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The Theory of Criminal Discovery and the Practice of Criminal Law

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THE THEORY OF CRIMINAL DISCOVERY AND THE PRACTICE OF CRIMINAL LAW

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INTRODUCTION: CRIMINAL DISCOVERY AND THE NEED FOR MORGAN-TYPE ANALYSIS

To crystallize in a few words the motif of a career as varied and comprehensive as that of Eddie Morgan would in any event be difficult, but it is doubly so for a life devoted, as his has been, to stuff as vital and dynamic as procedure and evidence. For me, his work most fundamentally is to be characterized as a quest for greater rationality in the adjudicative process. Whether one thinks of his analysis of the hearsay rule,[1] or his rationale of the admissions exception[2] to it, or his treatment of the dead man's statute,[3] or his study of the functions of judge and jury,[4] or any other of the numerous facets of his work in the theory and practice of litigation, one senses the scholar's ultimate struggles to reduce confusion and promote precision of thought. And one feels that these scholarly impulses have been undiminished—in fact, that they have been constantly freshened and vitalized—by their coexistence with the practicing lawyer's mastery of litigation as an art. Perhaps Morgan's uniqueness lies in the superimposition of the disciplined thought habits of the systematic theorist, upon the practitioner's understanding. His scientific attention to the trees has not blinded him to the artist's perception of the forest.[5]

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1. Morgan, *The Relation Between Hearsay and Preserved Memory*, 40 HARV. L. REV. 712 (1927); Morgan, *Hearsay and Non-Hearsay*, 48 HARV. L. REV. 1138 (1935); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948); MORGAN, BASIC PROBLEMS OF EVIDENCE 211 (1954); MORGAN, SOME PROBLEMS OF PROOF 106, 141 (1956).

2. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921); Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461 (1929); Morgan, *Admissions*, 12 WASH. L. REV. 181 (1937); Morgan, *Admissions*, 1 U.C.L.A.L. Rev. 18 (1953); MORGAN, BASIC PROBLEMS OF EVIDENCE 229 (1954); *cf.* MORGAN, *Declarations Against Interest*, 5 VAND. L. REV. 451 (1952).

3. MORGAN & MAGUIRE, CASES AND MATERIALS ON EVIDENCE 422 (2d ed. 1942); MORGAN & MAGUIRE, CASES AND MATERIALS ON EVIDENCE 350 (3rd ed. 1951); MORGAN, MAGUIRE & WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 175 (4th ed. 1957); MORGAN, BASIC PROBLEMS OF EVIDENCE 84 (1954).

4. MORGAN, BASIC PROBLEMS OF EVIDENCE 42 (1954); MORGAN, SOME PROBLEMS OF PROOF 70 (1956).

5. An unbounded admiration for Morgan's analytical and other intellectual capacities, and for his ability to articulate his concepts with noble precision, can of course coexist, as is the case with this author, with a skepticism as to some of his judgment values in evidence and procedure. Respecting con-

The quest for greater rationality in adjudication today conspicuously confronts the problem of discovery in criminal cases. Generally in the United States criminal discovery lags far behind its civil counterpart.[6] Why? At least on a theoretical level, the philosophy of civil discovery—that pretrial disclosure by reducing surprise and contributing to more accurate fact ascertainment promotes rationality in litigation—would seem applicable also to criminal cases. None has more cogently nor realistically stated that philosophy in the context of the specifics of our adversary system, than Morgan himself:

> It is doubtless true that the theory of our adversary system is attractive in statement. It may be the best we can devise, but it seldom fits the facts in modern litigation. If it were to operate perfectly, both parties would have the same opportunities and capacities for investigation, including the resources to finance them, equal facilities for producing all the discoverable materials, equal good or bad fortune with reference to availability of witnesses and preservation of evidence, and equal persuasive skill in the presentation of evidence and argument. The case is rare where there is even approximate equality in these respects, and there is no practical method of providing it. But there can be no question that the system ought to enable each litigant in advance to know the exact area of dispute and to have access to all available data, so that he may be aware in just what particulars he and his adversary disagree, that he may investigate and determine the pertinency and value of any materials favorable or unfavorable to his contention, and that he may consider the reliability of the persons willing or compellable to testify. Until he knows what state or states of fact the trier may find, he cannot prepare upon the substantive law. Until he knows what evidence is likely to be available for or against him, he cannot prepare to meet or interpose objections under the complex rules governing competency of witnesses, privileges of parties and witnesses, and the admissibility of unprivileged relevant evidence. So long as a party may divert the inquiry from the elements bona fide in dispute, or conceal the real crux of his claim or defense, and thereby take his opponent by surprise, so long

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fidential communications, for example, *compare* Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285, 286-92 (1943); Morgan, *Some Observations Concerning a Model Code of Evidence*, 89 U. PA. L. REV. 145, 150 (1940) *with* Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 109 (1956); Louisell & Crippin, *Evidentiary Privileges*, 40 MINN. L. REV. 413 (1956). Respecting the desirability of neutral expert witnesses, *compare* Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285, 293 (1943) *with* Louisell, Book Review, 45 CALIF. L. REV. 572 (1957); *cf.* Diamond, *The Fallacy of the Impartial Expert*, 3 ARCHIVES OF CRIM. PSYCHODYNAMICS 221 (1959).

6. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961) [hereinafter cited simply as *Dilemma*] briefly considers the present status of criminal discovery in England, at 64, and in our federal jurisdiction, at 68, and treats the California situation in detail, at 74-86. A bibliography of criminal discovery is contained in *Dilemma* 57 n.2, and 59 n.9. The Appendix to this article is devoted to the present status of criminal discovery in most of the states of the Union. For a current comprehensive discussion of discovery, including brief treatment of criminal discovery, see Note, 74 HARV. L. REV. 942, 1051-63 (1961).

> will the description of a trial as a battle of wits between contending counsel have a large measure of truth, and a distinguished judge like Jerome Frank may with much justification express the opinion that a lawsuit is a game of chance. The first step toward making a lawsuit a rational proceeding for discovering the factual basis of a controversy is acceptance of [the discovery] provisions of the Federal Rules. The next is a complete renovation of the rules of evidence.[7]

Morgan's "first step" to rationality now has more than a generation of history behind it so far as federal civil procedure is concerned, and is taken many times over as state after state adopts for civil cases the federal civil discovery rules.[8] But in criminal cases the story is different. It is true, as Professor Fletcher recently pointed out, that "within the last three years alone, there have been five state appellate decisions recognizing or ordering discovery in a criminal case for the first time."[9] It is also true that the growth of criminal discovery in California during the last five years, the case by case work of the courts, has been little short of phenomenal, as I recently noted in some detail.[10] But generally on the American scene, the picture is different; criminal discovery, at least in terms of the five chief formal techniques of civil discovery,[11] either does not exist or lags far behind.[12] Most surprising of all, perhaps, is the fact that California, which did not catch up with federal civil discovery practice until its legislature adopted in 1958 the federal civil discovery rules,[13]

7. MORGAN, SOME PROBLEMS OF PROOF 34-35 (1956).

8. FED. R. CIV. PROC. 26-37. As to adoption by various states of federal civil discovery practice, see generally 2 BUSCH, LAW AND TACTICS IN JURY TRIALS § 211 (1959); LOUISELL & WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES ¶ 10.02 (1960); 6 WIGMORE, EVIDENCE § 1856 (3d ed. 1940); *id.* Supp. 1957; Clark, *Two Decades of the Federal Civil Rules,* 59 COLUM. L. REV. 435, n.2 (1958); Weinstein, Gleit & Kay, *Procedures for Obtaining Information Before Trial,* 35 TEXAS L. REV. 481 (1957); Wright, *Procedural Reform in the States,* 24 F. R. D. 85 (1959). For a comprehensive bibliography of articles on discovery practice in the various states, see LOUISELL & WILLIAMS, *op. cit. supra,* ¶ 10.02 n.16. Chapter X of the last cited work, and Louisell, *Discovery Today,* 45 CALIF. L. REV. 486 (1957) contain detailed illustrations of the integrated use of the various discovery devices. For a comprehensive discussion of all phases of discovery in civil cases, federal and state, see 4 MOORE, FEDERAL PRACTICE ¶¶ 26.23—26.25 (2d ed. 1950).

