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THE CRIMINAL PROSECUTION: SPORTING EVENT OR QUEST FOR TRUTH?

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The Tyrrell Williams Memorial Lectureship was established in the School of Law of Washington University by alumni of the school in 1949, to honor the memory of a well-loved alumnus and faculty member whose connection with and service to the school extended over the period 1898-1947. This fifteenth annual lecture was delivered March 13, 1963.

Over the last fifteen years many distinguished judges, law teachers and lawyers have joined you in this annual tribute to the memory of an eminent teacher and scholar of the law. You will therefore appreciate my delight in accepting the signal honor of your invitation. The papers already delivered from this podium have indeed set a high standard. And it is significant, I think, that those papers have a common thread, if different themes. All make the point, by one formulation or another, that the quest for better justice is a ceaseless quest, that the single constant for our profession is the need for continuous examination and reexamination of our premises as to what law should do to achieve better justice. This has encouraged me to choose the subject upon which I shall speak this morning. Should we extend to criminal prosecutions the civil pre-trial discovery techniques which force both sides of a civil law suit to put all cards on the table before trial, and tend to reduce the chance that surprise or maneuver, rather than truth, may determine the outcome of the trial? Or, as Glanville Williams asked recently, shall we continue to regard the criminal trial as "in the nature of a game or sporting contest" and not "a serious inquiry aiming to distinguish between guilt and innocence"?¹

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1. Williams, *Advance Notice of the Defence*, 1959 CRIM. L. REV. (Eng.) 548, 554.

Before we get too deeply into that subject, one observation is appropriate, perhaps even necessary. My subject involves, of course, a question of criminal procedure—the process by which one accused of any crime has his guilt or innocence decided. Now it's a matter for real concern, I submit, that so many in our society, laymen and lawyers alike, show impatience with any and all procedures which appear to hamper the task of law enforcement agencies to bring an accused to conviction. More people than not resent the privilege against self-incrimination. Confessions extracted by prolonged interrogation of an accused may concern judges and criminologists, but trouble little the consciences of others. Police without a search or arrest warrant have broken down a suspect's door and provoked little public outcry, if perchance they stumbled on evidence which eventually proved his guilt. Too many of us seem to have forgotten the true office of the constitutional procedural safeguards against police tactics such as these. We have forgotten that these safeguards, while they do indeed make harder the conviction of an accused, were not provided for that purpose—the Framers of the Constitution weren't "soft on criminals." These safeguards are checks upon government—to guarantee that government shall remain the servant and not the master of us all. My Brother Douglas made the point from this podium four years ago that what distinguishes our criminal law from that of totalitarian regimes is really only this: that however desirable the ends, long and bloody history taught us that there are some police tactics that are not safely tolerated in a free society; in addition to the question whether our free society can morally tolerate them, such toleration could only end up in making government the oppressor of each and every one of us.²

But public misunderstanding of the true function of the procedural guarantees is, I submit, something in great measure the fault of our profession. How can we blame laymen for their impatience with procedural safeguards when so many lawyers believe that contributing one's legal services to an unpopular or unremunerative cause is dirty, or nasty, or opprobrious? It is a much overworked observation, but one which I can't resist repeating because it is central to this point, that far too many lawyers—usually without knowing why—look askance at criminal practice, even as an incidental supplement to a regular corporate or business practice.

This attitude relates partly, I know, to the status of practitioners of criminal law in our country. My Brother Douglas said in his recent Madison Lecture at New York University:

In 1770 British soldiers were tried in Boston for killing Americans in an episode known as the "Boston Massacre." John Adams

2. Douglas, *The Means and The End*, 1959 WASH. U.L.Q. 103.

and Josiah Quincy, Jr., defended them, six being acquitted and two being convicted of manslaughter. Feelings ran high. But Adams and Quincy did not hesitate, Adams saying that counsel "ought to be the last thing that an accused person should want in a free country." This was in the best tradition of our Bar.³

Too few leaders of today's Bar show the same consciousness of their professional responsibility; a noble tradition seems to have been forgotten by far too many. I must say frankly that I think the law schools have to share some of the blame for this lack of what should be widespread devotion to the tradition. I don't think the criminal law, particularly criminal procedure, is given as central a position as it should have in law school curricula. I have the uneasy feeling that whatever instruction there is in this field doesn't sufficiently drive home that many of our most precious guarantees of liberty and human dignity are at hazard in criminal procedures. Certainly the law schools do not turn out droves of bright young men anxious to carve out a career in criminal law—at least for the defense. Estates, corporate, tax, administrative law, all of these arouse far more interest. I don't doubt that the relatively greater financial return in those specialties plays a large part in the choice. But if the law schools give only cursory attention to criminal procedures in the curriculum, it is hard to see how students can be blamed for coming away from law school with the feeling that perhaps the institution also shares the unfortunate tendency of the community to disapprove of lawyers who undertake the defense of people charged with crime. And the worst result of this is the consequent ignorance even on the part of very able lawyers of the extent some of the most precious values of our society are involved in the administration of criminal justice. It is significant that in announcing a grant of almost three million dollars to improve legal representation of indigents, the Ford Foundation emphasized the importance of this particular function in the whole spectrum of the lawyer's responsibility.

