Cal. App. 3d 815, 134 Cal. Rptr. 106 (1976), *hearing granted*, No. 77-9 (Cal. Sup. Ct. Jan. 13, 1977).

12. *Id.* at 824, 134 Cal. Rptr. at 111. The granting of the right to depose a witness is in the trial judge's discretion as a matter of criminal discovery.

13. Vt. R. Crim. P. 15 (1974).

14. California presently does not require the defendant to reveal the names of witnesses he intends to call at trial. *See* Prudhomme v. Superior Court, 2 Cal. 3d 320, 326, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970). Therefore, the prosecutor in California would be allowed to depose only those witnesses whose identity was learned through the prosecutor's own investigations. This rule limits the usefulness of prosecutorial depositions. California courts may, however, grant the prosecutor the right to discover the names of intended defense witnesses. *See* note 38 *infra*. This Note endorses such a procedure.

15. Cal. Penal Code § 1335 (West 1970).

16. B. Witkin, California Criminal Procedure § 271 (1963); DeMeo, *supra* note 3, at ¶ 16.03(2); Kane, *Criminal Discovery—The Circuitous Road to a Two-Way Street*, 7 U.S.F.L. Rev. 203, 205 (1973).

17. *Depositions, supra* note 8, at 245-48.

the most liberal jurisdictions in its provisions for ensuring full discovery for the defendant.[18] In a state with such an active judiciary, it is interesting that Penal Code sections 1335-1345, which were passed in 1872 and act to deny discovery, have survived largely without alteration. However, the courts have consistently construed the statutes strictly and have stated that any change must come from the legislature.[19] This judicial deference stems from two sources: the California constitution and legislative rejection of liberalizing amendments.[20]

Prior to 1974, the California judiciary consistently held that the state constitution restricted its ability to create criminal discovery depositions. At that time article I, section 13 of the constitution read in relevant part that

> [t]he Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial.[21]

The general conclusion was that this provision set the constitutionally permissible limits for criminal depositions.[22] Although that conclusion is of questionable validity,[23] it nevertheless was the basis for denying the expanded use of depositions.

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18. Yannacone v. Municipal Court, 222 Cal. App. 2d 72, 74, 34 Cal. Rptr. 838, 839 (1963); *Depositions, supra* note 8, at 245-48.

19. *E.g.*, People v. Francis, 38 Cal. 183, 187 (1869) (decided under sections 562 and 563 of the Criminal Practice Act, predecessors to present California Penal Code section 1335); Lee v. Superior Court, 58 Cal. App. 3d 851, 853, 130 Cal. Rptr. 532, 534 (1976); People v. Bowen, 22 Cal. App. 3d 267, 280, 99 Cal. Rptr. 498, 506 (1972); People v. Lindsay, 227 Cal. App. 2d 482, 510, 38 Cal. Rptr. 755, 773 (1964); Clark v. Superior Court, 190 Cal. App. 2d 739, 743, 12 Cal. Rptr. 191, 193 (1961).

One commentator describes this judicial reluctance as the "peculiar self-decreed impotency of the common law courts to order depositions." 5 J. WIGMORE, EVIDENCE § 1401 (Chadbourn rev. 1974).

20. *See, e.g.*, Clark v. Superior Court, 190 Cal. App. 2d 739, 741, 12 Cal. Rptr. 191, 192 (1961).

21. CAL. CONST. art. 1, § 13 (1849, amended 1934, amended 1972, repealed 1974).

22. *See, e.g.*, People v. Bowen, 22 Cal. App. 3d 267, 277-78, 99 Cal. Rptr. 498, 504 (1971); Clark v. Superior Court, 190 Cal. App. 2d 739, 741, 12 Cal. Rptr. 191, 192 (1961). The Code Commissioner's Notes to Penal Code sections 1335-1341 state that by the 1905 amendments "the provisions of the statute respecting the conditional examination of witnesses have been extended so far as may be constitutionally done." CAL. PENAL CODE §§ 1335-45 (Code Comm'r Notes) (West 1970).

23. The courts or legislature could have found that article 1, section 13

In 1974, however, the legislature and the electorate replaced the above-quoted portion of article I, section 13 by a provision of article I, section 15 which states that "[t]he Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel."[24] This provision contains no restrictive language except for the requirement that the defendant and his counsel may be present. After the enactment of the new provision a court of appeal, in *Lee v. Superior Court*,[25] faced the problem of interpreting Penal Code sections 1335-1345. This court impliedly recognized that the constitutional restraints embodied in article I, section 13 no longer existed. However, the court did not interpret the repeal as an affirmative signal to judicially create discovery depositions. Rather, it continued the prior practice of strictly construing the statutes and forbidding all depositions not specifically authorized thereunder.[26] The recent *Runyan* opinion, however, breaks rank with that precedent. The *Runyan* court stated that:

> It is not reasonable to conclude that legislative failure to amend Penal Code sections 1335-1342 . . . constitutes any showing of legislative intent to limit depositions of witnesses in criminal cases. On the contrary, we interpret the failure of legislative action as leaving the development of general discovery guidelines, including depositions, to the judiciary.[27]

Although the 1974 constitutional amendments eliminate limitations on discovery depositions, it is unclear whether *Runyan* is correct in asserting that legislative inaction following the amendment is equivalent to legislative approval of judicial action.[28]

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was not a restriction on their power. The California constitution does not grant power to the legislature; it merely restricts the otherwise unlimited power of the legislature. Dean v. Kuchel, 37 Cal. 2d 97, 100, 230 P.2d 811, 813 (1951). The Supreme Court of Ohio addressed the issue of discovery depositions when it stated:

> Thus, when the General Assembly has [a general grant of power], and Section 10, Article 1, says that depositions may be taken to perpetuate testimony with the restriction that they may be used at trial only if the accused is afforded the right of confrontation, that does not mean that the General Assembly no longer has the constitutional power to provide for some other kind of depositions.

State v. Court of Common Pleas, 9 Ohio St. 2d 159, 164, 224 N.E.2d 906, 910 (1967). The court explained that the maxim *expressio unius est exclusio alterius* should rarely be applied. *Id.*

24. CAL. CONST. art. 1, § 15.

25. 58 Cal. App. 3d 851, 130 Cal. Rptr. 532 (1976).

26. *Id.* at 852-53, 130 Cal. Rptr. at 533.

27. 63 Cal. App. 3d at 823, 134 Cal. Rptr. at 110-11, *hearing granted*, No. 77-9 (Cal. Sup. Ct. Jan. 13, 1977).

28. The court in Lee v. Superior Court, 58 Cal. App. 3d 853, 130 Cal. Rptr. 532 (1976), attached no significance to the legislature's inaction. In fact, bills had been introduced before the legislature to allow discovery depositions, but were not acted on. *See* note 35 *infra*. *Runyan*'s conclusion, therefore, is conjectural.

Runyan's interpretation may be vindicated in the future by the California Supreme Court[29] or by legislative response to the opinion.

To establish *Runyan* firmly as the law of California, one of three events must occur. (1) The California Supreme Court must agree with *Runyan* that Penal Code sections 1335-1345 do not delineate the only circumstances under which a criminal deposition may be taken, thus allowing common law development of discovery depositions. (2) The California Supreme Court must find that the limit imposed by these sections is now constitutionally impermissible. Or, (3) the legislature must codify the *Runyan* decision. The particular method by which defense depositions become available critically affects the future of prosecutorial discovery depositions in California.

If the California Supreme Court affirms *Runyan's* interpretation, Penal Code sections 1335-1345 will not present the sole means of taking depositions. If this conclusion is true for the defendant, it is probably also true for the prosecution. Because of the form in which sections 1335-1345 are written, the court would be hard pressed to find a legislative intent that the statutes are restrictive toward one party and permissive toward the other.[30] Affirmance of *Runyan* would thus result in judicial discretion to grant prosecutorial discovery depositions.

A determination that discovery depositions are an element of due process provides a second way to establish *Runyan* as California law. The basis for such a decision is the criminal defendant's right to a fair trial as guaranteed by the fourteenth amendment.[31] Recently, this fair trial guarantee has been expanded to include ade-

29. The California Supreme Court has agreed to hear *Runyan* on appeal. No. 77-9 (Cal. Sup. Ct. Jan. 13, 1977).

30. In determining the legislative intent behind a statute, the statute must be construed as a whole. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 47.01 (4th ed. 1973). The legislature must have intended the statute either as a grant of power to both the prosecution and defense to conduct conditional examinations (not as a limit on other depositions) or as a denial of power to both the prosecutor and defendant to conduct other depositions. This situation should be distinguished from that in which a court considers the constitutionality of a statute. For a discussion of the effect of finding a portion of a statute unconstitutional, see note 33 *infra*.

31. *See* Wardius v. Oregon, 412 U.S. 470, 472 (1973).

quate pre-trial preparation and discovery.[32] However, the present construction of Penal Code sections 1335-1345 does not allow the defendant to use depositions for discovery. It is possible to envision circumstances in which a defendant cannot obtain adequate discovery by means other than depositions. Thus, the denial of discovery depositions denies some defendants their constitutionally guaranteed right to prepare their cases adequately.

If the court reaches the conclusion that Penal Code sections 1335-1345 deny due process rights, it must declare those sections unconstitutional. However, the court need void only the code's prohibition against defense discovery procedures.[33] Because the state as prosecutor does not enjoy a similar due process right, it will be limited to its present statutory right of deposing witnesses expected to be unavailable at trial for the sole purpose of preserving their testimony. The defendant will be allowed full use of depositions for discovery purposes. There is reason to believe that the legislature or courts would respond to such a one-sided situation by granting increased discovery rights to the prosecution.[34]

The third possible method for permitting discovery depositions in California is by legislative enactment. In 1972, 1975, and 1976, attempts to codify and expand criminal discovery procedures failed;[35]

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32. Evans v. Superior Court, 11 Cal. 3d 617, 625, 522 P.2d 681, 686, 114 Cal. Rptr. 121, 126 (1974). This concept is relatively new. For earlier cases stating that pre-trial discovery is not required by due process, see Jones v. Superior Court, 58 Cal. 2d 56, 59, 372 P.2d 919, 921, 22 Cal. Rptr. 879, 880-81 (1962); Everett v. Gordon, 266 Cal. App. 2d 667, 674, 72 Cal. Rptr. 379, 383 (1968).

33. This statement is true because "[i]f a statute has two or more objects and is valid as applied to one, but invalid as applied to another, the statute may be upheld in its valid aspect, but will be condemned in so far as it is invalid." 2 C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 44.17 (4th ed. 1973). The court will declare the entire statute void only if allowing a portion of it to remain in effect destroys the overall legislative intent. Franklin Life Ins. Co. v. State Bd. of Equalization, 63 Cal. 2d 222, 228, 404 P.2d 477, 482, 45 Cal. Rptr. 869, 874 (1965). This destruction occurs only when the provisions are connected in subject matter, depend on each other, and operate together for the same purpose. *See* 2 C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION, *supra*, at § 44.04. Because Penal Code section 1335 is directed at two distinct parties, the prosecutor and the defendant, the provisions are not so interdependent that they may not be severed.

34. *See* text accompanying notes 158-68 *infra*.

35. The 1972 legislation sought to codify the then existing defense rights of discovery and require the defendant to give advance notice of his intent to claim the affirmative defenses of alibi or incapacity. The bill was reported from committee without further action. A.B. 2128, Cal. Leg., 1972 Reg. Sess. (March 15, 1972). Two bills were introduced in 1976, each seeking to enact the Uniform Rules of Criminal Procedure, which were drafted by the National Conference of Commissioners on Uniform State Laws and

however, since 1972 article I, section 13 has been repealed. Penal Code sections 1335-1341 codified this constitutional provision. The Code Commissioner's Notes concerning the 1905 amendment of these sections states that "the provisions of the statute respecting the conditional examination of witnesses have been extended so far as may be constitutionally done."[36] Thus, the legislature believed in 1905, and may have continued to believe, that it lacked the power to legislate in the criminal deposition area. Because article I, section 13 has been repealed, the legislature is now free to expand the use of depositions so long as other constitutional rights are respected.[37]

FEDERAL CONSTITUTIONAL BARRIERS

The constitutional rights of the accused are the primary barriers to prosecutorial actions. In any proposal for prosecutorial depositions, two distinct constitutional issues arise: the right against self-incrimination and the right of confrontation.