9. Fletcher, *Pretrial Discovery in State Criminal Cases,* 12 STAN. L. REV. 293, 297 (1960).

10. *Dilemma* 59, 74. But even in California there still is no criminal discovery by means of depositions of witnesses. Clark v. Superior Court, 190 A.C.A. 820, 12 Cal. Rptr. 191 (1961).

11. As provided for, *e.g.,* in FED. R. CIV. PROC. 26-37: oral and written depositions of parties and witnesses with or without subpoenas or subpoenas *duces tecum;* interrogatories to adverse parties; motions for inspection and copying; physical and mental examinations; and demands for admissions. See Louisell, *Discovery and Pre-trial Under the Minnesota Rules,* 36 MINN. L. REV. 633 (1952); Louisell, *Discovery Today,* 45 CALIF. L. REV. 486 (1957).

12. See *Dilemma* and authorities cited therein esp. at 57 n.2, and 59 n.9; see also note 6 *supra,* and the Appendix to this article.

13. CAL. CODE CIV. PROC. §§ 2016-35 adopted in 1957 and effective January 1, 1958 substantially enacts FED. R. CIV. PROC. 26-37. For a detailed discussion of the California law, with particular reference to the difference between it

has by the common law method so far advanced its criminal discovery that "federal criminal discovery, far from being the leader, is now a lagger, certainly vis-a-vis California. . . ."[14]

If Morgan were commencing his career today, would he wield his typically powerful weapons, sharpened on the anvil of his incisive analysis, to the end that criminal discovery would catch up with civil? Of this I feel sure: before he would wield weapons, he would focus shafts of light. It was not until after he had achieved a mastery of the hearsay rule unexcelled in the history of Anglo-American law that he made bold to urge its complete overhauling.[15]

I have recently characterized one of the historic formulae for denying criminal discovery—that it would wholly subvert criminal law administration—as "reflecting attitude more than analysis."[16] Such general deprecations of discovery are no longer enough; modern legal sophistication—certainly the Morgan type—demands greater precision. Another of the historic objections to criminal discovery—that it would lead to intolerable perjury and tampering with documents and items of real evidence and hence promote the fabrication of wholly false defenses—was perhaps most cogently put, surprisingly enough, by the reformer Chief Justice Vanderbilt.[17] But essentially this objection proceeds from the premise that potential abuse condemns a device, a principle that we have largely and wisely—although by no means wholly[18]—discarded in procedural law, as witness the modern capacity of parties to testify.[19] The premise is no more valid for criminal discovery than for other legal institutions.

But the third of the historic reasons for denying criminal discovery —that it is unfair because any just system of disclosure presupposes mutuality which is impossible with criminal discovery because of our rule against compulsory self-incrimination[20]—gives pause. One need not rest resistance to this argument on the notion now frequently advanced that "to deny production on the ground that an

and the federal rules, see Louisell, *Discovery Today*, 45 CALIF. L. REV. 486 (1957).

14. *Dilemma* 74.

15. MORGAN, SOME PROBLEMS OF PROOF 106, 141, and esp. 193-95 (1956).

16. *Dilemma* 57.

17. State v. Tune, 13 N.J. 203, 210, 98 A. 2d 881, 884 (1953).

18. Not wholly, as is most acutely evident from the so-called "dead man's" statutes. See MORGAN, MAGUIRE & WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 175 (4th ed. 1957).

19. MORGAN, BASIC PROBLEMS OF EVIDENCE 74 (1954). The Supreme Court's latest word on this problem appears in Ferguson v. Georgia, 29 U.S.L. WEEK 4281 (U.S. March 27, 1961) (counsel of defendant in criminal case in Georgia, where defendant is incompetent as a witness but eligible to make an unsworn statement, cannot constitutionally be precluded from questioning defendant).

20. *E.g.*, State v. Rhoads, 81 Ohio St. 397, 424, 91 N.E. 186, 192 (1910); see *Dilemma* 87; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1197 (1960).

imbalance would be created between the advantages of prosecution and defense would be to lose sight of the purpose of a trial, which is the ascertainment of the truth; nondisclosure partakes of the nature of a game."[21] After all, to the extent that our criminal law administration is adversary, it, like civil law administration, naturally occasions in respect to discovery the problem of balancing as between adversaries the potential for fact ascertainment (although one can hardly argue that adversariness as such is the ultimate value of any rational system of adjudication, and certainly not of criminal law administration).[22] Perhaps a more important point, at least pragmatically, is that, viewing discovery realistically in the context of the total criminal investigatory process, often on fair appraisal of all relevant factors it would be found not to effect a true imbalance between prosecution and defense.[23] At least, when one considers the total investigative capacities of the state including access to scientific data and their interpretation,[24] the formal and actual limitations on the self-incrimination principle,[25] and the constitutional capacity of legislatures to require from a defendant advance knowledge of the nature of his defense,[26] there seems to be no intrinsic reason why criminal discovery must inevitably produce too gross an imbalance to be tolerable in an adversary system.

But if within a given jurisdiction the recognition of formal discovery rights in a defendant would imbalance to his undue favor his posture *vis-a-vis* the state's, further alternatives apparently are available to restore the balance, as suggested by a recent California case, *McCain v. Superior Court*.[27] In that case, a prosecution for exciting the lust of a child, defendant moved for pretrial discovery of certain information in the hands of the prosecution, including

21. Cash v. Superior Court, 53 Cal. 2d 72, 75, 346 P.2d 407, 408 (1959); see also Powell v. Superior Court, 48 Cal. 2d 704, 707, 312 P.2d 698, 699-700 (1957); People v. Riser, 47 Cal. 2d 566, 586, 305 P.2d 1, 13 (1956).
22. *Dilemma* 93, 97, 102.
23. *Dilemma* 60, 87.
24. On the significance of scientific data and their interpretation in modern adjudication, see LOUISELL & WILLIAMS, THE PARENCHYMA OF LAW ch. 16 (1960).
25. *Dilemma* 87.
26. A number of states require a defendant who relies on the defense of insanity to plead explicitly that defense. See, *e.g.*, CAL. PEN. CODE § 1016; see also WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 357-59 (1954). Fourteen states now have statutes providing that an accused who intends to rely upon alibi as a defense must give notice of his intention to the prosecution a specified number of days before trial. The relevant code provisions of these states are cited in *Dilemma* 61 n.13. Needless to say, any appraisal of criminal discovery as a factor in the balance between the state and the accused must, in order to approach accuracy, not only take account of all the weights on the scales, but must also consider each jurisdiction as a separate problem. See *Dilemma* 86.
27. 184 A.C.A. 853, 7 Cal. Rptr. 841 (1960). [A.C.A. is the abbreviation for Advance California Appellate Reports.]

recordings of statements made to police officers by defendant. The prosecution countered with a discovery motion against the defendant requesting, as a condition precedent to the granting of defendant's motion, that defendant be ordered to disclose "all original notes or documents or writings which contain statements . . . of witnesses or any tape recordings or writings by witnesses or any documents or photographs expected to be used as evidence in the trial,"[28] excepting attorney-client confidential communications. At the hearing the judge inquired of the defendant as to whether he had any objection to the granting of the prosecution's motion in conjunction with the granting of his motion. After some discussion and a continuance of several days defendant through his counsel indicated when the motions again were before the court that he was ready to submit to whatever orders the court might make. The court thereupon granted both orders for pretrial discovery on a "reciprocal contemporaneous basis." Defendant and the prosecution then exchanged materials. Later that day defendant by his counsel invoked his privilege against self-incrimination and other constitutional privileges,[29] but no change was made in the discovery order.