The problem is not simply one of apathy toward the practice of criminal law. Criminals are not the only unpopular or nasty people who need good lawyers and find it hard to get them among the graduates of the best schools. Here, too, our professional tradition has markedly and sadly changed. To quote Justice Douglas again:

In American history lawyers have often rallied opinion outside of courtrooms in support of the despised minorities. Charles Evans Hughes, William E. Borah, and John W. Davis served in that role. A few lawyers still speak in that tradition. But most lawyers have remained silent.⁴

3. DOUGLAS, *The Bill of Rights Is Not Enough*, 38 N.Y.U.L. REV. 207, 216 (1963).

4. *Ibid.*

Yet, innumerable civil rights cases require expert counsel in their preparation and presentation. One wonders where the cause of school desegregation and the removal of racial barriers from public facilities throughout the country would be today without the untiring efforts of a very few good lawyers who allowed the nobility of the cause to overcome its unpopularity in their own minds, and cared little what their neighbors thought, or how ran their stock in the local bar association.

I have a feeling that there is a pressing need for a rethinking by law teachers of the adequacy of law school curricula in these fields—here may be “one way of producing a generation of lawyers whose vision of the law will again extend beyond the interests of those who offer the largest retainers” to borrow once more from my Brother Douglas.

I hope I have not left the impression of carping. Of course, the American law schools in general and this law school in particular are well aware of the challenge and will surely meet it. If my tone seems critical it is only because the law schools have already imposed such high standards upon themselves that they also invite other branches of the profession to appraise their performance critically.

With that, which you may perhaps think is an impertinent preliminary, I return to the subject of pre-trial discovery in criminal cases. I'm sure you will appreciate now why I think this is anything but a dry topic, or one which is unworthy of so memorable an occasion as this. Few issues raise more sharply the basic ideological clash between opposed theories of criminal justice. Perhaps this is the reason for the bitterness that has often marked the debate. Until a few years ago American courts had virtually closed minds to any proposals for criminal discovery. As recently as 1927 Mr. Justice Cardozo was able to discern only “the beginnings or at least the glimmerings” of a “power in courts of criminal jurisdiction to compel the discovery of documents in furtherance of justice.”⁵ Of course, I suspect that there has for some time been a very great deal of discovery in actual day to day administration of the criminal law. I mean by this that prosecutors have not been loath to show their files to defense counsel—to some counsel because they trust them; more often, to any counsel, if disclosure offers the chance that counsel will persuade the client to enter a plea and save the prosecutor the trouble, and the state the expense of a trial.⁶ Apart from the constitutional overtones of denial of equal protection involved in such a practice, I think we must all agree that the opportunity for discovery on equal terms should either be the right of all accused, or the right of none.

5. *People ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 32, 156 N.E. 84, 86 (1927).

6. JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, ALI & ABA, THE PROBLEMS OF DISCOVERY IN CRIMINAL CASES 4-6 (1961).

Things have progressed dramatically since Mr. Justice Cardozo wrote in 1927. California has gone particularly far not only in allowing the accused discovery of the state's case,⁷ but has recently ventured to explore some areas where the state may, despite the self-incrimination privilege, compel discovery by the defendant.⁸ The States of Washington⁹ and Pennsylvania¹⁰ have also made strides. But by and large the states are still unreceptive.¹¹ I think it is particularly ironic that, according to Mr. Justice Jackson, Soviet prosecutors at the War Crimes Trials at Nuremberg protested against adoption of the prevailing American procedures on the ground that they're "not fair to defendants."¹² The upshot was a compromise procedure which permitted the accused at those trials more liberal discovery than

7. See, e.g., *Vance v. Superior Court*, 51 Cal. 2d 92, 330 P.2d 773 (1958); *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957). See also Garber, *The Growth of Criminal Discovery*, 1 CRIM. L.Q. 3, 18-23 (1962).