Right Against Self-Incrimination

The Constitution provides that "[n]o person . . . shall be com-

which provide discovery depositions for both parties. A.B. 4041, Cal. Leg., 1975-1976 Reg. Sess.(March 18, 1976). This bill was set for interim study, but no further action was taken. A.B. 585, Cal. Leg., 1975-1976 Reg. Sess. (Jan. 27, 1975). This bill died in committee.

36. The significance of this Commissioner's Note (CAL. PENAL CODE §§ 1335-45 (Code Comm'r Notes) (West 1970)) in relation to discovery depositions is tempered by three factors. First, the Commissioner's Note addresses only conditional examinations; it does not address discovery depositions. Second, the constitution, by specifically limiting when conditional examinations may be used, had probably made other uses impermissible. Again, however, it had not addressed discovery depositions. Third, the Commissioner's Note is only the legislature's interpretation of a constitutional issue. The court is the supreme authority in such matters. Bixby v. Pierno, 4 Cal. 3d 130, 141, 481 P.2d 242, 249, 93 Cal. Rptr. 234, 241 (1971); Bodinson Mfg. Co. v. California Employment Comm'n, 17 Cal. 2d 321, 325-27, 109 P.2d 935, 939 (1941). Thus the legislature's analysis of the statutes is not binding.

37. The bills before the legislature in 1975 and 1976 called for a total revision of California's criminal procedure. The legislature has not addressed the narrow question of prosecutorial depositions since the repeal of article 1, section 13. *See* note 35 *supra*. Thus, the warning in Rodriguez v. Superior Court, 9 Cal. App. 3d 493, 497, 88 Cal. Rptr. 154, 156 (1970), that the "doctrine of judicial abstention should persuade courts . . . to forbear from adopting new and important procedural devices which the legislature has considered and has rejected" is not applicable. *Rodriguez* addressed the issue of judicially creating a notice-of-alibi requirement.

pelled . . . to be a witness against himself."[38] Thus, serious constitutional questions arise in granting the prosecutor the right to de-

38. U.S. CONST. amend. V. The fifth amendment privilege against self-incrimination is made applicable to the states as a part of the fourteenth amendment's due process requirement by Malloy v. Hogan, 378 U.S. 1, 3 (1964).

Previous decisions in California allowed the prosecution to compel pre-trial disclosure from the defendant of certain evidence the defendant intended to introduce at trial. *E.g.*, Jones v. Superior Court, 58 Cal. 2d 56, 61, 372 P.2d 919, 922, 22 Cal. Rptr. 879, 882 (1962) (granting the prosecutor discovery of the names and addresses of witnesses an accused rapist intended to call and x-rays he intended to introduce in support of his defense of impotency). The theory of *Jones* is that such pre-trial disclosure does not violate the defendant's right against self-incrimination because he is merely required to accelerate the time of disclosure, not to disclose evidence against his will. However, in California *Jones* has been largely limited to its facts by Prudhomme v. Superior Court, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970). *Prudhomme* held the self-incrimination privilege "forbids compelled disclosures which could serve as a 'link in a chain' of evidence tending to establish guilt of a criminal offense." *Id.* at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133. California's rule appears much stricter than is necessary under the federal Constitution. Many states have statutes requiring the defendant to disclose names and addresses of witnesses he intends to call at trial, reports of experts, and physical evidence he intends to produce. *E.g.*, FLA. R. CRIM. P. 3.220(b) (West 1975) (making disclosure contingent on a prior request for discovery by the defendant); OR. REV. STAT. § 135.835 (1975); VT. R. CRIM. P. 16.1 (1974) (omitting physical evidence). The federal procedure is similar but omits lists of witnesses. FED. R. CRIM. P. 16. The drafters of this rule relied upon *Jones*. FED. R. CRIM. P. 16 (Advisory Comm. Note) (1975). The defendant may be required to disclose an intended alibi and the witnesses supporting that alibi. *See, e.g.*, FED. R. CRIM. P. 12.1. The judge may deny the introduction into evidence of undisclosed physical evidence, People v. Longaria, 333 Mich. 696, 697-98, 53 N.W.2d 685, 685-86 (1952), State v. McNamara, 543 P.2d 14, 16 (Or. App. 1975); FED. R. CRIM. P. 12.1(d), or prevent undisclosed witnesses from testifying, State v. Sharp, 202 Kan. 644, 649-50, 451 P.2d 137, 141 (1969); State v. Focht, 37 Ohio St. 2d 173, 174-75, 309 N.E.2d 922, 923 (1974); State v. Wolfe, 273 Or. 518, 520-22, 542 P.2d 482, 483-84 (1975); FED. R. CRIM. P. 12.1(d). *See also* Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L.C. & P.C. 29, 35-36 (1964); Osburn, *Pre-trial Disclosure Under the Oregon Criminal Procedure Code*, 10 WILLAMETTE L.J. 145, 160-61 (1974) [hereinafter cited as Osburn].

Pre-trial prosecutorial discovery in California may be permitted if the concept of self-incrimination prevalent in other jurisdictions is adopted. The court in *Prudhomme*, while denying prosecutorial discovery, stated it "readily acknowledge[d] that pretrial disclosure would greatly facilitate the administration of criminal justice by minimizing the element of surprise, avoiding unnecessary delays and continuances, reducing inconvenience to the court, counsel, jurors and witnesses, and permitting more effective pretrial preparation." 2 Cal. 3d at 323, 466 P.2d at 675, 85 Cal. Rptr. at 131.

The California Supreme Court recently admitted that the "federal high court's decisions on questions of compelled disclosure to the prosecution [are] not wholly consistent with our interpretation of the privilege against self-incrimination." Allen v. Superior Court, 18 Cal. 3d 520, 524, 557 P.2d 65, 66, 134 Cal. Rptr. 774, 775 (1976) (4-3 decision). *See also* Reynolds v. Superior Court, 12 Cal. 3d 834, 943, 528 P.2d 45, 50, 117 Cal. Rptr. 437, 442

pose the accused.[39] However, the rights of the accused are not violated by deposing a non-party witness because "[w]itnesses . . . to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity to interview them."[40] The privilege against self-incrimination "is a *personal* privilege: it adheres basically to the person, not to information which may incriminate him. . . . The Constitution does not proscribe incriminating statements elicited from another."[41]

A more difficult issue of self-incrimination arises if the defendant conducts cross-examination at the non-party witness's deposition. Although the state may not compel the defendant to conduct a cross-examination, the testimony that the prosecution elicits on direct examination may be so devastating that the defendant has no real choice. This cross-examination could conceivably expose the legal theories and factual bases of his defense.[42] The situation is

(1974). The court may soon disapprove the *Prudhomme* doctrine. In *Allen* the crucial fourth vote concurred on the facts, but desired the demise of the doctrine. 18 Cal. 3d at 527, 557 P.2d at 68, 134 Cal. Rptr. at 777 (1976) (Sullivan, J., concurring).

39. *See* 13A BENDER'S FORMS OF DISCOVERY § 8.15, at 8-345 (I. Hall ed. 1974). The United States Supreme Court in Brooks v. Tennessee, 406 U.S. 605, 609-10 (1972), held that the defendant may not be forced to testify before the other defense witnesses have testified. The right against self-incrimination allows him to remain silent until he has heard both the prosecution's case-in-chief and his own witnesses. This holding logically precludes the taking of a defendant's deposition.

40. Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966), *aff'd on remand*, 410 F.2d 1016 (D.C. Cir.), *cert. denied*, 396 U.S. 865 (1969). "Witnesses are not parties, and should not be partisans. They do not belong to either side of the controversy." State v. Papa, 32 R.I. 453, 459, 80 A. 12, 15 (1911). A witness may refuse to answer a question if it directly incriminates him, but not if it incriminates another. 8 WIGMORE, EVIDENCE § 2270 (McNaughton rev. 1961). The privilege may not be asserted by one individual for another, nor may one individual complain that another's rights have been violated. C. MCCORMICK, EVIDENCE § 120 (2d ed. 1972).

41. Couch v. United States, 409 U.S. 322, 328 (1973). *See also* United States v. Nobles, 422 U.S. 225, 233-34 (1976).

42. In California this material is not discoverable by the prosecutor. The California Supreme Court has questioned the constitutionality of notice-of-alibi statutes. Reynolds v. Superior Court, 12 Cal. 3d 834, 842, 528 P.2d 45, 49, 117 Cal. Rptr. 437, 441 (1974). In fact, California so protects the defendant's rights that the prosecution is denied discovery even during the course of the trial "if the trial court determines [it] will conceivably 'lighten' the 'burden' which the prosecution bears *in bringing about a con-*

distinguishable from that presented by notice-of-alibi statutes requiring the defendant to inform the state before trial of his intent to claim an alibi as an affirmative defense. Here the defendant initiates the disclosure and controls whether the affirmative defense is introduced at trial. With prosecutorial depositions neither factor is present. If the witness is unavailable at trial, the prosecution would be permitted to admit the witness's essentially ex parte deposition.[43]

Despite the initial impression that this situation is undesirable, the courts and legislatures have indicated that such procedures are not only constitutional, but also fair. The long standing approval of depositions to preserve testimony evidences this attitude.[44] Several possible reasons exist for such acceptance. First, the cross-examination is not a compelled personal disclosure. The defendant may run a risk in not cross-examining, but he similarly accepts a risk every time the fifth amendment self-incrimination privilege is invoked before the trier of fact. Second, the defendant need only cross-examine on those issues explored by the prosecution. His only goal is to obtain rebuttal and impeachment evidence. He need not expose his own theories or knowledge of special facts. Third, the defendant need not obtain his discovery during the deposition. He is free to conduct informal investigatory interviews with the deponent. Thus, the defendant may develop evidence to rebut the deposition without exposing his case to the prosecutor.

Right of Confrontation

The second constitutional argument is that depositions deny the accused the right to confront his accuser. This sixth amendment guarantee[45] has three distinct components: the right of cross-examination, the right to have the witness under oath, and the right to have the trier of fact observe the demeanor of the witness.[46]

viction." People v. Bias, 31 Cal. App. 3d 663, 672, 107 Cal. Rptr. 519, 526 (1973). *But see* note 38 *supra*. If the defendant had a right to avoid any pre-trial disclosure, the hearings required under omnibus procedures would be illegal. *See, e.g.*, OR. REV. STAT. § 135.835 (1974).

43. Ex parte depositions are an evil which has long been forbidden by the common law. *See* MCCORMICK, *supra* note 40, at § 244.

44. *See, e.g.*, United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973); People v. Feigelman, 65 Cal. App. 319, 223 P. 579 (1924); FED. R. CRIM. P. 15.

45. The sixth amendment right of confrontation was held applicable to the states in Pointer v. Texas, 380 U.S. 400 (1965). California guarantees the right of confrontation in CAL. CONST. art. 1, § 15 and CAL. PENAL CODE § 686(3) (West Supp. 1976).

46. Barber v. Page, 390 U.S. 719, 725 (1968).

The first two components are met under deposition practice. The difficulty arises with the demeanor requirement. Although depositions will be used primarily for the in-court impeachment of witnesses, thereby substantially mooting the demeanor issue, depositions will sometimes be used as the testimony of an unavailable witness.

Earlier, the United States Supreme Court had stated that the in-court appearance of the witness was necessary.[47] In recent years, however, it has become obvious that this is an overstatement. Rule 15 of the Federal Rules of Criminal Procedure permits the use of conditional examinations taken by the prosecution when the deponent is unavailable for trial.[48] Such a procedure was used with approval by the Second Circuit in *United States v. Singleton*.[49] As a California court of appeal noted in the 1968 case of *People v. Ashford*:[50]

> The emphasis . . . on confrontation by the trier of fact must be tempered by the knowledge that the State Constitution authorizes the use of depositions in criminal actions . . . ; that depositions are used every day to determine important factual questions in civil disputes; and that, when the witness is dead or seriously injured there can be no possibility of confrontation by the ultimate trier of fact.[51]

Further support is found in the practice of admitting testimony from prior examinations or trials on the same action.[52] Thus, the defen-

47. *Id.*; Berger v. California, 393 U.S. 314, 315 (1969) (making *Barber* retroactive). *But see* Motes v. United States, 178 U.S. 458, 471-73 (1900), which reviews pre-1900 cases allowing depositions into evidence when the witness was absent. *Barber* is considered the apex of the United States Supreme Court's interpretation of the demeanor requirement. 8 MOORE'S FEDERAL PRACTICE ¶ 15.02(3), at 15-26 (2d ed. 1975).