When the case was called for trial defendant moved for a dismissal, relying on section 1324 of the California Penal Code which provides that when a person furnishes incriminating information under a court order he is entitled to immunity from prosecution. The motion for dismissal was denied and defendant sought prohibition against proceeding with the trial, a device procedurally correct in California. Prohibition was denied because defendant by consenting to the discovery order waived his privilege against self-incrimination. Hence, his production of materials was deemed not to have been made pursuant to the statute's mandate with its concomitant immunization from prosecution, but pursuant to the waiver of the constitutional right, which had been invoked only after the waiver and therefore too late. The court said:

> Respondent and People contend, on several grounds, that there was no violation of petitioner's privilege against self-incrimination. The following ground appears decisive. Neither petitioner nor his counsel claimed the privilege prior to the time the trial court granted both motions on a "reciprocal contemporaneous basis" and in fact have waived any claim of privilege by stating: "The defendant is here and ready to submit to whatever orders your Honor makes." Following the order of the court granting the motions of both defendant and the People, defendant, through

28. 184 A.C.A. at 855, 7 Cal. Rptr. at 842.

29. Defendant invoked under the U.S. Constitution the searches and seizures provision of the fourth amendment, the fifth amendment's self-incrimination and due process provisions, and the fourteenth amendment. He also invoked the California constitution's provisions respecting self-incrimination and due process. 184 A.C.A. at 856, 7 Cal. Rptr. at 842.

> his attorney, complied and voluntarily handed over the material in question without making any objection to the ruling or to compliance therewith. The subsequent attempt of defendant's attorney to register his objections to the granting of the People's motion came too late to be effective for the order had already been executed.[30]

It would seem, therefore, that the self-incrimination principle is not an insuperable barrier to all significant development of criminal discovery. Likely it is to other factors—some chiefly psychological in nature, and the most important one the existence of organized crime in the United States—that we must turn for more adequate explanation of criminal discovery's lag behind its civil counterpart.

Criminal Discovery and the Psychology of Criminal Practice

It is easy enough to state, as some courts now do in justifying criminal discovery, that "nondisclosure partakes of the nature of a game";[31] or as I have stated, "adversariness as such is not the ultimate value of our legal system, certainly not of criminal law administration. Adversariness is only a means to ascertainment of the facts, and must be subordinated to the substantive objective when that means fails to promote the objective as efficiently as competing means would promote it."[32] But the fact is that in the psychology of American prosecution, adversariness looms large, and not wholly so for reasons attributable to prosecutors' orneriness. For despite the encroachments on the adversary principle, especially in criminal law administration, a trial is still a contest between opponents, not an inquiry conducted by neutrals. As the late Mr. Justice Jackson put it: "[A] common law trial is and always should be an adversary proceeding."[33] A distinguished former prosecutor, of unimpeachable integrity and ethical standards, recently remarked to the author:

> If I were to investigate a criminal case today in California, I would

30. 184 A.C.A. at 857, 7 Cal. Rptr. at 843. The court's conclusions derive support, doubtless essential, from the fact that criminal discovery is not yet required by due process. Leland v. Oregon, 343 U.S. 790 (1952); Cicenia v. LaGay, 357 U.S. 504 (1958). The allowance of one constitutional right hardly could be conditioned on the waiver of another. *Cf.* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 Yale L.J. 1149, 1197 (1960).

31. *E.g.,* Cash v. Superior Court, 53 Cal. 2d 72, 75, 346 P.2d 407, 408 (1959).

32. *Dilemma* 102.

33. In his concurring opinion in Hickman v. Taylor, 329 U.S. 495, 516 (1947). *Cf.* Morgan, Some Problems of Proof 1 (1956): "The theory of our adversary system of litigation is that each litigant is most interested and will be most effective in seeking, discovering, and presenting the materials which will reveal the strength of his own case and the weakness of his adversary's case so that the truth will emerge to the impartial tribunal that makes the decision." For a recent consideration of the functions of the judge in the context of an adversary trial, see the opinion of Woodbury, Chief Judge, for the court in *In re* United States, 286 F.2d 556 (1st Cir. 1961).

> do so upon the assumption that much of what I discovered, if not everything, would be in imminent peril of discovery. Since I am a product of the adversary system, I would do everything possible to limit and restrict what the defense might compel me to disclose. If any disclosure was to be made, I would want to exercise control over it. I'm sure that I could protect my situation pretty effectively, that is, I could frustrate all of the supposedly noble purposes of discovery. And that is just what law enforcement people are trying their best to do. Hope for change must lie in your suggestion for reciprocity. There's a lot to be said for the well known quid pro quo.

To the extent that the aforequoted objection proceeds from an assumed excessive imbalance occasioned by the lack of mutuality consequent upon the self-incrimination rule, in principle it should dissipate within any given jurisdiction if the reality is that granting formal discovery devices to defendant, in the context of the total fact-ascertainment process, would not unduly handicap the state.[34] Moreover, the prosecutor quoted above himself seems to acknowledge that there is in the doctrine of *McCain v. Superior Court*,[35] considered *supra*, the potential for adequate correction of his assumed imbalance. Obviously, the prosecution profession's antipathy to criminal discovery will be mollified more by the *McCain*-type pragmatic approach, than by the jurisprudential consideration that "the ultimate question [as to criminal discovery's acceptability] is, or should be, not simply whether discovery tends to tilt the scales, but whether it tends to tilt them to a right conclusion."[36]

That prosecutors generally evidence strong antipathy to those developments of criminal discovery which already have occurred in some places is made clear by attendance at almost any of their formal meetings, as well as by their informal discussion. If the dangers they typically foresee are inevitable concomitants of growth of discovery, the prospect for the increased rationality in criminal law that discovery theoretically presents is dismal indeed. Today in California, the state of greater growth of criminal discovery, one hears rumblings that the prosecutor-envisaged dangers are already upon us. One district attorney in a large metropolitan area, who formerly made it a practice to tape all of his office interviews with prospective witnesses, is reported to have dropped the practice with the growth of discovery orders. Thus is raised the threat of increasing reliance on recollection in substitution for record keeping. Indeed, the threat is not only that records will not be made, but that those made will conveniently be destroyed. Mr. Justice Frankfurter, speaking for four members of the Court recently stated in *Campbell v.*

34. *Dilemma* 60, 87.
35. 184 A.C.A. 853, 7 Cal. Rptr. 841 (1960).
36. *Dilemma* 97.

United States:[37] "Nothing in the legislative history of the [Jencks] Act remotely suggests that Congress' intent was to require the Government, with penalizing consequences, to preserve all records and notes taken during the countless interviews that are connected with criminal investigation by the various branches of the Government." One is reminded of the observation of Mr. Justice Murphy, for the Court in *Hickman v. Taylor*:[38] "Were such materials [counsel's memoranda] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." The answer, it seems to me, lies in the development in criminal discovery of the *Hickman* "work product" rubric,[39] besides, of course, judicial insistence on the duty of candor of prosecutors implicit in the basic norm of prosecution, that its primary function is not to convict but to see that justice is done.[40]

Another of the psychological hurdles to prosecutors' acceptance of criminal discovery lies in the fear that it will eventuate in their "doing all the work." Something of this feeling appears in the recent case of *People v. Cooper*,[41] wherein the California Supreme Court possibly indicated a swing of the pendulum respecting its attitude toward criminal discovery after its great forward strides of the last five years. For there the court in upholding denial of pretrial discovery said that to obtain it defendant must show some better cause "than a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime."[42] While I think the threat that discovery will promote indolence of defendants' lawyers is overdrawn, one need not share the prosecutor's psychology to acknowledge that "if diligence in preparing for trial, whether civil or criminal, is with any substantial number of lawyers an inverse function of the efficiency of discovery—if the zeal in preparing one's own case diminishes according as he is able to raid his opponent's workshop—then, indeed, in such indolence would there be danger that we would end with unilateral inquiry only into the facts. The essence of the adversary principle would be gone."[43]

One occasionally hears nowadays similar complaints respecting civil discovery, although the latter by reason of its inherent mutuality would seem better able to generate its own defenses against indolence.