8. In *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919 (1962), the California Supreme Court held last year that the State might obtain discovery of the names of expert witnesses whom the defendant planned to call at trial, and of certain medical reports relevant to the defendant's projected defense of impotency against a charge of rape. While a number of states (including California) have various statutory provisions authorizing limited discovery by the prosecution of the defense, see notes 27 & 28 *infra*, the *Jones* case appears to represent the first judicial recognition of such a procedure. Two judges of the California Supreme Court dissented on the ground that such discovery raised serious problems of self-incrimination. See generally Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 838-42 (1963).

9. See e.g., *State v. Thompson*, 54 Wash. 2d 100, 338 P.2d 319 (1959).

10. See e.g., *Di Joseph Petition*, 394 Pa. 19, 145 A.2d 187 (1958). Particularly significant to this case is the fact that the Attorney General of the State, as *amicus curiae*, filed a brief in support of the defendant's request for broader discovery rights. The brief stated:

It is submitted that the more liberal use of discovery in criminal cases is not only being practiced by the courts but also by the district attorneys of metropolitan communities . . . and this practice greatly aids in the administration of justice. . . . Under the present system in civilized communities where counsel is informed of the real strength of the Commonwealth's case, he is better enabled to give the proper advice to his client and trials are shortened, issues are met more fairly, guilty pleas are very often made, particularly in homicide cases, and the administration of justice is not only speeded up but made more fair and exact. Brief for the Attorney General as *Amicus Curiae*, pp. 11-12.

11. See generally Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960). See for further discussion of the problem, Comment, 1961 U. ILL. L. FORUM 187; Note, *Discovery in Criminal Proceedings*, 13 FLA. L. REV. 242 (1960); Note, *Criminal Discovery—the State of the Law*, 6 UTAH L. REV. 531 (1959).

12. See Jackson, *Some Problems in Developing an International Legal System*, 22 TEMP. L.Q. 147, 150-51 (1948); Bull, *Nurnberg Trial*, 7 F.R.D. 175, 178 (1947).

allowed under American law, although apparently narrower than Soviet or French practice sanctions.¹³

England went through our experience long ago. When in 1792 pre-trial inspection of documents was sought by a high official of the East India Company charged with malfeasance and corruption, it was denied out-of-hand with the outraged comment of the Lord Chief Justice that to grant such a request would "subvert the whole system of criminal law."¹⁴ But by 1883 Sir James Stephen was able to say that this too was barbarism not to be tolerated by a decent criminal procedure.¹⁵ And, of course, today there is substantial pretrial discovery of the Crown's case. Lord Devlin is authority that on the preliminary hearing, antecedent to indictment, the Crown is required "to make a complete disclosure of the whole of its case."¹⁶ In this way, Lord Devlin explains, if an indictment results, "the defense gets to know the whole of the material that will be put against them."¹⁷ And the Crown may not use at the trial against the accused any evidence not disclosed to him at the preliminary hearing. If the Crown turns up more evidence it must first give defense counsel notice of what it is.¹⁸

It may appear strange that resistance to criminal discovery should be so stubborn in America, when Chief Justice Marshall seemed so

13. See Orfeld, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221, 232-33 (1957).

14. *King v. Holland*, 4 Durn. & E. 691, 692, 100 Eng. Rep. 1248, 1249 (K.B. 1792). Also instructive and illuminating is the observation of another of the Justices, who concurred in the result: "It is clear that neither at common law, or under any of the statutes, is the defendant entitled as a matter of right, to have his application granted. And if we were to assume a discretionary power of granting this request, it would be dangerous in the extreme, and totally unfounded on precedent." *Id.* at 694, 100 Eng. Rep. at 1250.

15. [I]t did not occur to the legislature that, if a man is to be tried for his life, he ought to know beforehand what the evidence against him is, and . . . it did not appear to them that to let him know even what were the names of the witnesses was so great a favour that it ought to be reserved for people accused of a crime for which legislators themselves or their friends and connections were likely to be prosecuted. 1 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 226 (1883).

[The defendant] was not allowed as a matter of right, but only as an occasional favor . . . to see his [own] witnesses and put their evidence in order. When he came into court, he was set to fight for his life with absolutely no knowledge of the evidence to be produced against him. *Id.* at 398.

16. DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 112 (1958).

17. *Ibid.*

18. There are, however, exceptions and limitations upon the access which the English defendant has to the Crown's case:

[T]here could be much information which the defendant might need for proper preparation of his defense which would not be disclosed to him by this machinery, either because it is withheld by the prosecution as not admissible, or because, although admissible, it is evidence which the prosecution does not intend to offer at the trial. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 66 (1961).

strongly to approve it. You will recall that as a Circuit Justice he presided in the celebrated trial of Aaron Burr.¹⁹ At that trial a request was made on Burr's behalf for pre-trial inspection of a letter addressed to the President of the United States and in the possession of the United States Attorney. Although the great Chief Justice did not hold that there was an absolute right to compel disclosure, in characteristically strong terms he stated his view that if the letter had evidentiary relevance, or indeed was useful in cross-examination of any Government witness at the trial, it could not, in fairness to the defendant, be withheld from him. But the value of that precedent was virtually unappreciated in our country for almost a century and a half.²⁰

I submit that we must rethink our opposition to allowing the accused criminal discovery, certainly if we are to continue to maintain that our system of criminal justice, if not favoring the accused, at least keeps the scales evenly balanced in his contest with the state. Are the scales really evenly balanced? Who are our criminal defendants? Are they people having relatives with resources capable of helping in their defense? By and large, the so-called "white collar" criminal probably does have the resources and friends to aid him in his defense. Justice is indeed well served when prosecution and defense are fairly evenly matched. But is this the situation for the vast majority of our "blue collar" defendants? Judges know that the largest percentage of these people are indigent.²¹ To put it another way, these offenders, the largest number by far of the total of all offenders, come from that section of society where conditions result in the largest crime rate. It is here also that the mentally retarded are found—the experts make the provocative suggestion that deprived socio-economic upbringing causes considerably more retardation than springs from organic or

19. *United States v. Burr*, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807). Mr. Chief Justice Marshall referred in the course of his opinion also to the constitutional guarantees of a speedy and public trial and compulsory process for obtaining witnesses. *Id.* at 33.

20. Over a hundred years after the *Burr* case, for example, even Learned Hand found little merit in a request for criminal discovery on behalf of the defendant, principally on the ground of his belief that the advantage in the criminal prosecution lay almost wholly with the accused. *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923). The expansion of criminal discovery in the state courts has taken place very largely within the past decade. See Fletcher, *op. cit. supra* note 11, at 297-305.

21. A recent study indicates that, although the figures vary considerably from state to state, an average of thirty to sixty percent of criminal defendants lack funds with which to retain counsel. SPECIAL COMMITTEE OF THE ASSN. OF THE BAR OF THE CITY OF NEW YORK AND THE NATIONAL LEGAL AID AND DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED 80 (1959). Cf. BROWNELL, LEGAL AID IN THE UNITED STATES 83 (1951).

hereditary factors. Do not these less privileged of our society present the particular problem that without resources to prepare a defense, they often don't have an adequate defense? Can we boast of a decent administration of the criminal law if we don't provide them some redress against this hard reality? Criminal discovery would be one tool whereby they would have a better chance to meet on more equal terms what the state, at its leisure and without real concern for expense, gathers to convict them.²²

And what of the task society puts on the shoulders of assigned counsel? For public defenders are still provided by only a few states, and the Federal Government is only beginning to work out such a plan; assigned counsel must perforce provide what legal representation these defendants receive. But we not only give assigned counsel no compensation for his services in most cases—we deny him both financial help to prepare a defense and the discovery, which if not the best, might at least provide a substitute. Moreover, the court-appointed lawyer in a criminal case usually comes to the case late, after the state has gathered its evidence against the accused.²³ Assigned counsel therefore must do what he can within the limited time usually allowed him before trial, often long after the trail has grown cold. He must deal with an accused whose obvious interest in self-justification complicates his lawyer's task of finding the true facts.²⁴ Even if he can learn the names of the witnesses against his client, those witnesses have already talked to the state's investigators and more frequently than not have been warned not to talk with anyone representing the accused. If his client has signed a confession he has added problems. In view of the practical realities of police interrogation, he travels a rough road if he would establish whether the confession was coerced, or fairly represents what his client told the officers.²⁵ In all

22. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1172-98 (1960); Young and Gray, *Trial by Ambush—The Case for Pre-trial Discovery in Criminal Law*, 25 NEV. STATE BAR J. 91, 96-99 (1960).

23. See Louisell, *op. cit. supra* note 18, at 94-96.

24. See Fletcher, *op. cit. supra* note 11, at 306.

25. See Arens & Meadow, *Psycholinguistics and the Confession Dilemma*, 56 COLUM. L. REV. 19, 27-31 (1956). Mr. Chief Justice Weintraub of the New Jersey Supreme Court has recently commented on this problem:

We must be mindful of the role of a confession. It frequently becomes the core of the State's case. It is not uncommon for the judicial proceeding to become more of a review of what transpired at headquarters than a trial of the basic criminal event itself. No one would deny a defendant's right thoroughly to investigate the facts of the crime to prepare for trial of that event. When a confession is given and issues surrounding it tend to displace the criminal event as the focus of the trial, there should be like opportunity to get at the facts of the substituted issue. Simple justice requires that a defendant be permitted to prepare to meet what thus looms as the critical element of the case against him. *State v. Johnson*, 28 N.J. 133, 137, 145 A.2d 313, 316 (1958).

fairness, should he not at least be allowed a copy to see what there is about the confession which will permit him to pursue that inquiry before trial? And if some of the state's evidence is physical and tangible and has been subjected to police laboratory analysis or tests, the assigned counsel denied a look at the reports is at an obvious disadvantage.²⁶ Even if he can see the objects the police tested he won't have the funds or the facilities to have tests of his own made. Not every accused has the good fortune to have an ingenious Perry Mason as his counsel.