48. FED. R. CRIM. P. 15(d). The prosecutor under this rule may not conditionally examine defense witnesses.

49. 460 F.2d 1148 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973). The actual statute used in *Singleton* was not Federal Rule of Criminal Procedure 15 but rather a similar provision found in the Organized Crime Control Act of 1970. 18 U.S.C. § 3503 (1970). *Accord*, United States v. King, 20 CRIM. L. REP. (BNA) 2348 (9th Cir. Dec. 12, 1976); United States v. Ricketson, 498 F.2d 367 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974).

50. 265 Cal. App. 2d 673, 71 Cal. Rptr. 619 (1968).

51. *Id.* at 684, 71 Cal. Rptr. at 627 (citations omitted). The court in Virgin Islands v. Aquino, 378 F.2d 540, 548 (3rd Cir. 1967), stated it was a "well settled" proposition that the trier of fact need not observe the witness.

52. *See* Mancusi v. Stubbs, 408 U.S. 204, 216 (1972); People v. Lint, 182 Cal. App. 2d 402, 420, 6 Cal. Rptr. 95, 106 (1960); People v. Paysen, 123

dant's right of confrontation is not violated by permitting the prosecution to depose non-party witnesses.

POLICY ARGUMENTS AGAINST PROSECUTORIAL DISCOVERY DEPOSITIONS

If the trial court has the discretion[53] to grant prosecutorial discovery depositions, a mere demonstration that such discovery is constitutional may be insufficient. Similarly, the California legislature will not statutorily create prosecutorial discovery depositions merely because such actions are within its power. A review of California's judicial[54] and legislative[55] history shows a general acceptance of the present system. This acceptance is partially explained by the legislature's and judiciary's feeling of inability to act in the face of constitutional restraints.[56] Even though these restraints were recently removed by the repeal of article I, section 13 of the California constitution and by the United States Supreme Court's interpretations of the fifth and sixth amendments,[57] with

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Cal. App. 396, 398, 11 P.2d 431, 432 (1932) (allowing testimony of witness given at preliminary hearing to be admitted substantively when witness unavailable for trial). *But see* Barber v. Page, 390 U.S. 719, 725 (1968) (stating that a cross-examination at a preliminary hearing in certain circumstances may not meet the requirements of the confrontation clause); Pointer v. Texas, 380 U.S. 400, 407 (1965) (holding that the sixth amendment requires "complete and adequate" cross-examination); People v. Gibbs, 255 Cal. App. 2d 739, 743-44, 63 Cal. Rptr. 471, 476 (1968) (holding that on the particular facts of the case a transcript of the preliminary hearing could not be admitted because of lack of confrontation).

The long standing admissability of prior testimony if the witness is unavailable is based on the prosecutor's "necessity" of introducing relevant evidence. *See* California v. Green, 399 U.S. 149, 168 n.16 (1970). Under California civil practice if the witness is available, a deposition may not be used for purposes other than impeachment. *See* CAL. CIV. PROC. CODE § 2016 (d) (West Supp. 1976). The defendant has a constitutional right to compel attendance of witnesses. Washington v. Texas, 388 U.S. 14, 23 (1967). *See also* Dutton v. Evans, 400 U.S. 74, 96 (1970) (Harlan, J., concurring). Thus, the confrontation issue will arise only when the deponent is unavailable—the exact circumstances under which prior testimony has long been admitted.

53. *See, e.g.*, Pritchess v. Superior Court, 11 Cal. 3d 531, 538, 522 P.2d 305, 309, 113 Cal. Rptr. 897, 901-02 (1974); Hill v. Superior Court, 10 Cal. 3d 812, 817, 518 P.2d 1353, 1356, 112 Cal. Rptr. 257, 260 (1974).

54. *See, e.g.*, Lee v. Superior Court, 58 Cal. App. 3d 851, 852-53, 130 Cal. Rptr. 532, 533 (1976); Everett v. Gordon, 266 Cal. App. 2d 667, 671, 72 Cal. Rptr. 379, 381 (1968); People v. Lindsay, 227 Cal. App. 2d 482, 510, 38 Cal. Rptr. 755, 773 (1964).

55. Courts have found highly significant the fact that when in 1957 the legislature provided for depositions in civil cases it made no change in the criminal practice. *E.g.*, Clark v. Superior Court, 190 Cal. App. 2d 739, 742, 12 Cal. Rptr. 191, 193 (1961). *See also* note 35 *supra*.

56. *See* text accompanying notes 19-28 *supra*.

57. *See* text accompanying notes 38-52 *supra*.

the exception of *Runyan*,[58] there has been no liberalizing movement in this field. Policy considerations are probably responsible. Opponents of prosecutorial discovery envision a multitude of abuses flowing from reciprocal discovery depositions. Such abuses include perjury and intimidation of witnesses,[59] financial and administrative burdens for prosecutors and defendants,[60] an undesirable balance in favor of the prosecution in access to evidence,[61] and the defendant's being forced to examine witnesses without adequate preparation.[62] Such reasons, however, lack validity in light of modern legal practices.

Perjury and Intimidation

One of the chief arguments against prosecutorial discovery depositions is that their use would increase the possibility of perjured testimony.[63] Opponents of liberalized discovery claim that a party armed with advance knowledge of the adverse party's case can bribe or intimidate witnesses into providing testimony precisely designed to defeat the adversary's evidence and legal theories. In the 1953 New Jersey Supreme Court case of *State v. Tune*,[64] Chief Justice Vanderbilt's statement clarified this proposition.

> Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. . . . The presence of perjury in criminal proceedings today is extensive despite the efforts of the courts to eradicate it and constitutes a very serious threat to the administration of criminal justice and thus to the welfare of the country as a whole. . . . To permit unqualified disclosure . . . would defeat the very ends of justice.[65]

58. People v. Municipal Court (Runyan), 63 Cal. App. 3d 815, 134 Cal. Rptr. 103 (1976), *hearing granted*, No. 77-9 (Cal. Sup. Ct. Jan. 13, 1977).
59. *See* text accompanying notes 63-80 *infra*.
60. *See* text accompanying notes 81-90 *infra*.
61. *See* text accompanying notes 91-114 *infra*.
62. *See* text accompanying notes 115-19 *infra*.
63. State v. Tune, 13 N.J. 203, 210-11, 98 A.2d 881, 884 (1953); Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732, 734 (1967) [hereinafter cited as Langrock]; Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 57 (1961); Shatz, *supra* note 3, at 261.
64. 13 N.J. 203, 98 A.2d 881 (1953).
65. *Id.* at 210-11, 98 A.2d at 884. Various forms of intimidation exist.

A similar argument made in opposition to prosecutorial use of depositions is based on a questionable assumption, does not address competing considerations, and ignores rebutting evidence.

The argument's basic assumption is that the prosecutor's opportunity to depose some witnesses increases his ability to shape the testimony of other witnesses. An example will illustrate the contemplated situation. The prosecutor seeks to convict the defendant for assaulting the victim. He originally plans his case around the testimony of *A*, a friendly witness, that the defendant attacked the victim at 9:00 p.m. However, upon deposing hostile defense witness *B*, he learns that *B* saw the victim at 10:00 p.m. and that the victim at that time did not bear signs of injury. An unscrupulous prosecutor could attempt to induce witness *A* to testify he viewed the assault at 11:00 p.m. Alternatively, he may induce witness *B* to state he was mistaken in his deposition testimony and that he actually saw the victim at 8:00 p.m.

Opponents of prosecutorial discovery assert that the described misconduct could not occur in the absence of prosecutorial depositions. However, if the prosecutor has the resources to convince hostile witness *B* he should change his testimony after it is recorded in a deposition, the prosecutor can probably convince *B* to reveal his testimony even without the deposition. In addition, if California adopts discovery depositions for the defendant and the defendant chooses to depose the witness, the prosecutor will obtain the requisite information by cross-examination.[66] In an unregulated situation the testimony of friendly witness *A could* be tailored to meet any evidence discovered in *B*'s deposition. However, the testimony of the prosecution's witness is often fixed by his testimony at a grand jury or preliminary hearing. Thus, the prosecutor's witness could not change the basic structure of his testimony without being impeached by his prior testimony.[67] Making prosecutorial

Classic examples are threats of physical violence, United States v. Estep, 151 F. Supp. 668, 672-73 (N.D. Tex. 1957); People v. Chin Hane, 108 Cal. 597, 603, 41 P. 697, 699 (1895), or economic retaliation, Bergan Drug Co. v. Parke, Davis & Co., 307 F.2d 725, 727 (3d Cir. 1962).

66. A deposition is by definition a two-party affair with the right to cross-examine. CAL. CIV. PROC. CODE § 2004 (West 1955).

67. CAL. EVID. CODE §§ 770, 780(h), & 1235 (West 1966). California allows the use of a prior inconsistent statement for impeachment purposes or for its probative value if the witness is present to explain or deny the statement. People v. Strickland, 11 Cal. 3d 946, 953-54, 523 P.2d 672, 676, 114 Cal. Rptr. 632, 636 (1974). *But see* People v. Agee, 67 Cal. App. 3d 148, 155, 136 Cal. Rptr. 492, 495 (1977), which holds that unsworn prior inconsistent statements of a witness are not admissible for the truth of the matter asserted. Such pre-trial statements are valuable because the witnesses have not yet rehearsed their testimony. Daniel, *Criminal Discovery: A Matter of Fundamental Fairness*, 12 GA. ST. B.J. 134, 134 (1976).

and defense depositions unavailable pending the conclusion of the grand jury or preliminary hearing minimizes the possibility of prosecutorial misconduct. Allowing the defendant to depose the prosecution's witnesses before granting prosecutorial depositions is an additional safeguard to prevent the prosecutor from shaping his witness's testimony. Thus, by proper regulation of the procedure, the defendant is protected from prosecutorial efforts to suborn perjury or intimidate witnesses.

In contrast, the potential for abuse by the defendant is obvious if California denies the prosecutor discovery depositions while granting the defendant such depositions. The defendant may initially study the prosecution's evidence and legal theories when they are presented at the grand jury or preliminary hearings.[68] He may then obtain further knowledge of the prosecutor's case through either formal discovery[69] or the "open file" policy of many prosecutor's offices.[70] Equipped with this knowledge, he can conduct a searching examination when deposing the prosecutor's witnesses. After assembling this complete dossier on the prosecution's case, he can analyze it in depth. Through careful planning and tailoring of testimony, the defendant and his witnesses may create an almost irrebuttable defense.[71]

The prosecutor is presently powerless to prevent such abuses by the defendant. Although he may informally interview witnesses with their consent, he has no reasonable means of compelling their pre-trial cooperation. Thus the defendant can mold the testimony of his witnesses up until the very moment of trial. By allowing the prosecutor to take depositions, the dangers of this situation are largely avoided. The prosecutor can "freeze" the testimony of defense witnesses at an early date.[72] Once this testimony is frozen, the possibility of impeachment will deter the defendant from attempting to change the testimony at trial.[73]

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68. *See* text accompanying notes 109-13 *infra.*
69. *See* text accompanying notes 105-07 *infra.*
70. *See* text accompanying notes 101-04 *infra.*
71. This result also occurs when notice-of-alibi statutes are not in effect, thus leaving the prosecutor unable to expose the fabrication. 6 J. WIGMORE, EVIDENCE § 1855(b) (Chadbourn rev. 1974).
72. *ABA Minimum Standards for Criminal Justice—A Student Symposium—Louisiana and Criminal Discovery*, 33 LA. L. REV. 596, 599 n.13 (1973).
73. *See* note 67 *supra.*

If a defense witness presents perjured testimony at trial, the unperjured deposition of an unavailable defense witness may contain contradicting evidence. Because the deponent is unavailable, the deposition may be used for its substantive value.[74] Thus, in the deposition the prosecution has a valuable weapon to ensure the truthful testimony of both the deponent and the other defense witnesses.