37. 365 U.S. 85, 102 (1961).
38. 329 U.S. 495, 511 (1947).
39. Louisell, *Discovery and Pre-trial Under the Minnesota Rules*, 36 MINN. L. REV. 633, 635 (1952). The problem of failing to record data, and destroying them, may be even more serious respecting police files. See *Dilemma* 91, esp. n.161; *id.* 74 n.75.
40. ABA CANONS OF PROFESSIONAL ETHICS No. 5.
41. 53 Cal. 2d 755, 3 Cal. Rptr. 148, 349 P.2d 964 (1960).
42. 53 Cal. 2d at 770, 3 Cal. Rptr. at 157, 349 P.2d at 973.
43. *Dilemma* 95.

Perhaps the comprehensive survey in prospect of the actual workings of civil discovery, under the auspices of the Advisory Committee on Civil Rules,[44] will shed much light on the problem, for criminal as well as civil cases, of alleged discovery-induced indolence of counsel. In the meantime, courts should be alert against exaggerated claims that discovery is producing a generation of slothful attorneys. Certainly those who would curtail civil discovery on the "diligence" argument are conspicuous in neither number nor vigor.[45]

A factor that looms as an additional danger, not only in the psychology of the prosecutor but in that of the student of judicial administration as well, concerns potential proliferation of collateral issues in criminal cases as a consequence of discovery. The current term of the United States Supreme Court hardly assuages fears in this regard as *Campbell v. United States*,[46] involving application of the so-called *Jencks* legislation,[47] demonstrates. *Campbell*, like the *Jencks* case[48] itself, involved at-trial rather than pretrial discovery. But it is my view that although the timing of the discovery attempt has obvious significance—*e.g.*, significance respecting possible abuse, in that information furnished before trial may occasion greater opportunity for facilitation of perjury than when furnished only at trial—nevertheless both pretrial and at-trial discovery present essentially an integral problem, and it is fair to consider discovery's potential proliferation of collateral issues in the context of either type of disclosure.[49]

In *Campbell*, a prosecution of defendants for bank robbery, an eye witness identified one of the defendants at the trial and on cross-examination said that an FBI agent who had interviewed him during the week following the robbery had written down a statement which the trial judge first held was producible under the Jencks Act. As a result of the witness's further testimony, and government counsel's representations as to what he possessed by way of a statement, the trial judge finally ruled that the government need not produce any statement. The case ended up in the Supreme Court as a fight over whether there ever was a statement possessed by the government producible under the Jencks Act; if so, whether the government had destroyed it; whether a writing the government admittedly did have was a producible one; whether the trial court *sua sponte* should have called an FBI agent to enlighten it on these points, or left this task to

44. Under the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.
45. *Dilemma* 94.
46. 365 U.S. 85 (1961).
47. 18 U.S.C. § 3500 (1958).
48. Jencks v. United States, 353 U.S. 657 (1957).
49. *Dilemma* 63-64.

defendants themselves as a part of their adversary function; and whether the government witness, for whose impeachment the statement was sought, should himself have been the judge of whether the statement was discoverable to impeach him! Although all the justices concurred in the conclusion that the case had to be remanded to the district court for further appraisal as to whether there was in fact a statement producible under the Jencks Act, the Court split five to four on the rationale for the remand. It similarly split on the problem —or at least one phase of it—of whether the trial judge should have called the FBI agent as a court's witness or left the onus of getting his testimony on defendants. An intelligent layman, unacquainted with the complexities generated by the *Jencks* case, its judicial aftermath,[50] the attempted congressional palliative now popularly called the *Jencks* legislation, and the latter's construction in *Palermo v. United States*,[51] might well react to all the collaterality upon which *Campbell* turned by crying: If this be discovery, let's have no more of it!

Still, had the statement been discoverable before trial rather than its discovery precluded by the Jencks legislation—or had the FBI agent presumably in possession of the controlling facts on producibility been subject to a pretrial deposition to ascertain the nature of the statement—it is arguable that the collateral matters might have been substantially threshed out before the trial ever commenced. If so, the unfortunate turn of the *Campbell* litigation was not because of discovery, but because of undue limitations on it.

Clancy v. United States[52] affords another recent instance where collateral issues under the Jencks Act dominated outcome in the Supreme Court. This was a prosecution for tax evasion in the operation of a horse race booking enterprise. Government agents who interviewed defendants took no notes at the time but afterwards prepared memoranda of the interviews. The trial judge denied the defense's motion for production at trial of these memoranda because they had not been made "contemporaneously" with the interviews. In the Supreme Court the government conceded this was error; because the government agents had become witnesses at the trial, their own memoranda became producible to the extent they were relevant to the direct testimony at the trial. The trial court's error, however, is understandable—and unfortunately similar errors likely will continue to be made—because of the complexity of the concept of compulsory producibility under the Jencks Act. Thus, a government witness's statement is discoverable after he testifies at the trial,

50. *Dilemma* 64 n.25.
51. 360 U.S. 343 (1959).
52. 365 U.S. 312 (1961).

to the extent it is relevant to his testimony, if it is a written statement made by the witness and signed or otherwise adopted or approved by him (or, as now stated in *Campbell, supra,* if it is a copy of such a statement),[53] or if it is "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."[54] Apparently in *Clancy* the trial judge thought of the memoranda as merely governmental resumés of the defendants' statements, overlooking that the government agents themselves had become witnesses so as to make their own statements producible under the Jencks Act.

Although the Court unanimously accepted the government's concession of error respecting producibility of the memoranda, it split six to three as to disposition of the case, the majority reversing for a new trial, the minority favoring remand for determination as to whether defendants' counsel actually had received the requested memoranda. Thus disposition really turned upon the purely collateral factual issue as to whether the requested memoranda actually had been passed to the defense at the trial.

True, the Jencks Act is comparatively recent; it became effective only September 2, 1957. Perhaps the common law method of case to case decision will yet make acceptable and workable, from the viewpoint of judicial administration, its complex formula. At this point it would seem that something will have to give: either that formula itself, or the act's preclusion of pretrial discovery with its potential for clearing up collateral issues.[55]

ORGANIZED, PROFESSIONAL AND CONSPIRATORIAL CRIME

The considerations discussed in the preceding section probably pale in significance as barriers to growth of criminal discovery, when compared with the hurdle interposed by the fact of organized crime in the United States. I have little doubt that society could afford substantial development of criminal discovery in the typical case, to the end that sheer surprise as an element in outcome would be as effectively reduced in criminal as it now is in civil litigation where the Federal Rules of Civil Procedure or their state counterparts prevail.[56] But what of prosecutions in the field of organized, professional

53. 365 U.S. at 93 (1961).
54. 18 U.S.C. § 3500 (e) (2) (1958).
55. Of course, it must candidly be acknowledged that pretrial discovery, even if of ideal scope, might not in a given case clear up all collateral issues; indeed, the range of issues potentially implicit in the case may not be circumscribed until the witness involved has testified at the trial.
56. *Dilemma* 100.

and conspiratorial crime? Do the defendant, his attorney, and fellow members of his criminal syndicate, present hurdles too high for criminal discovery's leap?

This is a delicate question difficult to write about, but one that intellectual candor dictates that we face. The difficulty is compounded by the danger that remarks about criminal lawyers will be misconstrued. Nothing would be more wrongful than a general disparagement of attorneys who appear for defendants in criminal cases. Often their professional standards are in every respect just as high ethically as those of their civil counterparts. Often they appear out of motives primarily of public service rather than financial profit. Except in the District of Columbia, they still work for nothing when they appear by assignment in federal court. Rather than general disparagement of those lawyers who refuse wholly to shun criminal law administration, and hence at least occasionally appear for defendants in criminal cases, what is needed is disparagement of a certain attitude of disdain among a portion of the American bar to everything pertaining to criminal law. The English bar does not seem to me to have that attitude; barristers in every sense eminent often appear in criminal cases.