What assigned counsel obviously needs to discharge the heavy responsibility we give him is at least the opportunity to do what the state does when the trail is fresh, namely, seek corroboration of the accused's story, or lack of it, from external facts through avenues of inquiry opened by what the state has learned. The implication in the argument against discovery is that the accused is guilty, so that not only may he not complain of the use against him even of his confession, or to its use as a source of leads to make the case against him as ironclad as possible, but that he really has no complaint that his counsel is denied access to the same materials to aid him better to develop the whole truth. In other words, the state may eat its cake and have it too. To that degree, does not the denial of all discovery set aside the presumption of innocence—is not such denial blind to the superlatively important public interest in the acquittal of the innocent? To shackle counsel so that he cannot effectively seek out the truth and afford the accused the representation which is not his privilege but his absolute right seems seriously to imperil the bedrock presumption of innocence.

And might not expanded discovery benefit the prosecution as well as the accused? If sharpening of the issues, exposure of untenable arguments and more efficient marshaling of the evidence result from discovery, doesn't the prosecution profit? For if voluntary disclosure to defense counsel often results in guilty pleas because defense counsel becomes convinced of the hopelessness of the client's cause, should not a rule authorizing criminal discovery in every case result in even more dispositions without trial?²⁷

26. See *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1061 (1961). With regard to the availability of discovery of such reports, compare, e.g., *Layman v. State*, 355 P.2d 444 (Okla. Crim. App. 1960), with *Pinana v. State*, 352 P.2d 824 (Nev. 1960).

27. See Anderson, *What Price Conviction?*, AMERICAN BAR ASSN. SECTION OF CRIMINAL LAW, PROCEEDINGS 41 (1958); Fletcher, *supra* note 11, at 319. In this connection more liberal use of discovery might also complement, as it has in civil cases, the expanded use of the pre-trial conference as a medium for limiting and refining the issues, and for settlement before litigation—here either in the form

The beneficial results claimed for statutes of an increasing number of states, which require an accused to give the prosecution pre-trial notice of an alibi or insanity defense,²⁸ include not only preventing surprise at the trial but also aiding more effective preparation for trial.²⁹ What justifies our being so sure then that according criminal discovery to the accused will benefit only the accused at the expense of the state?

But rigid opposition to pre-trial criminal discovery for the accused still persists. I don't think the reasons for this resistance have been better expressed than they were in a case decided ten years ago when I sat on the New Jersey Supreme Court. By a closely divided vote that court denied discovery to an accused of a copy of his own confession.³⁰ In the ordinary affairs of life we would be startled at the suggestion that one should not be entitled as a matter of course to a copy of something he signed. But the New Jersey court so held—and in a case in which the accused was charged with murder so that his life was at stake.

The facts were these. In the early morning hours from midnight to 5 a. m., in custody and without counsel, and surrounded only by police officers, the accused had what the police called "conversations" with them during which not the accused but one of the officers wrote down fourteen pages of narrative which, when completed, the accused read aloud, and signed after the officer read them back to him. Two months later the accused was assigned counsel to defend him at the trial. The accused told assigned counsel that he had signed something but had no recollection whatever of what was said in what he signed. Counsel sought out the prosecutor, who admitted that the accused had signed a confession, but refused to permit counsel to examine it. Counsel then sought an order from a trial judge directing the prosecutor to allow counsel to inspect and make a copy of the alleged con-

of dismissal of the prosecution, or a guilty plea by the defendant. See Comment, *Pre-Trial Disclosure in Criminal Cases*, 60 YALE L.J. 626, 646 (1951). Cf. 4 MOORE, FEDERAL PRACTICE ¶ 26.02 (3d ed. 1962).

28. Some fourteen states have adopted statutes which require the defendant to give notice to the prosecution if he intends to introduce evidence of an alibi, e.g., N.Y. CODE CRIM. PROC. § 295-1; OHIO REV. CODE ANN. § 2945.58. A slightly larger number of states require by statute notice to the prosecution of an intended plea of not guilty by reason of insanity, e.g., CAL. PENAL CODE § 1016; IND. ANN. STAT. § 9-1701.