The long civil experience confirms that reciprocal rights to depositions discourages perjury rather than promotes it.[75] Vermont, which previously allowed only the defendant to take depositions in criminal cases, amended its procedure in 1974 to allow the prosecutor a similar right.[76] Thus, experience shows that the interests of justice are best served by allowing both parties to depose witnesses.

Some of the most respected authorities in the United States have noted that deposition practice avoids perjury and promotes discovery. The Advisory Committee Note to Federal Rule of Criminal Procedure 16 stated that the purpose of allowing prosecutorial depositions to preserve the testimony of witnesses whose lives would be endangered by disclosure was "to make pretrial disclosure possible and at the same time to minimize any inducement to use improper means to force the witness either to not show up or to *change his testimony before a jury.*"[77] Mr. Justice William J. Brennan made the most powerful statement against the specter of perjury.

> I could not be persuaded . . . that the old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of truth, supports the case against criminal discovery. I should think, rather, that its complete fallacy has been starkly exposed through the extensive and analogous experience in civil causes.[78]

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74. *See* CAL. CIV. PROC. CODE § 2016(d) (West Supp. 1976); CAL. PENAL CODE § 1345 (West 1970).

75. Address by Associate Justice William J. Brennan, Symposium at the Judicial Conference of the District of Columbia Circuit, Wash. D.C. (May 9, 1963), *printed in* 33 F.R.D. 56, 62 (1964). *See* Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1154 (1951). This article concerned a study of civil practice done by the Administrative Office of the United States Courts. The author of the article concluded that most attorneys reject the contention that discovery leads to perjury.

76. VT. R. CRIM. P. 15 (1974).

77. FED. R. CRIM. P. 16 (Advisory Comm. Note) (1975) (emphasis added).

78. Brennan, *supra* note 75. The American Bar Association has implicitly rejected the idea that discovery leads to perjury or the intimidation of witnesses. Weininger, *Criminal Discovery and Omnibus Procedure in a Federal Court: A Defense View*, 49 S. CAL. L. REV. 514, 517-18 (1976). An

A last factor exposing the fallacy of the perjury argument is that the state, as an authority figure with huge investigatory powers, in most instances obtains sufficient evidence even in the absence of depositions.[79] Thus, the use of depositions generally will not increase the state's ability to tailor its testimony to counteract the expected defense. Rather, the effect will be preserving testimony while affording the prosecution a more economical means of gathering evidence.[80]

Financial and Administrative Problems

A second argument against prosecutorial use of depositions is that it imposes a financial and administrative burden on both the defendant and the prosecutor. The civil experience demonstrates that the deposition process can be expensive and time-consuming.[81] The use of depositions in criminal cases will be even more expensive because the confrontation clauses of the United States and California Constitutions guarantee the defendant's right to be present at the taking of the deposition. The exercise of this right necessarily involves travel expenses either for the witness or for the parties. If the defendant is in custody, provisions must be made to prevent his escape. Special facilities must be provided for taking criminal depositions.[82] In addition, expensive legal counsel may be present. All these factors substantiate claims that a deposition procedure can be expensive.

The true issue, however, is which device will provide the least expensive means of obtaining information concerning a case. If discovery through depositions is unavailable, the prosecutor must de-

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ABA advisory committee stated that "the answer to the alleged untrustworthiness of counsel is not the denial of procedures beneficial to the process, but improvement in the standards for lawyers' conduct and more efficient discipline." ABA ADVISORY COMM. ON PRETRIAL PROCEEDINGS, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (approved draft), pt. 1, Standard 1.2, at 39 (Commentary) Oct. 1970. For a similar view, see United States v. Ash, 413 U.S. 300, 320 (1973).

79. *See* note 92 *infra*.

80. *See* text accompanying notes 138-40 *infra* concerning the advantages of preserving a witness's testimony. *See* text accompanying notes 81-87 *infra* concerning the economics of depositions.

81. *Depositions, supra* note 8, at 251; Speck, *supra* note 75, at 1138.

82. Clark v. Superior Court, 190 Cal. App. 2d 739, 743, 12 Cal. Rptr. 191, 193 (1961).

velop his information through the investigatory arms of law enforcement agencies and his personal efforts.[83]

The inferiority of the investigatory process, both economically and qualitatively, is evidenced by the frequent use of depositions in civil practice. In civil litigation each party desires to minimize its costs. Because attorney's fees (the major expense) are not generally awarded the prevailing litigant,[84] each party uses the least expensive method for obtaining information. Depositions are frequently used because a short deposition often produces more information than do several hours of investigation.[85] In addition, if the deposition process is not used, each party must conduct its own investigation. Thus, the cost of one deposition proceeding must be compared with the cost of conducting two separate investigations. Because the majority of cases in California state courts involve indigent defendants,[86] the state must usually bear the costs of either depositions or an investigation.[87] It therefore appears that the substitution of depositions for investigations can effect substantial savings for both the defense and prosecution.

The deposition process does impose extra administrative burdens on the prosecutor and the defense counsel by requiring personal attendance at the time the witness is deposed at hearings on possible collateral issues concerning the depositions.[88] However, because

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83. The prosecutor in California has virtually no formal discovery devices because of California's strict interpretation of the defendant's fifth amendment self-incrimination privilege. *See generally* note 42 *supra.*

84. *See* LeFave v. Dimond, 46 Cal. 2d 868, 870, 299 P.2d 858, 859 (1956); CAL. CIV. PROC. CODE § 1021 (West 1955).

85. *Deposition, supra* note 8, at 251.

86. One commentator estimated in 1965 that 60% of all felony defendants and 25% to 50% of all misdemeanor defendants could not afford counsel. An estimated 50% needed appointed counsel for appeals and other post-conviction matters. S. SILVERSTEIN, DEFENSE OF THE POOR 8-9 (1965).

87. CAL. PENAL CODE § 987.2 (West Supp. 1976) grants the court power to award a "reasonable sum for compensation and for necessary expenses." Such expenses may include costs of employing investigators and experts. 41 CAL. OP. ATT'Y GEN. 62-237 (1973). The Vermont and federal rules permit the court to charge the government for the costs incurred by a defendant in attending a prosecutorial deposition or by an indigent defendant in attending a defense deposition. FED. R. CRIM. P. 15(c); VT. R. CRIM. P. 15(c) (1974).

88. For example, a prosecutor may seek to depose the spouse of the defendant. The defendant may oppose the deposition on the grounds the information sought is protected by the marital communications privilege. A pre-trial hearing must be held to determine whether the deposition may be taken.

Depositions also work a burden on non-party witnesses. Courts are slow in subjecting such involuntary participants to the court's compulsory process. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.

depositions are more economical than investigations, the state could merely shift its funding from the investigative agencies to the prosecutorial agencies. With this greater funding the prosecutor's office could expand its legal staff to compensate for the increased workload.

A valuable by-product of shifting the investigative function to the prosecutor's office is a reduction in the prosecutor's need to rely on the veracity and completeness of the investigative agency's reports. In some instances this division in functions results in injustice to the defendant.[89] By personally observing the deponent's testimony during a deposition, the attorney avoids distortions which are inevitable with secondary information such as reports and summaries. In addition, he observes the demeanor of the witness. With this firsthand information the prosecutor is better prepared to examine the witness at trial.

The possibility of abusing the deposition process and thereby causing administrative or financial burdens does exist. An indigent or extremely wealthy defendant could request such extensive depositions that the prosecutor would prefer accepting a plea of guilty to a lesser offense or even foregoing the prosecution. Similarly, the prosecutor, by conducting extensive depositions, could economically blackmail a non-indigent defendant into a guilty plea. Such potential abuses, however, can be controlled by protective court orders.[90] With this protection depositions will prove to be an inexpensive, easily administered procedure.

L. REV. 228, 245 (1964). However, witnesses are subjected to such inconvenience in civil suits in which the interests of the parties are generally much less. Thus, this argument appears without foundation.

89. *See* Address by Dean A. Kenneth Pye, Symposium at the Judicial Conference of the District of Columbia Circuit, Wash., D.C. (May 9, 1963), *printed in* Pye, *The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 82, 88 (1964). One case of such an injustice occurred when a defendant claimed another person with the same nickname as his had committed the charged offense. The United States Attorney denied in court that such an individual existed. Through an error in FBI procedures the defendant gained access to normally closed FBI files. Those files showed that such an individual did exist. The police officials had never informed the United States Attorney of this fact. *Id.*

90. Protective orders for civil depositions may be issued for cause under CAL. CIV. PROC. CODE §§ 2019(b)(1) & (d) (West Supp. 1976). The court may change the time or place of the deposition, limit the subject of inquiry, deny the deposition, assess costs, or make any other order necessary to pro-

Balance of Discovery Powers

The use of depositions by the prosecution is also opposed on the ground that the balance in access to information between the defendant and the prosecutor will be upset. This balance refers to the relative abilities of the opposing parties to secure the evidence necessary to prove their positions. The defendant should not be at a disadvantage vis à vis the prosecution in his ability to obtain this evidence.[91] Opponents of increased prosecutorial discovery believe that the balance presently favors the prosecutor[92] and that he should not be given any further advantages.

However, this argument is based on the proposition that the prosecutor enjoys a superior position in access to the facts surrounding a case. In light of recent advances in defense discovery,[93] it is questionable whether such a position exists. The Advisory Committee Note to Rule 16(c) of the Federal Rules of Criminal Procedure stated that increased prosecutorial discovery "would appear necessary to prevent the defendant from obtaining an unfair advantage."[94] Learned Hand in 1923 anticipated the Advisory Committee Note when he stated that "[u]nder our criminal procedure the accused has every advantage [over the prosecution]."[95] Both

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tect the deponent or party from annoyance, embarrassment, or oppression. The California Supreme Court has discussed the vagueness of these standards. *See* Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 382-83, 364 P.2d 266, 279, 15 Cal. Rptr. 90, 103 (1961). Despite this vagueness the provisions provide adequate protection. *See* McCoy, *California Civil Discovery, An Introduction*, 41 J. ST. B. CAL. 519, 522 (1966). Protective orders have generally been necessary only in complex litigation such as anti-trust cases. Louisell, *Discovery Today*, 45 CALIF. L. REV. 486, 513-14 (1957).

91. *See* G. Lapides, *Cross-Currents in Prosecutorial Discovery: A Defense Counsel's Viewpoint*, 7 U.S.F.L. REV. 217, 255 (1973).

92. The state's basic investigatory power is clearly superior to that of the defendant's. Kampfe & Dostal, *Discovery in the Federal Criminal System*, 36 MONT. L. REV. 189, 205 (1975). *See* Dennis v. United States, 384 U.S. 855, 878 (1966). The state's police force begins its investigation soon after the event. It utilizes advanced scientific facilities and the combined forces of several law enforcement agencies. Potential witnesses are more willing to cooperate with the state than with the defense attorney. Nakell, *Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. REV. 437, 439-40 (1971-72). The state may also subpoena witnesses to appear before a grand jury. *See, e.g.*, CAL. PENAL CODE § 939.2 (West Supp. 1976). In Iowa the prosecutor may subpoena a witness for an interview, but if an indictment, preliminary information, or information has been filed, the defendant may be present and conduct a cross-examination. IOWA CODE ANN. § 769.19 (West Supp. 1976).

93. *See generally* text accompanying notes 101-14 *infra*.

94. FED. R. CRIM. P. 16 (Advisory Comm. Note) (1966). For a similar view, see Louisell, *supra* note 63.

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

these comments were addressed to systems affording the defendant considerably *less* discovery than does the present California system.

The defendant presently enjoys several advantages in discovery. One is his fifth amendment privilege against self-incrimination.[96] In California the state rarely may compel pre-trial disclosure of evidence that the defendant intends to introduce at trial.[97] This evidence includes not only the defendant's expected testimony but also statements by other witnesses which are in the defendant's possession. Thus, the prosecution may obtain only very limited discovery directly from the defendant.