But the fact cannot be gainsaid that among the practitioners in American criminal courts are those who not only represent defendants from criminal enterprises as trial counsel but fall—almost inevitably it would seem—into the tragic plight of acting as advisors to the criminal enterprises to which their clients belong. A criminal syndicate's lawyer may stop at almost nothing to gain the syndicate's objective or, whatever his personal principles, may be overwhelmed by the pressures emanating from the gang, or the latter's more or less independent acts of subornation of perjury, getting rid of state's witnesses, and the like. As illustrative, I select the observations made in 1915 by a justice of the court which in the last five years has effected the greatest development of criminal discovery in the United States—the California Supreme Court:

> The court could not have done justice to the state, as well as to the petitioner, if it failed to keep in mind the common experience in the administration of criminal justice, that in relation to crimes involving conspiracy and confederation those who plan them remain in the background, while reckless tools are sent forth to do the actual work under promises of reward, protection, and defense. If exposure follows, the men who actually committed the criminal act are alone brought to the bar of justice. Then an attorney, chosen by the heads of the enterprise, appears to defend them. Deference is generally paid to appearances by having one attorney for each individual. If conviction follows, the leaders in the background are naturally anxious about the outcome. Will the district attorney be able to obtain confessions from the men already in

> the toils of the law, and, in that way, develop all the facts of the crime and reach out for the prime conspirators? In such circumstances the advantage of hiring an attorney to guide the criminals already in the clutches of the law can hardly be exaggerated. What would be the conception of duty on the part of an attorney who would, in such a situation, accept employment to represent the two sets of malefactors? This is not an unusual experience by any means, as every one familiar with criminal litigation is aware.[57]

On informal occasions, district attorneys will state, almost boast, that in fact they *are* willing freely to open up their files for inspection by defendant's counsel, when the latter is considered trustworthy in the sense that he would not be a party to subornation of perjury or an illegally fabricated defense, or kindred tactics. An outsider like the writer, whose experience in criminal cases always has been at the defendant's side of the table, is naturally skeptical as to whether files are in fact so freely opened; whether such voluntary disclosure is not done most typically in cases where the prosecutor believes that sharing the information may induce a plea of guilty. But in any event, can a prosecutor be blamed for resisting pretrial disclosure to a lawyer who represents a defendant fairly to be characterized as from the "professional criminal class"?

In attempting to tackle this problem I recently said, after asking the question whether criminal discovery reform generally in the United States must be held at bay by the fact of organized crime:

> Rather, it would seem that the law should take account of these realities, and draw the line between typical, and organized, crime. In the usual criminal case, the norm would be discovery as full-fledged as that which now characterizes civil litigation in federal court and those many jurisdictions which have emulated the federal civil discovery rules. Discovery, however, would be withheld, or perhaps allowed subject to restrictions, upon a showing by the state that by reason of the nature of the accused's associations and representatives, it would likely lead to improper uses such as threats to witnesses, hired or professional perjury, or the like. Among such restrictions might be delaying the time of allowance of discovery, *e.g.*, allowing it only shortly before trial so as to reduce to a minimum chance for interference with state witnesses. Or, waiver of the self-incrimination privilege might be imposed as a condition of discovery on applicants representing the professional criminal groups, although not generally imposed. Undoubtedly this approach would necessitate a measure of "trial court discretion," but it would be a discretion delimited by some tangible, objective considerations. It would be something like the kind of discretion apparently appropriate in fixing the amount of bail. Federal Rules of Criminal Procedure rule 46 (c), which may be taken as representative, provides that if defendant is

57. Lawlor, J., dissenting in *Ex parte* McDonough, 170 Cal. 230, 247, 149 Pac. 566, 572 (1915). See also Abbott v. Superior Court, 78 Cal. App. 2d 19, 177 P.2d 317 (1947); People v. Warden of County Jail, 150 Misc. 714, 270 N.Y. Supp. 362 (1934), *aff'd*, 242 App. Div. 611, 271 N.Y. Supp. 1059 (1934).

admitted to bail the amount shall be such as will insure his presence "having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant." Under this standard, one court considered, *inter alia,* that defendant when apprehended was in the company of a bail-jumper and was a person "without respect for legal processes."[58] Other courts have deemed significant defendant's character and reputation,[59] his criminal record,[60] his "consistent pattern of behavior,"[61] and the extensive criminal operations of the defendant.[62] Douglas, J., in recently denying without prejudice a bail application pointed out that "this traditional right to freedom during trial and pending judicial review has to be squared with the possibility that defendant may flee or hide himself."[63] This seems to be the kind of practical appraisal in which are relevant defendant's connections and associations, whether law abiding or not, as they are relevant to the likelihood *vel non* of abuse of criminal discovery.[64]

Since the foregoing was written there has appeared another helpful opinion by Mr. Justice Harlan in *Fernandez v. United States,*[65] involving prosecution for conspiracy to violate the federal narcotics laws, wherein the justice denied applications for restoration to bail from defendants whose bail had been revoked during trial by the trial judge. The latter had rested his revocation on a number of trial incidents, including "alleged threats made in the courtroom by three of the defendants to a government witness while he was in the process of identifying various defendants; alleged tampering with another government witness, not connected up, however, with any of the defendants; a trial interruption of about a week occasioned by injuries to one of the defendants resulting from what the Government suspected was a contrived automobile accident; [and] bail jumping on the eve of trial by one of the charged defendants, requiring his severance from the case. . . ."[66] Harlan refused to admit the applicants to bail, stating that on balance he was unable to say that the action of the trial judge in remanding defendants was arbitrary.

Effectuation for purposes of criminal discovery of a reasonable distinction between the typical criminal defendant, and the defendant from the realms of organized crime, probably would be best achieved,

58. United States v. Stein, 18 F.R.D. 248 (S.D.N.Y. 1955), *bail reduced,* 231 F.2d 109 (2d Cir. 1956).
59. *Ex parte* Jagles, 44 Nev. 370, 195 Pac. 808 (1921).
60. People *ex rel.* Sammons v. Snow, 340 Ill. 464, 173 N.E. 8 (1930).
61. *In re* Morehead, 107 Cal. App. 2d 346, 237 P.2d 335 (1951).
62. *Cf. Ex rel.* Gross v. Sheriff of City of New York, 277 App. Div. 546, 101 N.Y.S.2d 271 (1950) (material witness).
63. Bandy v. United States, 364 U.S. 477 (1960).
64. *Cf.* Foote, *Foreword: Comment on the New York Bail Study,* 106 U. PA. L. REV. 685 (1958).
65. 81 Sup. Ct. 642 (1961).
66. 81 Sup. Ct. at 643.

from the viewpoint of the mechanics of litigation, by putting the burden on the prosecution to show why a discovery order which would be proper in the typical case, should be withheld because of involvement of organized crime.[67] Prompt review of pretrial discovery orders would in the long run likely be sound judicial economy; certainly the prompt review afforded in California by writ of mandate seems to work efficiently.[68]

CONCLUSION

I suspect that Morgan might favor a policy of discretion in the trial judge more comprehensive than I have delineated—perhaps even a discretion broad enough to grant or withhold pretrial disclosure wholly without regard to my distinction between typical and organized crime. If so, in logic there would be support for him, as always. For it is arguable that it is not only in the professional crime situation, but in all cases where the witnesses are friendly or subservient to the defendant, that discovery is inimical to efficient prosecution by unduly imbalancing the scales; that this happens for example in the simple drunk driving case. But I doubt whether, in the simple drunk driving case for example, reasonable discovery rights in the defendant would in fact unduly imbalance the scales. To the contrary, it seems to me that in that type of case the prosecution's increasing facilities for scientific aids necessitate criminal discovery for a fair trial, at least to the extent of data pertaining to scientific tests. Therefore in that kind of situation, discovery should be a matter of right, not of trial court discretion. Indeed, in the generality of criminal cases some measure of discovery often seems essential to fairness and therefore should be accorded as of right, absent controlling considerations pertinent to likely abuse of discovery. In a word, where considerations of fairness indicate discovery, and there are no substantial countervailing considerations, defendant's capacity to get it should not depend on his "luck of the draw" at motions calendar. My own experience has made me acutely aware that the warning of Holt, C.J.—"discretionary" is "but a softer word for arbitrary"—[69] was not only for his time, but for the ages,

67. Clearly we must do better with problems of machinery and definition than New Jersey did in defining a "gang" as "consisting of two or more persons," producing a standard so vague as to violate due process. Lanzetta v. New Jersey, 306 U.S. 451 (1939). And we must be ever-mindful of the implications of the caution of Clark, Circuit Judge, in concurring in United States v. Bufalino, 285 F.2d 408, 420 (2d Cir. 1960): "For in America we still respect the dignity of the individual, and even an unsavory character is not to be imprisoned except on definite proof of specific crime."

68. Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957); *Dilemma* 78-85 and California cases cited.

69. Walcot's Case, Holt, K.B. 680, 90 Eng. Rep. 1275 (1793); *cf.* Breitel, *Controls in Criminal Law Enforcement,* 27 U. CHI. L. REV. 427 (1960).

or at least until human nature radically changes. It is for that reason that I struggle for objective, reasonable, and identifiable norms to control trial court discretion in the area of criminal discovery, as elsewhere. And I think the suggested distinction between typical and organized crime is a realistic and valid one which would help provide such norms.[70]

70. *Dilemma* 98.

APPENDIX: CRIMINAL DISCOVERY IN THE STATES*

ALABAMA

Criminal discovery at trial of documents other than admissible evidence is left to the discretion of the trial court. The Court of Appeals of Alabama, in affirming a conviction for conspiracy to commit mayhem, upheld the trial court's discretion in refusing defendant's motion to compel the prosecution to turn over police reports of interviews with state witnesses. Mabry v. State, 40 Ala. App. 129, 110 So. 2d 250 (1959), *cert. denied,* 110 So. 2d 260 (Ala. 1959). See Redden, *The Right of the Defendant to Discovery in Criminal Prosecutions,* 22 ALA. LAWYER 115 (1961).

ARIZONA

The Supreme Court of Arizona in State v. Colvin, 81 Ariz. 388, 307 P.2d 98 (1957) confirmed the position it had taken one year earlier in State v. Superior Court, 81 Ariz. 127, 302 P.2d 263 (1956) of leaving pretrial discovery to the discretion of the trial judge. In *Colvin* the court affirmed the trial court's order denying a defendant accused of aggravated assault discovery of statements of witnesses. In the *Superior Court* case it affirmed the trial court's order requiring the prosecution to produce a transcript of the defendant's statements made on deposition.

ARKANSAS

The law is in some conflict in Arkansas. In affirming a rape conviction, the Supreme Court of Arkansas held that the trial court had committed no error in refusing to allow the defendant to depose the complaining witness. Bailey v. State, 227 Ark. 889, 302 S.W.2d 796 (1957), *rehearing denied, cert. denied,* 355 U.S. 851 (1957). Yet the rationale of the court in Bates v. State, 210 Ark. 1014, 198 S.W.2d 850 (1947), in holding that the trial court did not err in refusing to grant the defendant's motion for inspection of a statement by one of the prosecution witnesses, was that the defendant "had just as much right to interview the witness and take a statement in advance of trial [as the state]."

CALIFORNIA

California has undoubtedly taken the lead in developing criminal discovery. The situation there is discussed in detail in Louisell, *Criminal Discovery: Dilemma Real or Apparent?,* 49 CALIF. L. REV. 56, 74 (1961). See, *e.g.,* Cash v. Superior Court, 53 Cal. 2d 72, 346 P.2d 407 (1959); Funk v. Superior Court, 52 Cal. 2d 423, 340 P.2d 593 (1959); Vance v. Superior Court, 51 Cal. 2d 92, 330 P.2d 773 (1958); Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957). But see Clark v. Superior Court, 190 A.C.A. 820, 12 Cal. Rptr 191 (1961).

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*This Appendix was prepared by Mr. Sheldon H. Wolfe, 3rd year student, Law School (Boalt Hall), University of California, Berkeley, research assistant to Professor Louisell. It does not purport to be exhaustive, especially in reference to devices which may perfom discovery functions but are not conventionally classified as discovery measures, *e.g.,* bills of particulars. See Louisell, *Criminal Discovery: Dilemma Real or Apparent?,* 49 CALIF. L. REV. 56, 60 (1961). For a bibliography of criminal discovery, see *id.* at 57 n.2; 59 n.9. Acknowledgment is made of help furnished by the availability of a brief dated August 17, 1960, filed by the District Attorney of Contra Costa County, California, in Cope v. Municipal Court, Civil No. 19,346, District Court of Appeal, 1st App. Dist., Div. One, California. In that case an order, apparently unpublished, fixing the scope of discovery was entered on November 21, 1960.

COLORADO

Colorado is still apparently aligned with those states that leave defendant's right of discovery to the discretion of the trial court, although both Rosier v. People, 126 Colo. 82, 247 P.2d 448 (1952) and Walker v. People, 126 Colo. 135, 248 P.2d 287 (1952) cast some doubt on the authority of Struna v. People, 121 Colo. 348, 215 P.2d 905 (1950) (at trial) and Massie v. People, 82 Colo. 205, 258 Pac. 226 (1927) (pretrial), which had adopted the discretionary approach in upholding the trial court's refusal of defendant's motion for discovery. In *Walker* the Supreme Court of Colorado made the general statement that "the doctrine of discovery is therefore a complete and utter stranger to criminal procedure." In *Rosier* the Court restricted defendant's right of discovery to cases where he was able to show materiality of the document and then only in "rare circumstances." However, the effect of these cases is somewhat lessened by the fact that in both cases the trial court had denied defendant's pretrial motion for discovery.

CONNECTICUT

The Supreme Court of Errors of Connecticut in State v. Zimnaruk, 128 Conn. 124, 20 A.2d 613 (1941), affirming a sex-perversion conviction, held there was no error in the trial court's refusal of a defense motion for the production and inspection of stenographic notes of a detective's interview with the complaining witness where no foundation of contradiction had been laid.

The state's attorney had given the document to the trial judge for his consideration and the court refused to override the judge's discretion. However, it appears that there was no requirement that the state's attorney furnish the document to the judge.

DELAWARE

The Superior Court of Delaware, in affirming a conviction for murder, held that the defendant had no right to pretrial discovery of documents that did not constitute evidence. There are dicta to the effect that even at trial no discovery would be permitted even for impeachment purposes unless the witness' credibility was first put in issue. State v. Thompson, 50 Del. 456, 134 A.2d 266 (1957). This rule was extended to preclude pretrial discovery of the defendant's own statements in the hands of the prosecution. State v. Kupis, 37 Del. 27, 179 Atl. 640 (1935).

DISTRICT OF COLUMBIA

As to the District of Columbia generally as a federal jurisdiction, see Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 68 (1961). The Municipal Court of Appeals for the District of Columbia in a bastardy proceeding, which is quasi-criminal in nature, held it was not error to refuse defendant the opportunity to examine the complainant's affidavit which was given to the prosecution in *confidence*. Fuller v. United States, 65 A.2d 589 (D.C. App. 1949).

FLORIDA

It is apparently well settled case law in Florida that a defendant is not entitled as a matter of right to pretrial discovery of statements made by witnesses to the prosecution. In both McAden v. State, 155 Fla. 523, 21 So. 2d 33 (1945) and Ezzell v. State, 88 So. 2d 280 (Fla. 1956) the Florida Supreme Court, affirming two murder convictions, upheld the trial court's refusal to grant defendant's motion for pretrial discovery of the statements of witnesses in the hands of the state's attorney. But see, especially in reference

to Florida statutory provisions, Note, *Discovery in Criminal Proceedings*, 13 U. FLA. L. REV. 242 (1960).

GEORGIA

Georgia, evidently on the theory that witnesses are as available to the defense as to the prosecution, denies the defendant the right to discovery of statements made by witnesses to the prosecution. The Georgia Court of Appeals, in affirming a murder conviction, held that the trial court's denial of defendant's discovery motion at trial was not error. However, the court was careful to distinguish the case of Wilson v. State, 93 Ga. App. 229, 91 S.E.2d 201 (1956) in which the defendant was denied the opportunity of contacting the state's only witness. Bass v. State 98 Ga. App. 570, 106 S.E.2d 845 (1958). This doctrine was confirmed by the Georgia Supreme Court in Walker v. State, 215 Ga. 128, 109 S.E.2d 748 (1959) upholding denial of defendant's pretrial motion for discovery in a murder case.