29. Compare Williams, *Advance Notice of the Defence*, 1959 CRIM. L. REV. 548, with Comment, *Pre-Trial Disclosure in Criminal Cases*, 60 YALE L.J. 626, 635-37 (1951). See also Statton & Watkins, *Is Specific Notice of the Defense of Alibi Desirable?* 18 TEXAS L. REV. 151 (1940).

30. *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953). But the New Jersey Supreme Court has since substantially altered its view, see *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958).

fession. The trial judge granted the order. The prosecutor took an appeal and our court by a vote of 4-3 reversed the trial judge.

The opinion for the court was written by one of the great judges of our time, the late Chief Justice Arthur T. Vanderbilt. His distinction is reason enough to acknowledge the force of the reasons he advanced against criminal discovery. Even more so is this the case, in light of his monumental service in fostering pre-trial discovery and pre-trial conference procedures in civil causes. His powerful voice against the extension to criminal causes of the same procedures necessarily gives pause to anyone who would question the soundness of that view.

He marshaled four arguments:

First, one purpose of broad discovery is to minimize opportunities for falsification of evidence. But unlike civil proceedings, he said—and I quote him—“[I]n criminal proceedings long experience has taught the courts that often discovery will lead not to honest factfinding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense”³¹

Second, the result of full discovery in criminal causes would be—I quote again—“that the criminal defendant who is informed of the names of all of the State’s witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime”³²

Third, in view of the defendant’s constitutional protection against self-incrimination, discovery would be a one-way street, for the state would have no right whatsoever to demand any inspection of any of the accused’s documents, or to take his deposition, or to submit interrogatories to him. In other words—once more I quote— “[T]he state is completely at the mercy of the defendant who can produce surprise evidence at the trial, can take the stand or not as he wishes, and generally can introduce any sort of unforeseeable evidence he desires in his own defense. To allow him to discover the prosecutor’s whole case against him would be to make the prosecutor’s task almost insurmountable.”³³

Fourth, the favorable English experience with allowing the accused broad discovery offers no guide for America. The constantly increasing rate of crimes of violence in this country is a particular reason for not expanding the safeguards which now protect the criminal de-

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

32. *Ibid.*

33. *Id.* at 211-12, 98 A.2d at 885.

defendant. The law-abiding instincts of the English, he said, "are in marked contrast to the disrespect for law which has long characterized the American frontier and which has not yet disappeared as the criminal statistics indicate in certain segments of the American population."³⁴

Chief Justice Vanderbilt concluded that even as to the accused's own confession these reasons apply, for "[t]o grant a defendant the unqualified right to inspect his confession before trial would be to give him an opportunity to produce false testimony and to commit perjury at the expense of society."³⁵

"We have in New Jersey," he said, "set up adequate safeguards to protect the criminal defendant from being prejudiced by the admission in evidence of a statement signed by him which has not emanated from his own free will."³⁶ The Chief Justice here referred to the familiar requirements governing the determination of the voluntariness of a confession and, hence, its admissibility against the accused.

Plainly enough, each of these reasons has a persuasive appeal. But are their merits so clear? First is the reason that pre-trial discovery would inevitably result in a perjured defense. That objection, I say with all respect, is startlingly reminiscent of Sir John Wigram's reason expressed over a century ago when the struggle to introduce discovery in Chancery was bitterly waged. Said Sir John, "[E]xperience . . . has shewn—or (at least) courts of justice in this country act upon the principle—that the possible mischiefs of surprise at the trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred, when either party is permitted, *before* a trial, to know the precise evidence against which he has to contend . . ."³⁷ But, as has been trenchantly observed, "English courts never had any experience at all in the matter . . ."³⁸ By the same token, how can we be so positive criminal discovery will produce perjured defenses when we have firmly shut the door to such discovery? That alleged experience is simply non-existent.³⁹ So if it be

34. *Id.* at 219, 98 A.2d at 889.

35. *Id.* at 226, 98 A.2d at 893.

36. *Id.* at 215, 98 A.2d at 887.

37. WIGRAM, *POINTS IN THE LAW OF DISCOVERY* § 347 (1842).

38. Sunderland, *Scope and Method of Discovery Before Trial*, 42 *YALE L.J.* 863, 867 (1933).

39. There have been many assertions that liberal discovery invites perjury and fabrication, but virtually no tangible proof or documentation of these assertions. What meager statistical evidence there is suggests that perjury is a very slight danger indeed. See Fletcher, *supra* note 11, at 310-11. Indeed, it seems quite as likely that better knowledge on both sides concerning the material evidence, and an awareness on the defendant's part how much of the case is recorded on paper, would serve to deter rather than encourage perjury and fabrication.

true, as unfortunately it is, that crime is on the rise in this nation, we surely can't blame that regrettable fact on the operation of any criminal discovery procedures.