Another method available to the defendant to prevent prosecutorial discovery is his privilege claim. By asserting a privilege, he can prevent the other party to a patient-psychotherapist,[98] husband-wife,[99] or clergyman-penitent[100] communication from disclosing the contents of that communication.

In contrast to the defendant's right to prevent the prosecutor from obtaining certain evidence is the prosecutor's obligation to disclose evidence to the defendant. Because the prosecutor has a duty not only to the people of the state but also to the accused,[101] he is expected to maintain an open file—that is, the prosecutor should, at least to a limited extent, allow the defendant to inspect the state's file on his case.[102] In addition, under the 1963 United States Supreme Court holding in *Brady v. Maryland*[103] and its progeny, the prosecutor must disclose to the defendant any exculpatory evidence his investigations reveal.[104]

96. *See* note 38 *supra.*
97. *See generally* note 38 *supra.*
98. CAL. EVID. CODE § 1014 (West Supp. 1976); *see also id.* § 1028 (West 1966), which limits the definition of *psychotherapist* for criminal proceedings.
99. *Id.* § 980 (West 1966). For the non-applicability of this privilege in certain criminal proceedings, see *id.* § 985 (West Supp. 1976) and § 987 (West 1966).
100. *Id.* §§ 1033 & 1034 (West 1966).
101. Address by the Honorable Paul B. Johnson, Conference of the National District Attorneys Association, Panel on Pre-trial Discovery in Criminal Cases (Aug. 21, 1964) *printed in* 31 BROOKLYN L. REV. 320, 323 (1964).
102. The open file policy is not complete. Many prosecutors close their files when negotiations have failed and there is a decision to prosecute. Osburn, *supra* note 38, at 147.
103. 373 U.S. 83 (1963).
104. *Id.* at 87. *See also* Weatherford v. Bursey, 97 S. Ct. 837, 845 (1977) (prohibition against concealing favorable evidence does not always require

In California, however, the defendant need not rely simply on the prosecutor's duty under *Brady* to open his files. Through judicially created discovery devices defendants may compel the prosecutor to disclose virtually all evidence which is non-privileged—that is, not the attorney's work product—does not endanger the prosecution of the case or other legitimate government interests—for example, does not identify informers or reveal military secrets—and is not readily available to the defendant by other means.[105] Thus, in most instances the defendant may inspect statements which are in the hands of the prosecutor and which were made either by the defendant himself or by the prosecution witnesses,[106] real evidence and reports concerning that evidence, and the names and addresses of eye-witnesses to the charged offense.[107] Obviously the criminal defendant in California has sufficient methods to discover the evidence supporting the prosecution's case-in-chief.

The defendant may supplement the material he obtains from the prosecutor's file through his own efforts. If *Runyan* becomes the law of California, the defendant will be allowed to use depositions for discovery purposes. Should the California Supreme Court or the legislature reject *Runyan*, the defendant would retain his right to interview witnesses without interference by the prosecutor. A second device available to the defendant for obtaining information not found in the prosecutor's files is the commencing of a civil suit relating to the same matter as do the criminal charges. This situation could occur, for example, when the defendant's assault charges arose from a fight with the victim. The defendant, by filing a civil assault charge against the victim, obtains the right to use civil depositions. Because civil discovery is virtually unlimited, the defendant obtains information unavailable to him under the rules of criminal discovery. Although protective orders sometimes issue

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the prosecution to reveal the names of its witnesses before trial; no duty to divulge name of undercover agent); United States v. Agurs, 427 U.S. 97, 108-12 (1976) (stating that the prosecutor has an affirmative duty to disclose material exculpatory evidence but has no duty to allow the defendant to inspect his files). The prosecutor must also present exculpatory evidence to the grand jury if the defendant is charged by indictment. Johnson v. Superior Court, 15 Cal. 3d 248, 251, 539 P.2d 792, 794, 124 Cal. Rptr. 32, 34 (1975).

105. *See, e.g.*, Hill v. Superior Court, 10 Cal. 3d 812, 817-19, 518 P.2d 1353, 1356-58, 112 Cal. Rptr. 257, 260-62 (1974); *In re* Valerie E., 50 Cal. App. 3d 213, 219, 123 Cal. Rptr. 242, 246 (1975).

106. People v. Lindsay, 227 Cal. App. 2d 482, 510, 38 Cal. Rptr. 755, 773 (1964).

107. *Id. See* Vetter v. Superior Court, 189 Cal. App. 2d 132, 134-35, 10 Cal. Rptr. 890, 892-93 (1961).

in instances of this kind,[108] the possibility of abuse is readily apparent.

The defendant, in addition to his superior access to raw information, enjoys pre-trial opportunities to observe and probe the strategy of the prosecution. These opportunities arise from the procedures involved in bringing a defendant to trial. A preliminary hearing is required if a defendant is charged by a complaint.[109] At the hearing the prosecution must produce a legal theory and evidence sufficient to convince the judge that the defendant should stand trial. Thus the defendant gains an insight into the prosecution's case-in-chief.[110] The defendant may also call witnesses and conduct cross-examination. One California court warned that "[m]any magistrates have faced the problem of having skilled and adept defense counsel attempt to turn the preliminary hearing into full scale discovery proceedings, even to the extent of subpoenaing all of the officers and possible witnesses involved."[111]

If the prosecutor charges the defendant by an indictment, a grand jury hearing is required.[112] Although the defendant has no right to cross-examine or even to be present at the hearing, he is entitled to a transcript of the proceeding.[113] Because the prosecutor at the

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108. *See* United States v. Kordel, 397 U.S. 1, 12 n.27 (1970); United States v. Bridges, 86 F. Supp. 931, 933 (N.D. Cal. 1949).

109. CAL. PENAL CODE §§ 737-39 (West 1970).

110. DEMEO, *supra* note 3, at ¶ 16.03(5); Daniel, *supra* note 67. DeMeo notes that the defendant may call witnesses at the preliminary hearing. Thus a preliminary hearing may serve as a form of deposition for each side. This proceeding often provides the defendant with information to determine whether he will plead guilty. *See* Weininger, *supra* note 78, at 529. *See also* Shatz, *supra* note 3. DeMeo further notes, however, that in serious cases the prosecutor uses grand jury proceedings, thus effectively eliminating the discovery function for both sides. DEMEO, *supra* note 3, at ¶ 16.03(5). In England the prosecution must make known to the defendant all evidence it intends to introduce at trial. *Id.* at ¶ 16.01(3)(a).

111. People v. Ashford, 265 Cal. App. 2d 673, 680 n.3, 71 Cal. Rptr. 619, 624 n.3 (1968).

112. People v. Mersino, 237 Cal. App. 2d 265, 270, 46 Cal. Rptr. 821, 825 (1965); CAL. PENAL CODE §§ 737 & 917 (West 1970).

113. CAL. PENAL CODE § 938.1 (West Supp. 1976). As a practical matter the defendant's discovery is often quite limited. The prosecutor need only put on enough evidence to show probable cause that the accused should stand trial. *See* Weininger, *supra* note 78, at 526; Comment, *Criminal Discovery Depositions in Iowa: The Future of* State v. Peterson, 60 IOWA L. REV. 345, 350 (1974). *But see* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1191 (1960);

grand jury hearing must present the same evidence as required at a preliminary hearing, the transcript reveals the probable testimony of key witnesses and the legal theory of the prosecutor's case.

The final procedural device available to the defendant for gaining information concerning the prosecution's case is the pre-trial motion.[114] Usually these are motions by the defendant to suppress evidence or compel discovery. The prosecutor may be forced in the process of opposing the motion to reveal the legal theory of his case-in-chief or previously undisclosed evidence. Thus, the defendant gains valuable information even if he is unsuccessful in his motion.

It is apparent from this review of devices available to the defendant that he presently enjoys a superior position to the prosecution in access to information. Granting the prosecution the right to take discovery depositions does not alter that position. Whatever information the prosecutor gains at the deposition is immediately available to the defendant. No matter how thorough the prosecution's discovery, the defendant retains exclusive knowledge of those matters protected from discovery by the fifth amendment and personal communications privileges. It appears, therefore, that opposition to prosecutorial discovery depositions based on fear of upsetting the relative availability of information to each side is unfounded.

Inability to Conduct Effective Cross-Examination

A final argument in opposition to prosecutorial discovery depositions is that the defendant may not be adequately prepared to cross-examine the witness.[115] The prosecution will generally seek to depose witnesses shortly after the crime occurs. Defense counsel, however, does not begin his investigation until the defendant is arrested and counsel appointed or retained. Because the state's investigation usually starts immediately after the crime is committed, it has superior information in the early phases of the case.[116] Thus, the defendant's counsel may, in fact, be unable to conduct an ade-

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Nakell, *supra* note 92 (expressing the view that grand jury proceedings are used by prosecutors as a discovery device).

114. Shatz, *supra* note 3, at 263; *see, e.g.*, People v. Superior Court, 19 Cal. App. 3d 522, 531-32, 97 Cal. Rptr. 118, 125 (1971).

115. United States v. Singleton, 460 F.2d 1148, 1155 (2d Cir. 1972) (Oakes, J., dissenting), *cert. denied*, 410 U.S. 984 (1973); A.B.A. SPECIAL COMMITTEE REPORT ON FEDERAL RULES OF PROCEDURE, *printed in* 38 F.R.D. 95, 107 (1965).

116. *See* note 92 *supra.*

quate cross-examination of the deponent. Because the confrontation clause requires an opportunity to fully and effectively cross-examine,[117] this denial may rise to constitutional dimensions. Even if the denial does not raise constitutional questions, a judge may exercise his discretion and forbid the taking or use of depositions on the basis of unfairness to the defendant.

Procedures can be developed to avoid these undesirable results. One such procedure is allowing the defendant access to the prosecution's files in the early phases of the case. Another is allowing the defendant to depose the prosecution's witnesses before the prosecution is allowed to depose the witnesses friendly to the defendant. Both procedures provide the defendant rapid access to the facts necessary for him to cross-examine the witnesses the prosecution seeks to depose. Another protective device is requiring the deposition to be noticed a considerable period of time in advance of its taking.[118] This device allows the defendant to focus his investigation on areas of the case within that witness's knowledge. With these safeguards the possibility of denying the defendant a full and effective cross-examination at any deposition is minimized.

Events *could* occur subsequent to the taking of the deposition which indicate the defendant was denied an effective cross-examination. This situation could arise, for instance, if new evidence comes to light after the taking of the deposition.[119] This evidence may suggest an important new line of inquiry. Should this situation develop, the defendant is not without remedy. He may seek a second deposition to examine the witness on the new evidence.

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117. Pointer v. Texas, 380 U.S. 400, 407 (1965). In determining whether a defendant was given adequate opportunity to cross-examine, the court looks to the nature of the proceeding, the character of the witness, the witness's connection with the events, the extent and subject of the witness's testimony, and the preparation time and opportunities the defendant had. People v. Gibbs, 255 Cal. App. 2d 739, 742, 63 Cal. Rptr. 471, 474-75 (1968).

118. Under Vermont's former procedure of allowing only defense depositions, the practice was carried out almost entirely by stipulation. This practice may be a result of Vermont's small bar and rural character. Langrock, *supra* note 63, at 733. The results may be different in California. Another difference is that prosecutors, because they are better prepared in the early stages of the case, may seek depositions earlier than is convenient for the defendant. Thus, California probably may expect the setting of many deposition times by court order.

119. *See* Comment, *Confrontation: A Trial Right?—United States v. Singleton*, 1973 UTAH L. REV. 839, 847.

If the witness is unavailable for a second deposition, the trial judge must exercise his discretion on the issue of admitting the deposition into evidence. If the judge finds that the defendant was denied full cross-examination, he may declare inadmissible those portions of the deposition effected by the denial.

As demonstrated, the reasons put forth in opposition to prosecutorial defense depositions are not persuasive. Opponents of prosecutorial depositions have largely ignored the ability of the judiciary to protect against abuses of the judicial process. With the safeguards of judicial supervision, constitutionally mandated protections, and full defense discovery, the criminal defendant has little to fear from prosecutorial depositions.