IDAHO

The Idaho position on pretrial discovery is that it is limited to civil cases. In Idaho Galena Mining Co. v. Judge of District Court, 47 Idaho 195, 273 Pac. 952 (1929) the supreme court issued a writ of prohibition against the trial judge who had granted a motion for pretrial discovery in a criminal libel suit. The authority of this case is somewhat weakened since the documents (business records) sought to be discovered were in the hands of persons other than the prosecution. There is language indicating that a subpoena duces tecum might have been appropriate.

ILLINOIS

The Supreme Court of Illinois, in affirming a robbery conviction, held there was no absolute right to pretrial discovery of the transcript of the record of a preliminary hearing. It upheld the trial court's denial of defendant's motion for inspection, People v. Murphy, 412 Ill. 458, 107 N.E.2d 748 (1952), *cert. denied*, 344 U.S. 899 (1952). The court adopted a somewhat more liberal attitude toward motions at trial in People v. Moses, 11 Ill. 2d 84, 142 N.E.2d 1 (1957). But see People v. Moretti, 6 Ill. 2d 494, 129 N.E.2d 709 (1955) wherein the court affirmed a murder conviction and upheld the trial court's denial of defendant's at-trial motion for discovery of documents not sought to be introduced in evidence. See Grady, *Discovery in Criminal Cases*, [1959] U. ILL. L.F. 827.

INDIANA

Pretrial discovery is at the discretion of the trial court. In affirming a conviction for assault and battery with intent to commit murder, the Supreme Court of Indiana upheld the trial court's denial of the defendant's pretrial motion to inspect statements made by prosecution witnesses. Anderson v. State, 156 N.E.2d 384 (Ind. 1959). Dicta indicate a different result if the defendant at trial supports a discovery motion by claiming that prior inconsistent statements made by the witnesses would be beneficial to his defense. See also Lander v. State, 238 Ind. 680, 154 N.E.2d 507 (1958) (pretrial; real evidence).

IOWA

The Supreme Court of Iowa, while reversing a rape conviction on other grounds, upheld the trial court's denial of the defendant's pretrial motion to inspect "all statements, investigations, reports and other evidence, in-

cluding confessions, if any, that the State intends to use in the prosecution of the above matter." State v. Kelly, 249 Iowa 1221, 91 N.W.2d 562 (1958).

KANSAS

In affirming a murder conviction, the Supreme Court of Kansas reversed the trial court's grant of defendant's pretrial motion for discovery on the basis that in the absence of statutory authority the trial court was without power. State v. Jeffries, 117 Kan. 742, 232 Pac. 873 (1925).

KENTUCKY

The Court of Appeals of Kentucky, in affirming a manslaughter conviction, upheld the trial court's refusal to grant pretrial inspection of physical evidence plus the defendant's confession. Kinder v. Commonwealth, 279 S.W.2d 782 (Ky. 1955). But see Arthur v. Commonwealth 307 S.W.2d 182 (Ky. 1957) (absolute right of inspection at trial).

LOUISIANA

Louisiana gives the defendant an absolute right to pretrial inspection of his written confession. The Supreme Court of Louisiana so held in reversing a murder conviction in State v. Dorsey, 207 La. 928, 22 So. 2d 273 (1945), *rehearing denied.* The court was careful to limit the scope of inspection to written confessions and has steadfastly refused to expand it. Following is a list of cases wherein the court has upheld the trial court's denial of the defendant's pretrial motion for discovery and inspection:

State v. Haddad, 221 La. 337, 59 So. 2d 411 (1951) (co-defendant's confession); State v. Lea, 228 La. 724, 84 So. 2d 169 (1955) (defendant's oral confession); State v. Weston, 232 La. 766, 95 So. 2d 305 (1957) (statements of witnesses); State v. Matassa, 222 La. 363, 62 So. 2d 609 (1952) (physical evidence—heroin); State v. Labat, 226 La. 201, 75 So. 2d 333 (1954) (written confession where the state had declared its intent not to use the confession at trial); State v. Mattio, 212 La. 284, 31 So. 2d 801 (1947) (police reports); State v. Simpson, 216 La. 212, 43 So. 2d 585 (1949), *cert. denied,* 339 U.S. 929 (1950) (statements of the defendant not amounting to a confession).

MASSACHUSETTS

The Supreme Judicial Court of Massachusetts has ruled that there is no pretrial inspection as of right but that the matter lies completely within the discretion of the trial court. Commonwealth v. Noxon, 319 Mass. 495, 66 N.E.2d 814 (1946) (murder; physical evidence); Commonwealth v. Chapin 333 Mass. 610, 132 N.E.2d 404, *cert. denied,* 352 U.S. 857 (1956) (murder; defendant's confession).

MICHIGAN

The defendant's right to pretrial inspection is within the discretion of the trial court. The Supreme Court of Michigan reversed the trial court's denial of the defendant's motion for pretrial discovery of his confession and remanded on the basis that the trial court had failed to exercise its discretion and had merely relied on the absence of statutory or judicial authority. People v. Johnson, 356 Mich. 619, 97 N.W.2d 739 (1959).

MINNESOTA

In Minnesota there is no pretrial discovery as a matter of right. In Axilrod v. State, 248 Minn. 204, 79 N.W.2d 677 (1956) the supreme court, affirming a murder conviction, upheld the trial court's denial of defendant's pretrial

motion stating that the rules of civil procedure are inapplicable to criminal cases. See also State v. Steele, 117 Minn. 384, 135 N.W. 1128 (1912) where the supreme court overruled the trial court's grant of the defendant's pretrial motion to inspect a copy of his statement made to an investigating officer. The court held that the trial judge could not justify his action as a matter of right and that there was no basis for the exercise of his discretion.

MISSISSIPPI

There is no right to pretrial discovery of documents which are not themselves admissible in evidence. The Supreme Court of Mississippi so held, in affirming an accessory-after-the-fact conviction and upholding the trial court's denial of the defendant's motion to discover statements made by the prosecution witness to the district attorney. Bellew v. State, 38 Miss. 734, 106 So. 2d 146, *appeal dismissed,* 360 U.S. 473 (1958).

MISSOURI

The only justification for pretrial inspection is if the object of inspection is to be evidence at the trial. The Supreme Court in State v. McQueen, 296 S.W.2d 85 (Mo. Sup. Ct. 1956) granted the state's motion for a writ of prohibition against the circuit judge to prohibit him from enforcing a subpoena duces tecum and order for inspection of police records. The court said, 296 S.W.2d at 90: "Can there be any doubt that discovery was a material factor in procurement of the subpoena . . . ? We think not. We must hold that the subpoena and the order to produce for inspection are illegal . . . ."

MONTANA

Unless the purpose of discovery is to produce evidence there is no right to pretrial inspection in the absence of statute. The question is open as to whether or not the trial court can even exercise discretion. In State v. District Court, 135 Mont. 545, 342 P.2d 1071 (1959), the supreme court granted the state's motion for a writ of prohibition against the district court's pretrial inspection order. The court evaded the discretion issue by holding the defendant had failed to "show proper cause to move any discretion the trial court might have."

NEBRASKA

The Supreme Court of Nebraska, in upholding a murder conviction, affirmed the trial court's action in denying the defendant's pretrial motion for discovery of confessions and other documents in the possession of the state. Cramer v. State, 145 Neb. 88, 15 N.W.2d 323 (1944). The court held that there was no right to pretrial inspection unless the documents were admissible in evidence in chief. However, the court did recognize the trial court's power to exercise some discretion in this area.

NEVADA

Documents in possession of the state are susceptible to defendant's at-trial motion for discovery even if their sole evidentiary value is for impeachment purposes. In affirming the trial court's denial of such a motion, the Nevada Supreme Court in State v. Bachman, 41 Nev. 197, 168 P. 733 (1917), held that the defendant had failed to show that the confession of an accomplice would have been admissible for *any* purpose.