I must say I cannot be persuaded that the old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of the 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 where liberal discovery has been allowed and perjury has not been fostered. Indeed, this experience has suggested that liberal discovery, far from abetting, actually deters perjury and fabrication.⁴⁰ Surely that experience is solid evidence of the beneficial results of discovery to the cause of justice, without that defeat of justice through perjury foretold by the prophets of doom. In any event, as has been said, "The true safeguard against perjury is not to refuse to permit any inquiry at all, for that will eliminate the true as well as the false, but the inquiry should be so conducted as to separate and distinguish the one from the other where both are present."

We must remember that society's interest is equally that the innocent shall not suffer and not alone that the guilty shall not escape. Discovery, basically a tool for truth, is the most effective device yet fashioned for the reduction of the aspect of the adversary element to a minimum. Even Dean Wigmore, certainly no champion of leniency for the criminally accused, could find no merit in this objection that discovery would encourage perjury. Said he: "The possibility that a dishonest accused will misuse such an opportunity is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself. That argument is outworn; it was the basis (and with equal logic) for the one-time refusal of the criminal law . . . to allow the accused to produce any witnesses at all."⁴¹

Besides, isn't there a suggestion in the argument, and a rather slanderous one, that the criminal defense bar cannot be trusted? After all, isn't it the defense attorney and not the accused himself who will have access to the state's materials? Whatever justification there may be for the assumption that the desperate accused will try anything to escape his fate, the notion that his lawyer can't wait to

40. See Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1154 (1951): "Facilitation of perjury has been a bogey man of discovery for over a hundred years. No evidence can be produced conclusively to prove or disprove it, and the consensus among lawyers is to reject it. This investigation disclosed the variety of ways in which lawyers use discovery to thwart perjury." See also 4 MOORE, FEDERAL PRACTICE ¶ 26.02 [2] (3d ed. 1962).

41. 6 WIGMORE, EVIDENCE § 1863, at 488 (3d ed. 1940).

conspire with him to that end hardly comports with the foundation of trust and ethics which underlies our professional honor system.

The second argument is that an accused, knowing the names of witnesses against him, may see to it that they are silenced before the trial. Of course, there have been instances where this has happened. But no one suggests that discovery in criminal cases should be at large and without the intervention of judicial discretion. Surely whether or not this is a danger in a particular case is a matter to which courts ought to give some consideration. Where that possibility may appear, a trial judge's discretion affords an ample safeguard. Dangers and other abuses of this kind are clearly a matter of legitimate concern—they argue however not for wholesale prohibition of criminal discovery but only for circumspection and for appropriate sanctions tailored to dealing with apprehended abuses in the particular case.⁴²

The third objection—that our constitutional privilege against self-incrimination prevents discovery being a two-way street—is admittedly more troublesome. Another very distinguished judge, Learned Hand, also voiced this objection:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.⁴³

But is this premise really sound? Is the privilege against self-incrimination in fact a barrier to state discovery of the accused? The innumerable cases that come to our Court charging police abuses of the interrogation process suggest the contrary. The right to conduct prolonged questioning of suspects is vigorously championed by some law enforcement authorities. Success very frequently crowns the effort, if the proportion of guilty pleas and convictions resting upon confessions affords a reliable guide. And even apart from discovery of this sort, what of the investigatory paraphernalia important to the preparation of criminal evidence which is, as of course it should be, available to law officers? Laboratories, skilled investigators, experts in all areas are an essential part of the equipment of every agency which

42. See Louisell, *supra* note 18, at 63, 90, 98-101.

43. *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923).

would boast of being abreast of the modern techniques for the detection and prevention of crime. All of us are gratified that our agencies are so equipped, and would not want to strip their resources. But I suggest that it overstates the fact to say that we don't need to extend criminal discovery procedures to the accused because the scales are already distorted in his favor by the privilege against self-incrimination and the fact that the state has the burden of proving his guilt beyond a reasonable doubt.