Policy Arguments in Favor of Prosecutorial Discovery Depositions

Proponents of prosecutorial discovery depositions maintain that the use of such devices would improve the standard of justice in California courts. This claim is based on the ability of depositions to improve the quality and quantity of evidence available to each party,[120] preserve testimony,[121] and curb possible abuses arising when hearsay evidence is used.[122] Prosecutorial depositions would also result in an expansion of the open file policy,[123] reduce claims of abuse resulting from the informal procedure of interviewing witnesses,[124] and improve the timing of pre-trial preparation.[125] Finally, a grant of increased pre-trial discovery for the prosecution may result in a similar grant to the defendant.[126]

Improved Evidence

The key advantage of prosecutorial discovery depositions is that they ensure a "fuller and fairer factual presentation at trial."[127]

120. *See* text accompanying notes 127-37 *infra.*
121. *See* text accompanying notes 138-40 *infra.*
122. *See* text accompanying notes 141-50 *infra.*
123. *See* text accompanying notes 151-53 *infra.*
124. *See* text accompanying notes 154 *infra.*
125. *See* text accompanying notes 155-57 *infra.*
126. *See* text accompanying notes 158-68 *infra.*
127. *See Contemporary Studies Project: Perspectives on the Administration of Criminal Justice in Iowa*, 57 Iowa L. Rev. 598, 726 (1972). The study, in discussing proposals for increased defense discovery, appeared to adopt the position that:

> In the adversary approach to criminal justice, the theory is that each side, through its champion, the advocate, will endeavor to present its best supportive evidence and will subject to penetrating examination the evidence presented by the opposing side. It is be-

This advantage accrues because the prosecutor, by skillfully deposing witnesses, gains insight and factual information concerning his case unavailable by other means. The trier of fact, armed with the complete data provided by the parties, makes an accurate appraisal of the guilt or innocence of the defendant. This accuracy is diminished if the trier of fact is denied a total picture of the crime and its participants. Thus, the availability of prosecutorial depositions helps to guarantee a correct verdict in criminal cases.

The pre-trial availability of evidence also ensures that the trial proceeds with fewer surprises for each party. Because an attorney at trial is often hesitant to ask questions to which he does not already know the answer, many matters can never be examined.[128] If an attorney does ask a question of this kind and receives a surprising answer, he either may continue his examination on the point, thereby risking bringing out even more unfavorable evidence, or he may seek a continuance to investigate the matter.[129] Both these results disrupt the smooth presentation of the attorney's case.

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lieved that in the glaring light so generated the judge or jury will perceive the truth. However, this can be done best if both sides are prepared and have reasonable knowledge of what the other side will present.

Id.

A study of omnibus procedures in the United States District Court for San Diego found that "[b]ecause facts in most criminal trials are hotly disputed or difficult to obtain by other means, defendants usually make maximum use of available discovery in preparing for trial." Weininger, *supra* note 78, at 516-17. *See also* Traynor, *supra* note 88, at 249.

128. *Cf.* 5 WIGMORE, *supra* note 19, at § 1368, at 38-39 (explaining the dangers of cross-examination when the attorney does not know the witness's expected testimony). Although a judge may call and examine witnesses, CAL. EVID. CODE § 775 (West 1966), the primary duty of presenting evidence lies with counsel. *See* United States v. Nobles, 422 U.S. 225, 230 (1975). Thus, the evidence produced at trial is often limited to that within the knowledge of counsel. Osburn, *supra* note 38, at 145-46. For discussions of the advantages and disadvantages of allowing the jury and judge to examine witnesses see, Strawn v. State *ex rel* Anderberg, 332 So. 2d 601 (Fla. 1976); 12 ALA. L. REV. 185 (1959).

129. Continuances are available through CAL. PENAL CODE § 1050 (West 1970). Nebraska, because of its liberal rules of discovery, has eliminated the traditional provision allowing surprise as a grounds for having evidence declared inadmissible as unduly prejudicial. Dow, *Criminal Hearsay Rules: Constitutional Issues*, 53 NEB. L. REV. 425, 427 (1974). A Vermont court denied a defendant's post-conviction appeal for a new trial on the grounds of newly discovered evidence. The court held that because the evidence would have been discovered by deposing the witness, the defendant's claim was invalid. State v. Ciocca, 126 Vt. 184, 225 A.2d 65 (1966).

If pre-trial depositions are allowed, the attorney can avoid the dangers of surprise testimony and thus reduce the number of continuances for investigations and hearings on evidentiary matters.[130] In addition, if evidentiary questions brought out in pre-trial hearings are appealed before a plenary trial takes place,[131] the number of cases being reversed and retried for judicial errors is reduced.[132] This reduction saves both the state and the defendant unnecessary expenditures of time and money. Prosecutorial depositions can, therefore, serve a valuable role by ensuring the efficient operation of the judicial process.

A final benefit arising from the improved knowledge of the case provided by depositions is the increased likelihood of pre-trial dispositions.[133] These dispositions—that is, plea bargaining and dismissals—occur because each party can analyze the strength of the opposing party's position. The defendant and prosecutor see the facts formalized in the deposition transcript rather than as mere investigatory files which may or may not accurately reflect the factual situation.[134] In addition, by observing the witness at the deposition, each party can evaluate the impact of that witness's demeanor upon the trier of fact. Because an estimated ninety percent of all convictions and ninety-five percent of all misdemeanor convictions in the United States result from guilty pleas,[135] the im-

130. ABA, *supra* note 78, at pt. I, Standard 1.1.

131. Writs of mandate or prohibition are available to permit review of discovery orders before trial. *E.g.*, Lee v. Superior Court, 58 Cal. App. 3d 851, 852, 130 Cal. Rptr. 532, 533 (1976); Clark v. Superior Court, 190 Cal. App. 2d 739, 740, 12 Cal. Rptr. 191, 191 (1961).

132. *See* note 130 *supra*.

133. A study in Vermont polled the state's prosecutors, judges of courts with criminal jurisdiction, and leading defense attorneys. The study concluded that open discovery and depositions remove "the element of bluffing and encourage defense counsel and prosecutor to work out a solution to the alleged crime." Langrock, *supra*, note 63, at 734. The maintenance of an open file system whereby the defendant realizes the full strength of the prosecution's case induces guilty pleas. Osburn, *supra* note 38, at 146-47. Access to police reports is thought to have similar results. Daniel, *supra* note 67, at 137.

"An informed settlement would lead to a more humane, individualistic administration of criminal law, tempering the dominating discretion and control of the prosecutor." Fletcher, *Pre-trial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 319 (1960). Moreover, the United States Supreme Court in Santobello v. New York, 404 U.S. 257, 261 (1971), has stated that plea bargaining should be encouraged.

134. *See* Langrock, *supra* note 63, at 733.

135. D. NEWMAN, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 n.1 (1966). The overall figure for California in 1965 was 74%. THE PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

portance of this procedure is obvious. Some authorities believe that even more defendants will plead guilty if they have a greater knowledge of the prosecution's case.[136] The experience in jurisdictions which allow the defendant liberal discovery and deposition rights supports the contention that such procedures promote pre-trial dispositions.[137]

The benefits of fair pre-trial settlements are manifold. A guilty defendant who would have pleaded innocent avoids the expense and mental rigors of trial. Conversely, innocent defendants will be released from the threat of trial if the evidence produced by depositions convinces the prosecutor of the defendant's innocence. The state benefits from settlements by avoiding the expense of unnecessary prosecutions and appeals.

Preservation of Testimony

Depositions act to preserve the testimony of the deponent for use in later proceedings. Under the present California system the prosecutor must prove at the time of the deposition that the witness will be unavailable for trial.[138] Thus the testimony of a witness who unexpectedly dies, becomes incapacitated, or evades the court's subpoena power[139] is lost. This lost testimony is sometimes the critical evidence necessary to convict a guilty defendant. Therefore, preventing the prosecution from deposing a witness sometimes results in the inability of the state to successfully conduct an otherwise winning case. To avoid such results the prosecutor may prefer to rush a poorly prepared case to trial before the witness is lost. The results of this hasty preparation will often be undesirable. If

136. *See* note 133 *supra*.

137. In the Vermont study none of the polled individuals thought depositions increased the likelihood of trial. The great majority believed they decreased the possibility. Langrock, *supra* note 63, at 733. Two-thirds of those polled in a study of the federal omnibus procedure said the discovery allowed thereunder was "very helpful" in evaluating the prosecution's case. Weininger, *supra* note 78, at 554 n.175.

138. CAL. PENAL CODE § 1341 (West 1970).

139. Attendance of witnesses who have left the jurisdiction may generally be compelled by CAL. PENAL CODE § 1334-1334.6 (West 1970). This uniform act, in effect in every state, authorizes the taking into custody and delivery to the forum state of witnesses for grand jury hearings or criminal prosecutions. In People v. Gibbs, 255 Cal. App. 2d 739, 744, 63 Cal. Rptr. 471, 475 (1967), the court noted that informers are frequently unavailable for trial.

the defendant is in fact innocent, he will have unnecessarily suffered through a trial. The prosecutor, if his preparation had been complete, would probably have realized the defendant was innocent and not proceeded to trial. Conversely, a guilty defendant who is found not guilty largely because of a poorly prepared prosecution is unjustifiably not punished, for the double jeopardy clause of the Constitution protects him from reprosecution.[140] Thus, preserving the testimony of witnesses protects vital interests of both the state and innocent defendants.

The benefits of allowing the prosecutor to preserve testimony, however, do not flow exclusively to the state and the innocent defendant. Rather, all defendants gain by the opportunity to observe the prosecutor examine a witness. If the deponent is a friendly witness, the prosecutor seeks to preserve his testimony in a form most favorable to his case. Thus, the defendant hears the deponent's testimony in the same form as it will be presented at trial. This testimony may reveal evidence previously unknown to the defendant. It is impossible for the defendant to obtain such insight into the prosecution's case by any other means.

Curing Hearsay Abuses

The use of hearsay evidence in the trial situation is considered a necessity.[141] Commentators admit, however, that hearsay evidence is susceptible to abuse.[142] One example of such abuse occurs if a witness at the trial falsely claims that a third party made a particular statement. If the third party declarant is unavailable for trial and the alleged statement is a spontaneous declaration,[143] declaration against interest,[144] statement of prior mental or physical

140. *See* Ashe v. Swenson, 397 U.S. 436, 437 (1970). A defendant is put in jeopardy and may not be reprosecuted once the defendant is "put to trial before the trier of fact." United States v. Jorn, 400 U.S. 470, 479 (1971). For circumstances allowing appeal by the state following a ruling for the defendant, see CAL. PENAL CODE § 1235 (West 1970) and § 1238 (West Supp. 1976).

141. *See* Dow, *supra* note 129.

142. *See generally* MCCORMICK, *supra* note 40, at §§ 244-46.

143. CAL. EVID. CODE § 1240 (West 1966). The declarant's statement which falls under one of the hearsay exceptions is admissable whether or not he is available. CAL. EVID. CODE § 1203(d) (West 1966). *Id.* § 1204 controls the admission of hearsay statements into evidence in criminal trials. The section basically requires that to be admissible a hearsay statement must have been made "Under such circumstances that it is [constitutionally admissible] against the defendant"—for example, not an involuntary statement. *But see* People v. Agee, 67 Cal. App. 3d 148, 155, 136 Cal. Rptr. 492, 495 (1977), which holds that prior unsworn inconsistent statements of a witness are not admissible as substantive evidence.

144. CAL. EVID. CODE § 1230 (West 1966).

state,[145] or dying declaration,[146] the statement may be considered for its probative value. If the prosecutor seeks to rebut the perjurious hearsay by showing that the hearsay is contrary to other statements made by the declarant, he may use two devices: ordinary hearsay of his own or the deposition of the third party declarant.[147] Ordinary hearsay may be sufficient to demonstrate the falseness of the perjurious hearsay. A deposition, however, is probably far more effective.[148] It is the direct statement of the declarant, made under oath, accurately and impartially recorded, and subject to cross-examination. Consequently, depositions provide an extremely effective device to expose and rebut perjurious hearsay.[149]

The ability of prosecutorial depositions to deter perjurious hearsay is not limited to their use as rebuttal evidence or solely for the prosecutor's benefit. Assume, for example, that the prosecution introduces a hearsay statement made by an unavailable declarant. The defendant may respond by questioning why hearsay is relied upon rather than a deposition of the declarant. A similar situation occurs when the defendant confronts a witness at trial with a prior inconsistent statement. The question arises of why the confronting party has not sought to depose the witness on that subject. If no logical explanation is forthcoming, the trier of fact may infer that the hearsay is of doubtful validity.