NEW HAMPSHIRE

While enjoining the defendant, a murder suspect, from enforcing a pretrial order for inspection of photographs in the hands of the police the Supreme

Court of New Hampshire stated the rule to be that there is no right to pretrial inspection in the absence of statute. State *ex rel.* Regan v. Superior Court, 102 N.H. 224, 153 A.2d 403 (1959).

NEW JERSEY

There is no right to pretrial inspection of documents in general. However, the trial court at its discretion may grant inspection of the defendant's written confession. The Supreme Court of New Jersey so held in dismissing the defendant's direct appeal from the trial court's order denying his motion to inspect. State v. Cicenia 6 N.J. 296, 78 A.2d 568 (1951). In State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953) the supreme court, in considering the state's petition for certification, reversed that part of the trial court's order which provided for defendant's inspection of his written confession. The court felt that the trial court's action was an abuse of discretion in that the defendant had failed to sustain the burden of proving the necessity of inspection in the "interest of justice."

NEW MEXICO

The only reported New Mexico case which could be located in the field of pretrial discovery and inspection follows; it has not been overruled or cited by any subsequently reported case. The Supreme Court of New Mexico in Territory v. McFarlane, 7 N.M. 421, 37 Pac. 1111 (1894), upheld a trial court's denial of a pretrial motion for production of testimony taken before the justice of the peace, holding that there was no statutory authority for such inspection.

NEW YORK

The right to pretrial inspection is limited to documents which would themselves be admissible evidence. The rule was so stated in the leading case of People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927), wherein the New York Court of Appeals affirmed a writ of prohibition granted by the Appellate Division of the Supreme Court against the trial court from enforcing its order compelling the production and inspection of various documents. The burden of proof is on the defendant to show the existence and the materiality of the evidence. People v. Marshall, 5 App. Div. 2d 352, 172 N.Y.S.2d 237 (1958), *aff'd,* 188 N.Y.S.2d 213 (1959).

OHIO

There is no right to pretrial inspection. The Ohio Supreme Court so held in sustaining the state's objections to the trial court's order compelling production of the transcript of grand jury proceedings. The defendant had been acquitted of bribery and the state brought exceptions. State v. Rhoads, 81 Ohio St. 397, 91 N.E. 186 (1910). However, when the prosecution offers a document in evidence the defendant of course has an absolute right to inspect at trial. State v. Sharp, 162 Ohio St. 173, 122 N.E.2d 684 (1954).

OKLAHOMA

Ordinarily, unless documents in the county attorney's possession are evidence themselves and are the very essence of the case, they should not be required for inspection in pretrial proceedings. The Supreme Court of Oklahoma so held in denying the defendant's petition for mandamus to compel the county attorney to make available a tape recording of conversations between the defendant and the county attorney. Application of Killion, 338 P.2d 168 (Okla. 1959).

OREGON

The defendant's right to pretrial inspection is at the discretion of the trial court. The Supreme Court of Oregon, in affirming a murder conviction, found the trial court had not abused its discretion by denying the defendant's pretrial motion for inspection of his confession. State v. Leland, 190 Ore. 598, 227 P.2d 785 (1951), *aff'd*, 343 U.S. 790 (1952).

PENNSYLVANIA

The accused has no right to pretrial inspection of evidence in possession of the prosecution. Commonwealth v. Wable, 382 Pa. 80, 114 A.2d 334 (1955). *But cf.* Petition of DiJoseph, 394 Pa. 19, 145 A.2d 187 (1958), wherein the Supreme Court of Pennsylvania denied the state's motion for a writ of prohibition and upheld the trial court's order to compel the district attorney to produce the alleged murder weapon upon defendant's pretrial motion for inspection. However, the order was modified so that the district attorney was not compelled to reveal photographs of fingerprints, if any, on the weapon.

RHODE ISLAND

The trial court has discretion in special cases to relax the rigors of the common law rule against pretrial inspection by the accused. In affirming a murder conviction the Supreme Court of Rhode Island found no error in the trial court's denial of the defendant's pretrial motion for inspection of physical evidence in possession of the state. State v. Di Noi, 59 R.I. 348, 195 Atl. 497 (1937), *rehearing denied*, 60 R.I. 37, 196 Atl. 795 (1938).

SOUTH DAKOTA

The trial court has inherent power to compel pretrial inspection of documents "evidential in character." This was the rule espoused by the Supreme Court of South Dakota in State *ex rel.* Wagner v. Circuit Court, 60 S.D. 115, 244 N.W. 100 (1932). The court there dismissed the state's petition for certiorari, the circuit court having ordered the prosecution to allow inspection of certain documents in the state's possession by the accused who was charged with theft by false pretenses.

TENNESSEE

The Supreme Court of Tennessee in Witham v. State, 191 Tenn. 115, 232 S.W.2d 3 (1950), in affirming a robbery conviction, held there was no error by the trial court in denying the defendants' requests to examine their confessions prior to their introduction at trial. See also Ivey v. State, 340 S.W.2d 907 (Tenn. 1960). Chapter 91 of the Public Acts of 1961 provides that the Tennessee discovery statute [TENN. CODE ANN. § 24-1201] shall not apply to criminal proceedings.

TEXAS

There is no right to pretrial inspection until the moment the prosecution offers the subject of the requested inspection in evidence. The Texas Court of Criminal Appeals, in affirming a murder conviction, upheld the trial court's denial of the defendant's pretrial motion to inspect his confession. Dowling v. State, 317 S.W.2d 533 (1958). See also Pettigrew v. State, 163 Tex. Crim. 194, 289 S.W.2d 935 (1956) (photographs); Hill v. State, 319 S.W.2d 318 (1958) (statements by state's witnesses).

UTAH

In affirming an embezzlement conviction, the Supreme Court of Utah upheld

the trial court's denial of the defendant's pretrial motion to inspect documents in possession of the prosecution on the ground that there had been no abuse of discretion. State v. Lack, 118 Utah 128, 221 P.2d 852 (1950).

VERMONT

The Supreme Court of Vermont, dismissing the defendant's exception to the denial by the trial court of his motions to inspect the transcript of the grand jury proceedings and to quash his indictment for murder, held that the accused had no right to pretrial inspection and that the matter is left within the discretion of the trial court. State v. Goyet, 119 Vt. 167, 122 A.2d 862 (1956). As to defendant's rights of inspection at trial, see State v. Lavallee, 163 A.2d 856 (Vt. 1960).

VIRGINIA

Virginia adopts the rule that the accused is not as a matter of right entitled to inspect evidence in the hands of the prosecution previous to the trial. The Supreme Court of Virginia so held, affirming a murder conviction and upholding the trial court's denial of the defendant's motion to inspect documents which he had written, in the possession of the state. Abdell v. Commonwealth, 173 Va. 458, 2 S.E.2d 293 (1939).

WASHINGTON

The general rule in Washington is that pretrial inspection is within the sole discretion of the trial court. The supreme court, affirming and reversing multiple abortion convictions, upheld the trial court's denial of the defendant's pretrial motion for inspection. State v. Payne, 25 Wash. 2d 407, 171 P.2d 227 (1946). But discretion is a double-edged sword. The supreme court, in dismissing the state's petition for certiorari to review the trial court's order compelling production of an autopsy report for defendant's inspection, held that the facts supported the exercise of the trial court's discretion in sustaining the defendant's pretrial motion. The defendant was a juvenile, indigent, a foreigner who had surrendered the documents prior to employment of counsel. State v. Thompson, 54 Wash. 2d 115, 338 P.2d 319 (1959).

WEST VIRGINIA

There is no right to pretrial inspection of documents not offered in evidence by the prosecution. The Supreme Court of West Virginia held in State v. Tabet, 136 W.Va. 239, 67 S.E.2d 326 (1951), that the trial court had not committed error in denying the pretrial motion of defendant who was convicted of murder.

WISCONSIN

The Supreme Court of Wisconsin in State v. Herman, 219 Wis. 267, 262 N.W. 718 (1935), stated in affirming a criminal libel conviction that the rule is well established that "one accused of crime enjoys no right to an inspection of evidence relied upon by the public authorities for his conviction." (Wisconsin cases cited.)