The next argument is that the experience of other nations where broad discovery has not subverted the criminal law, notably England and Canada, does not help us. I can't as readily as my former Chief disregard the absence of the conjured dangers in England and Canada under a form of discovery advantaging the accused far beyond anything in our system. First of all, the argument that crime is increasing at a greater rate in America than in those countries would, I think, come as a surprise to their law enforcement officers. But if it is true that we are a less law-abiding people than the British, how explain the satisfaction with broad criminal discovery of our neighbor Canada between whose mores and our own similarities are so often remarked?⁴⁴

There is one final issue to which I might turn my attention for a moment. Assuming that, as I believe, we should adopt broader criminal discovery, should the definition of its limits be a matter for legislatures or courts? I incline to believe that just as discovery in civil causes is largely a matter of court rules, so also should be the fashioning of rules for criminal discovery. For one thing, most of the progress already made toward liberalizing criminal discovery has come from court decisions and court rules and not from legislative enactments. This is true even as to the limited discovery permitted under the Federal Rules of Criminal Procedure,⁴⁵ and is so much the more true as to the States. Two other reasons also suggest that judicial rather than legislative rulemaking is to be preferred. The extent to which discovery should be allowed in particular cases will present complex problems. There will be questions for the exercise of sound

44. See, e.g., *Rex v. Bohozuk*, 87 Can. C.C. 165 (1947).

45. Limited federal criminal discovery is sanctioned by FED. R. CRIM. P. 16, 17 (c); see *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951); Note, *The Scope of Criminal Discovery Against the Government*, 67 HARV. L. REV. 492 (1954). For a judicial suggestion that the inherent criminal discovery powers of the federal courts may exceed the express powers conferred by the rules, see *Shores v. United States*, 174 F.2d 838 (1949). Compare generally on the allocation of responsibility in the area Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275 (1962); Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 250-54 (1951).

discretion depending upon the particular materials of which discovery is sought. The showing of need of a given accused may require discovery despite strong state interests advanced by the prosecution against allowing it. In other words, there will be much need for the striking of a proper balance in individual cases. Surely arguments of the prosecution that, for example, witnesses might be imperiled are not wholly illusory. And to the extent discovery of the accused may be sought by the prosecution, there will necessarily lurk below the surface constitutional questions arising from the privilege against self-incrimination.⁴⁶

I do not deny the force of the objections which have been raised against expanded criminal discovery. All I have attempted to suggest this morning is that these objections, if not wholly invalid, are simply not insurmountable. In any event, I have great difficulty accepting them as reasons for refusing to allow criminal discovery under appropriate safeguards. Where dangers do exist, and abuses are threatened, not denial of discovery but appropriate safeguards to prevent such dangers and abuses, should be our effort. We found out that the civil discovery procedures could be abused, and fashioned safeguards against them. The court-made rules protecting the attorney's work product⁴⁷ and enforcing privileges against disclosures of confidential or secret information are examples.⁴⁸ If there is merit in the insistence that the public interest in law enforcement requires even stronger safeguards against unwarranted disclosure of the prosecution's case, surely appropriate sanctions can be devised. In the rare

46. See *Jones v. Superior Court*, 58 Cal. 2d 56, 69, 372 P.2d 919, 927 (1962) (dissenting opinion), suggesting that discovery of a defendant's list of prospective witnesses and of certain medical reports relevant to his defense of impotence, in a prosecution for rape, constituted a dangerous "inroad upon the . . . right of a defendant in a criminal case to remain silent, if he chooses, at every stage of the proceeding against him."

It has even been suggested that discovery in favor of the accused might be constitutionally compelled in certain situations. *State v. Dorsey*, 207 La. 927, 964-66, 22 So. 2d 273, 285 (1945). So, also, Judge Kaufman has suggested that "there are situations where discovery of the defendant's statement would be demanded under the aegis provided defendant by the fifth amendment. Such a situation might occur where psychiatric examinations of defendant before trial are indispensable to the adequate preparation of a defense of insanity, or where defendant is seeking exclusion of the statement by challenging its authenticity." Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113, 1120-21 (1957).

47. See *Hickman v. Taylor*, 329 U.S. 495 (1947); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1027-46 (1961).

48. Cf. *United States v. Reynolds*, 345 U.S. 1 (1953). FED. R. CIV. P. 30 (b), for example, authorizes a court before commencement of an oral examination in a civil case, to make certain specified protective orders and "any other order

case, the denial of all discovery may be compelled to protect the safety of witnesses or prevent an apparent perversion of the judicial process.⁴⁹ So I would leave the primary responsibility with the trial judge under such guidance from appellate courts as may be necessary to mark its proper limits. The gain to the public interest in the pure and just administration of the criminal law is well worth the risks.

which justice requires to protect the party or witness from annoyance, embarrassment, or oppression."

49. See *Louisell*, *supra* note 18, at 98-101, for the suggestion that the problem of discovery might be approached differently in cases involving organized crime, or defendants known to be representatives of powerful criminal syndicates, where the granting of liberal discovery might be peculiarly hazardous.