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145. *Id.* § 1251.

146. *Id.* § 1242.

147. *See* CAL. CIV. PROC. CODE § 2016(d) (West Supp. 1976). This section lists the circumstances under which a deposition may be used in California civil proceedings. *See* CAL. PENAL CODE § 686(3)(b) (West Supp. 1976), which allows the use of depositions in criminal cases when permissable under other provisions of California law.

148. Interviews of witnesses are inferior to depositions. A witness being deposed is under oath and hence subject to the contempt power of the court for perjury. This assurance of truthfulness is lacking in interviews. *Cf.* Hill v. Superior Court, 10 Cal. 3d 812, 819, 518 P.2d 1353, 1357, 112 Cal. Rptr. 257, 261 (1974) (stating witnesses in interviews will not make truthful statements about delicate subjects).

The deposition may be read to the jury, but they may not take it with them when retiring for their deliberations. CAL. PENAL CODE § 1137 (West Supp. 1976).

149. The prior consistent statement of a witness is admissible if a prior inconsistent statement made by him has been admitted and the consistent statement was made before the inconsistent statement or if a charge of recent fabrication, bias, or improper motive has been made. CAL. EVID. CODE §§ 791 & 1236 (West 1966).

In light of the low respect hearsay is often accorded,[150] any instrument to reduce its use should be welcomed. California, however, by forbidding prosecutorial discovery depositions denies both the prosecution and the defense a valuable weapon to counteract perjurious hearsay testimony.

Increased Open File Policy

The ability to inspect a prosecutor's files at will is a great convenience for the defendant. The expense and delay of formal discovery orders are avoided. Unfortunately, the "openness" of the open file policy varies among different prosecutor's offices.[151] One device which has proved effective in increasing such openness is discovery depositions for the defendant.[152] It can be hypothesized that the prosecutor allows the defendant to inspect his files because a defendant armed with discovery depositions can obtain most of the information even without his cooperation. Thus, any reason to shield his files is removed. However, some prosecutors resist the open file policy *because* of the great ability of the defendant to gather information through depositions. The prosecutor believes that the defendant already enjoys an advantage, and the prosecutor is not willing to voluntarily increase that advantage.[153] If the prosecutor is granted discovery depositions, however, this belief may disappear. Therefore, permitting the prosecutor to depose witnesses should result in an expansion of the open file policy and its accompanying benefits.

Informal Interview Abuses

The presence of opposing counsel at depositions is a guarantee against improper attorney conduct. Informal interviews, in con-

150. *See* note 142 *supra.*
151. *See* note 102 *supra.*
152. Langrock, *supra*, note 63.
153. "Defendants who seek the advantages of broad discovery must also accept its burdens. There is no reason to believe that prosecutors will reveal their cases as long as defense counsel shirk their discovery responsibilities." Weininger, *supra* note 78, at 552. In 1973 it appeared Oregon's defense attorneys recognized the value of reciprocity and approved increased prosecutorial discovery. Osburn, *supra* note 38, at 147. The duty to disclose exculpatory evidence is also occasionally abused. Nakell, *supra* note 92, at 455-57.
Some prosecutors believe increased prosecutorial discovery would not result in further cooperation because there is already almost total candor on the part of the prosecution toward the defense. Telephone interview with attorney from the San Diego County District Attorney's office, San Diego, Ca. (March 2, 1977).

trast, are generally ex parte meetings. Thus, J. N. DeMeo, a leading expert on California discovery, has stated that "[t]here are certain inherent dangers to interviewing witnesses, rather than taking formal depositions, as the defense attorney faces the potential danger of being accused of subornation of perjury or witness tampering."[154] This statement is equally applicable to prosecutors. Providing prosecutors the right to depose witnesses would both protect them from unfounded charges of subornation of perjury and assure the defendant that such activities do not occur.

Pre-Trial Preparation

Adequate pre-trial preparation is a critical element in assuring a successful defense or prosecution.[155] The parties should conduct their investigations as soon after the crime occurs as possible.[156] The state is able to secure information immediately after the event because its police forces respond rapidly to the crime. However, a busy public defender or private defense attorney may defer his investigation until other more pressing cases are disposed of. Because the prosecutor's files will not contain the exact information the defendant needs,[157] the defendant loses evidence by his delay.

This undesirable situation is partially rectifiable by granting the prosecutor the right to take depositions. The pendency of those depositions forces the defendant to conduct investigations in preparation for his cross-examination. This pre-trial preparation ensures a more adequate defense at trial.

Increased Defense Discovery

Although prosecutorial depositions are opposed by people seeking to protect defendants, such opposition may be short-sighted. There are indications that the unavailability of prosecutorial discovery limits the creation of defense discovery.

The reason for limiting defense discovery pending expansion of prosecutorial discovery is that the defendant already enjoys a su-

154. DEMEO, *supra* note 3, at ¶ 16.03(2).
155. F. BAILEY & H. ROTHBLATT, INVESTIGATION AND PREPARATION OF CRIMINAL CASES § 1 (1970).
156. *Id.* § 10.
157. *Id.* § 2.

perior position in access to information.[158] Further liberalizing defense discovery could put the defendant in such a superior position that the trial loses its character as a clash between adversaries. Thus the Advisory Committee Note to Federal Rule of Criminal Procedure 16 stated in 1975 that "[t]he majority of the Advisory Committee is of the view that the two—prosecutorial and defense discovery—are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution."[159]

The attitude that defense discovery should not be expanded until the prosecutor has adequate means of discovery may demonstrate itself in several fashions. The recent *Runyan*[160] decision allowing discovery depositions for the defendant provides a good example. If either the California Supreme Court or the legislature determines that expansion of defense discovery is contingent on expanded prosecutorial discovery, the *Runyan* procedure may be annulled. If, however, *Runyan* is affirmed, the defense's battle is still not won. The defendant's right to depose witnesses is vested in the trial judge's discretion.[161] The judge may simply deny the defendant's request. Alternatively, the judge may grant the defendant's request for depositions but in return deny the defendant any right to inspect the prosecution's files concerning the witnesses. This denial may be proper because the defendant is allowed to discover only those materials in the prosecutor's files which he cannot obtain by his own efforts.[162] By being granted the right to depose the witnesses, the defendant *does* have the means to obtain such information. Thus the price California defendants may pay for the right to depose witnesses is the right to inspect the prosecution's files.

158. *See* text accompanying notes 94 & 95 *supra.*

159. FED. R. CRIM. P. 16 (Advisory Comm. Note) (1975). *See also* Osburn, *supra* note 38 at 146. The Iowa Supreme Court in State v. Pedersen, 219 N.W.2d 665 (Iowa 1974), allowed the defendant to depose witnesses. One reason for so allowing was the prosecution's reciprocal discovery device in IOWA CODE § 769.19 (West Supp. 1976). See 13A BENDER'S FORMS OF DISCOVERY, *supra* note 39, at § 8.11, at 8-216, for cases granting prosecutorial discovery if reciprocal rights are granted to the defense.

The recent growth of prosecutorial discovery in other jurisdictions may be the result of previous grantings of discovery rights to the defendant. *See* Traynor, *supra* note 88, at 246.

The court in Clark v. Superior Court, 190 Cal. App. 2d 739, 742, 12 Cal. Rptr. 191, 193 (1961), stated "[t]he right to take depositions should be a mutual one." The statement appears to have been an expression of displeasure with the present system, for it was largely irrelevant to the decision.

160. People v. Municipal Court (Runyan), 63 Cal. App. 3d 815, 134 Cal. Rptr. 106 (1976), *hearing granted*, No. 77-9 (Cal. Sup. Ct., Jan. 13, 1977).

161. *See* note 53 *supra.*

162. *See* note 105 *supra* and accompanying text. A Vermont case held

It is not necessary, however, for California's defendants to suffer such consequences. If the prosecution is granted the right to depose witnesses, the legislature and judiciary may willingly grant defendants both discovery depositions and inspection of prosecutor's files. Such rights may, in fact, be constitutionally required.

The requirement that a grant of increased discovery for the prosecutor must be matched by a similar grant to the defendant is best illustrated by the United States Supreme Court's treatment of notice-of-alibi statutes. In *Wardius v. Oregon*[163] the Court declared Oregon's notice-of-alibi statute unconstitutional. The Court distinguished Oregon's statute from a similar Florida statute found constitutional in *Williams v. Florida*.[164] The distinguishing factor was the Florida statute's provision for reciprocal discovery by the defense. The Court in *Wardius* noted that the *Williams* decision "emphasized that the constitutionality of such rules might depend on 'whether the defendant enjoys reciprocal discovery against the State.' "[165]

The basis of the *Wardius* opinion is the due process clause of the fourteenth amendment. The Court stated that:

> Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak of the balance of forces between the accused and his accusor.[166]
>
> . . . .
>
> This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the

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it was not error to deny a defendant a copy of the grand jury transcript because he had other sufficient means—that is, depositions—to secure the information. State v. Miner, 128 Vt. 55, 64, 258 A.2d 815, 820 (1969).

When the Federal Rules of Civil Procedure first granted liberal discovery "[s]ome Courts found it hard to accept the new . . . provisions and were quick to seize upon any collateral consideration to restrict the application of the rules." Freedman, *Discovery as an Instrument of Justice*, 22 TEMP. L.Q. 174, 175 (1948).

163. 412 U.S. 470 (1972).

164. 399 U.S. 78 (1970).

165. 412 U.S. at 471, *quoting in part from* Williams v. Florida, 399 U.S. 78, 82 n.11 (1970). The Court described liberal rules of discovery for the prosecution and defense as "a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system." 412 U.S. at 474. The court further noted that "[a]s [the court] recognized in *Williams*, nothing in the Due Process Clause precludes states from experimenting with systems of broad discovery." *Id.*

166. 412 U.S. at 474 (citations omitted).

> lack of reciprocity interferes with the defendant's ability to secure a fair trial.[167]

The California Supreme Court has adopted the *Wardius* reciprocity philosophy.[168] Thus substantial reason exists to believe that the best way for the defense to ensure its own liberal pre-trial discovery is by accepting prosecutorial discovery depositions.

Supporting Authorities

This Note is not alone in its endorsement of prosecutorial depositions. The Task Force on Administration of Justice, which consisted of distinguished practicing attorneys and scholars, recognized discovery depositions as a valuable fact-finding procedure.[169] It recommended that jurisdictions amend their statutes to allow prosecutors and defendants the right to such depositions.

In 1974 Vermont followed the advice of the Task Force by enacting Vermont Rule of Criminal Procedure 15.[170] The Reporter's Note stated that "granting the prosecution the right to take depositions is consistent with . . . the entire purpose of these rules to make the administration of criminal justice more efficient."[171]

California inferentially approved such procedures when Justice Traynor stated 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 the issues in the case."[172]

With such distinguished authority as support, no judge or legislator should feel hesitant in advocating depositions for the prosecution.

PROPOSALS FOR REFORM

This Note proposes three basic plans for the reform of California's deposition practice. Each achieves distinct results.

Conditional Examinations for Capital Offenses

The first plan for reform calls for the amendment of Penal Code

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167. *Id.* at 474 n.6 (citations omitted).
168. *See* Evans v. Superior Court, 11 Cal. 3d 617, 623, 522 P.2d 681, 685, 114 Cal. Rptr. 121, 125 (1974).
169. PRESIDENT'S COMM., *supra* note 135, at 43.
170. VT. R. CRIM. P. 15 (1974).
171. *Id.* (Reporter's Notes).
172. Jones v. Superior Court, 58 Cal. 2d 56, 59, 373 P.2d 919, 920, 22 Cal. Rptr. 879, 880 (1962).

section 1335 to reverse the effect of the 1976 case of *Lee v. Superior Court.*[173] In *Lee*, the prosecutor sought to conditionally examine a witness expected to be unavailable for trial. The defendant was charged by indictment with two murders and had previously been convicted of a third murder. If convicted, he would be subject to a mandatory death penalty.[174] The prosecution's request was denied because Penal Code section 1335 provides that the prosecution may have witnesses conditionally examined in cases *other* than those for which the punishment may be death. The prosecution's argument that the code bars only the *use* of the deposition at trial, not its *taking*, was rejected.[175]

In effect, *Lee* requires the prosecution to elect the crimes for which the defendant will be charged before the witness becomes unavailable. Three results can flow from that requirement. (1) The prosecutor may delay initiation of the prosecution until he can determine whether sufficient evidence exists to convict the defendant of a capital offense without the witness's conditional examination. (2) The prosecutor may decide to charge a defendant with less than a capital offense. (3) The prosecutor may be forced to trial without the testimony of a key witness.

Delaying prosecution is undesirable because the evidence is staler and the potential defendant has a greater opportunity to leave the jurisdiction. Additionally, the potential defendant endures an extended period subject to a possibile prosecution. Finally, the public is denied a rapid vindication of its rights.

Prosecution on a lesser charge is also undesirable. Each of the offenses for which the death penalty is prescribed involves beha-

173. 58 Cal. App. 3d 852, 130 Cal. Rptr. 532 (1976).

174. Although a defendant may no longer be executed, a sentence of execution still has legal effects. *See* notes 176 & 177 *infra.* In California the death penalty is authorized for eight offenses: treason (CAL. PENAL CODE § 37 (West 1970)), perjury in capital cases (*id.* § 128), first degree murder (*id.* § 190 (West Supp. 1976)), kidnapping for ransom or robbery with bodily harm to the victim (*id.* § 209 (West Supp. 1976)), train wrecking (*id.* § 219 (West Supp. 1976)), malicious assault by life prisoner (*id.* § 4500 (West Supp. 1976)), explosion of destructive devices causing great bodily injury (*id.* § 12310 (West Supp. 1976)), and sabotage resulting in death or great bodily injury (CAL. MIL. & VET. CODE § 1672(a) (West 1955)). Circumstances mandating the death penalty are found in CAL. PENAL CODE §§ 37, 128, 4500 (West 1970) and § 190.2 (West Supp. 1976).

175. 58 Cal. App. 3d at 853, 130 Cal. Rptr. at 533.

vior intolerable to society. The legislature, by allowing or mandating the death penalty, indicated that such behavior must be dealt with harshly. However, the prosecutor, by being forced to elect charges prematurely, is denied an opportunity to fully develop his evidence. Thus he may decide to charge a non-capital offense in the belief that he cannot obtain *any* conviction without the deposition. Later, the accumulated evidence may become sufficient to secure a conviction without the use of the deposition. Nevertheless, the prosecutor, having made his irrevocable election, is prevented from charging the defendant with the capital crime. Thus, the state is denied full law enforcement and the alleged offender gains an advantage completely unrelated to any recognized policy or constitutional guarantees.

This situation can easily be avoided. Penal Code section 1335 should be amended to prevent the use, but not the taking, of conditional examinations in capital cases. The prosecutor would then be able to evaluate his evidence as the time for trial approaches. If the evidence in absence of the deposition proves inadequate, he may prosecute for a non-capital offense. If the evidence is adequate for conviction, the likelihood of settlement is increased because the defendant faces a potentially longer incarceration under the death penalty.[176] The people's right to full prosecution is thus vindicated. The accused continues to enjoy the benefit of the statutory policy that "no defendant should be put to death upon the testimony of a witness whose demeanor was not observed by the trier of fact"[177] because the conditional examination may not be introduced into evidence.

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176. Because of the present unconstitutionality of executions in California, all people sentenced to death are instead given life sentences. California v. Anderson, 6 Cal. 3d 628, 657 n.45, 493 P.2d 880, 899 n.45, 100 Cal. Rptr. 152, 171 n.45 (1972). The offender may be paroled in seven years. CAL. PENAL CODE § 3046 (West 1970). If the defendant is convicted of second degree murder, he may be sentenced to prison for a minimum of five years. *Id.* § 190 (West Supp. 1976). Under California's new sentencing laws, which become effective on July 1, 1977, a defendant convicted of second degree murder may receive a sentence of from five to seven years. Uniform Determinate Sentencing Act of 1976, ch. 1139, Stat. of 1976, 1976 Cal. Legis. Serv. 4752, 4784 (West). In the circumstances presented in *Lee*, the prosecutor could not charge the defendant with first degree murder and also conditionally examine the witness. Thus, the severest conviction the defendant receives in this situation is for second degree murder. Under California's new sentencing laws a defendant convicted of certain violent crimes will be sentenced to an additional three year minimum incarceration for each prior violent crime conviction. *Id.* at 4816-18. For legislative efforts to deny parole to prisoners convicted of capital crimes and to revive California's death penalty, *see* note 177 *infra*.

177. Lee v. Superior Court, 58 Cal. App. 3d 851, 853, 130 Cal. Rptr. 532,

The loss of critical testimony may occur when the prosecutor charges the defendant with a capital offense. By so doing, he loses the right to conditionally examine the witness. If the witness is ultimately unavailable for trial, the prosecution could be unsuccessful. The deposition may have been the necessary ingredient for conviction. Thus, the defendant may go totally free although the underlying policy is to prevent only his execution on such evidence. Clearly this result is undesirable. If the prosecutor is allowed to preserve the witness's testimony, he may be able to secure a conviction for a lesser offense.

Depositions upon Written Interrogatories

A second plan for reform allows the preservation of evidence in all cases, but denies prosecutorial discovery. The legislature can create such a device by enacting in the Penal Code a provision for

533 (1976). A defendant may no longer be executed in California. California v. Anderson, 6 Cal. 3d 628, 657, 494 P.2d 880, 899, 100 Cal. Rptr. 152, 171 (1972). The courts, however, have not been able to determine the exact effect of this ruling on statutes which prescribe different procedures when the crime is punishable by death. *E.g.*, People v. Reyes, 60 Cal. App. 3d 227, 231, 131 Cal. Rptr. 340, 343 (1976). The California Supreme Court has indicated that when the procedure involved is harsher toward an individual convicted of a capital offense, invoking that procedure is proper—for example, denial of bail. California v. Anderson, 6 Cal. 3d 628, 657 n.45, 493 P.2d 880, 899 n.45, 100 Cal. Rptr. 152, 171 n.45 (1972). Under Penal Code section 1335, however, a defendant who has committed a crime punishable by death is treated more leniently than is one charged with a less serious crime. The reason for this leniency has disappeared with the disappearance of the death penalty.

However, the protection afforded by Penal Code section 1335 may retain validity. Efforts are being made to make parole unavailable to defendants convicted of capital offenses. *See* A.B. 174, Cal. Leg., 1977-1978 Reg. Sess. (Jan. 10, 1977); A.B. 37, Cal. Leg., 1977-1978 Reg. Sess. (Dec. 10, 1976); A. Const. Res. 5, 1977-1978 Reg. Sess. (Dec. 12, 1976). Parole will not be available under California's new sentencing act, which becomes effective on July 1, 1977, when the defendant is sentenced to life imprisonment for first degree murder by torture, Uniform Determinate Sentencing Act of 1976, ch. 1139, Stat. of 1976, 1976 Cal. Legis. Serv. 4752, 4784 (West), kidnapping resulting in bodily harm to any person subject to the act, *id.* at 4785, or train wrecking when any person suffers bodily harm, *id.* at 4786. Efforts are also being made to conform California's death penalty statutes to the federal constitutional standard that the penalty need not be mandatory if the sentencing authority's discretion is guided and limited by statute. Gregg v. Georgia, 428 U.S. 153, 195 (1976). For example, S.B. 155, Cal. Leg., 1977-1978 Reg. Sess. (Jan. 19, 1977), which would require the death penalty for certain crimes, was passed by the Assembly and Senate but vetoed by the Governor on May 27, 1977. Efforts are being made to override the veto. The San Diego Union, May 28, 1977, at A-1, col. 6.

taking depositions upon written interrogatories.[178] Under this proposed procedure the prosecutor serves a set of interrogatories on a court appointed officer and the opposing counsel. The officer propounds the interrogatories to the witness. The prosecution is not present, but defense counsel, the defendant, and counsel for the witness are present. The defendant is allowed full cross-examination, thus guaranteeing his right of confrontation. The testimony is then sealed and delivered to the court without examination by the prosecutor.[179] Thus, the deposition cannot be used for prosecutorial discovery. If the witness subsequently becomes unavailable, or a party seeks to impeach the witness's testimony, the party desiring to admit the deposition requests an *in camera* hearing at the trial. At that time objections are heard and rulings made on the admissibility of the evidence.

This procedure allows the prosecutor to conduct his pre-trial preparation and trial with the knowledge that evidence will not suddenly become unavailable. Witnesses are safe from intimidation because their testimony is already recorded. Criminals will not be allowed to go free because of their ability to intimidate the witnesses. The state is saved the expense of protecting key witnesses from possible physical harm and is assured full and complete punishment of offenders. All these benefits can accrue without violating the constitutional rights of the defendant.

Prosecutorial Discovery Depositions

A third plan makes available non-party discovery depositions for both the prosecution and the defense. The same basic procedures and rules of evidence would apply for both civil and criminal depositions. Thus, the criminal procedure would involve noticing the deposition,[180] reserving objections to the time of trial,[181] and respecting witness privileges.[182] Criminal deposition practice should also follow the civil practice in not requiring leave of court to depose a witness.[183] There are two reasons for this: the workload of the court is reduced and the infusion of judicial discretion is

178. This civil procedure is defined in CAL. CIV. PROC. CODE § 2020 (West Supp. 1976).

179. Anyone disclosing the contents of the deposition would be subject to the contempt power of the court.

180. CAL. CIV. PROC. CODE § 2019(a)(1) (West Supp. 1976).

181. *Id.* §§ 2016(e) & 2021(c).

182. *See* notes 98-100 *supra.*

183. CAL. CIV. PROC. CODE § 2016(a) (West Supp. 1976). Vermont follows this practice. VT. R. CRIM. P. 15 (1974).

minimized.[184] A party may, however, oppose the deposition by showing good cause why it should not be taken.[185] The usual protective orders preventing abuse or oppression would of course be available.[186] This final plan ensures the full discovery and preservation of evidence necessary for a modern criminal proceeding.

CONCLUSION

The ultimate goal of a trial is to provide a proper ruling of law based on the fullest and most accurate factual record possible. The present California system inhibits the attainment of that goal. This Note has attempted to demonstrate how prosecutorial depositions will rectify this situation. In particular, an effort has been made to illustrate how prosecutorial depositions benefit the defendant and help cure the ills of expense, perjury, and counsel misconduct which occasionally infect the criminal process. For years the expansion of prosecutorial discovery and depositions has labored under the specter of intrusion into vital defense rights. Hopefully, some of that specter has been dispelled and the door opened for the use of prosecutorial criminal discovery depositions.

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184. The experience with vesting discretion in the trial judge has not always been happy. "The . . . Committee . . . recognized the fact that arbitrary and discriminatory application of discovery by leave of court is prevalent throughout the State." Note, *The Constitutional Implications of Discovery Practice in Quasi-Criminal Prosecutions in Illinois*, 7 LOY. CHI. L.J. 79, 93 (1976). *See also* Note, *Criminal Procedure—Discovery—Movement Towards Full Disclosure*, 77 W. VA. L. REV. 561, 563 (1975). The California courts have almost absolute discretion in granting discovery. Shatz, *supra* note 3, at 289.

185. Good cause may be demonstrated by showing a privilege the defendant may assert to block a witness's testimony, financial hardship, or lack of materiality of the expected testimony. The list is not exhaustive, and the court must retain its discretion to achieve justice. *See* Brennan, *supra* note 75, at 65.

186. *See, e.g.*, CAL. CIV. PROC. CODE § 2019(b)(1) (West Supp. 1976).