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## THE TYRRELL WILLIAMS MEMORIAL LECTURE

*The Tyrrell Williams Memorial Lecture was established in 1948 by the family and friends of Tyrrell Williams, a distinguished member of the faculty of the Washington University School of Law from 1913 to 1946. Since its inception, the Lectureship has provided a forum for the discussion of significant and often controversial issues currently before the legal community. Former Tyrrell Williams Lecturers include some of the nation's foremost legal scholars, judges, public servants, and practicing attorneys.*

*The Honorable William J. Brennan, Jr., distinguished jurist, public servant, and Associate Justice of the United States Supreme Court, delivered the 1989 Tyrrell Williams Memorial Lecture on the campus of Washington University in St. Louis, Missouri.*

## THE CRIMINAL PROSECUTION: SPORTING EVENT OR QUEST FOR TRUTH? A PROGRESS REPORT\*

WILLIAM J. BRENNAN, JR.\*\*

Twenty-six years ago this week I stood at this lectern to deliver the fifteenth annual Tyrrell Williams Memorial Lecture.<sup>1</sup> It is an honor in-

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\* Tyrrell Williams Memorial Lecture given at Washington University School of Law on March 8, 1989.

\*\* Associate Justice, Supreme Court of the United States

1. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279.

deed to be invited to join you a second time in this tribute to an eminent teacher and legal scholar. The subject of my lecture in 1963 was discovery in criminal cases: whether we should extend to criminal prosecutions the civil pretrial discovery techniques that force the parties to a civil lawsuit to put all their cards on the table before trial, and that tend to reduce the chance that surprise or maneuver—rather than truth—may determine the outcome of the trial. A long tenure on the bench and the indulgence of kind hosts give me the opportunity upon occasion to revisit views expressed in the past, and to see how my suggestions and predictions have fared over the years. That is what I propose to do today. In my experience, the results of such an exercise must be mixed. The last quarter-century has seen significant advances in many areas of the law, including criminal discovery. But as I said in 1963, “the quest for better justice is a ceaseless quest,” and “the single constant of our profession is the need for continuous examination and reexamination of our premises as to what law should do to achieve better justice.”<sup>2</sup> Law’s evolution is never done, and for every improvement made there is another reform that is overdue. Hence the subtitle I have chosen for this lecture on criminal discovery: *A Progress Report*.

The essential purpose of permitting a criminal defendant to engage in pretrial discovery of the prosecution’s case is to enhance the truth-finding process so as to minimize the danger that an innocent defendant will be convicted. Discovery serves other ends as well. The most important of these subsidiary purposes, given courts’ crowded criminal dockets, is that a guilty defendant is more likely to plea-bargain and plead if the prosecution discloses to him a strong government case. This fact, as a practical matter, is probably at the moment the main impetus to broad discovery in the day-to-day workings of the criminal justice system. The prospect of a plea is often enough to induce a prosecutor whose evidence is compelling to open her files to the defense, even though no rule compels open-file discovery. Nevertheless, discovery induced by the hope for a plea is uncertain and arbitrary, because it depends solely on the prosecutor’s discretion and will be influenced by the strength of the prosecution’s evidence—so that voluntary discovery is unusual when the defendant might benefit most from it, that is, where the government’s case is weak.<sup>3</sup> The proper guide to discovery practices should not be the likelihood that disclosure in a particular case will save the trouble of a trial, as is now in

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2. *Id.*

3. See Note, *The Conundrum of Criminal Discovery*, 64 KY. L.J. 800 (1976).

large part the case, but the degree to which discovery will enhance the reliability of factfinding. The central argument for *broad* criminal discovery is the claim that the truth is more likely to come out at trial if there has been an opportunity for the defense to investigate the evidence and to prepare its case.

Defense counsel has only a very imperfect opportunity to test the government's case, for example, if she is unaware in advance that a prosecution witness has previously made statements implicating someone other than the defendant in the crime; if she does not know that the witness has been promised something by the government in return for testifying; or if she has had no opportunity to interview the witness in advance of trial. Similarly, counsel is likely to be unprepared to cross-examine an expert if she has not seen the expert's written report. As a less obvious example, consider that if the prosecution is permitted to surprise the defense by seeking to introduce at trial evidence of the defendant's uncharged misconduct to show, for instance, motive or intent, as the Federal Rules of Evidence permit,<sup>4</sup> then defense counsel will have only the most meager of opportunities at that point to investigate the allegation of prior misconduct or to formulate legal argument as to why the evidence should not be admitted.

Going beyond these few examples, I would say as a general proposition that the truth-finding function of criminal trial is enhanced when the prosecution is not allowed to surprise the defendant with its evidence—"trial by ambush" as it is sometimes accurately referred to—but is required to disclose its case in advance of trial so that defense counsel may carefully consider and investigate the evidence and prepare her trial tactics and questions. In this I agree with Justice Traynor who wrote, when he was a member of the California Supreme Court, that "[t]he truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise."<sup>5</sup> As Justice Douglas noted in an opinion in 1958, instruments for obtaining broad discovery "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent," and it follows from

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4. FED. R. EVID. 404(b). See generally Imwinkelried, *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence*, 56 FORDHAM L. REV. 247 (1987).

5. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 249 (1964).

this view that “[o]nly strong public policies weigh against disclosure.”<sup>6</sup>

It is hardly contentious that the truth-seeking function of trial is served by the exchange of information. But the extent to which “strong public policies weigh against disclosure” has long been disputed. When I gave this lecture in 1963 the prevailing view was still that there were good reasons not to allow discovery in criminal cases. Let me give you a brief outline of the state of criminal discovery at that time. The picture is quite a bleak one, and it may surprise those of you who have studied present-day criminal procedure, so rapid has been the transformation of the law in this area. The lack of access at that time to materials essential to the testing of the government’s case and to the development of the defense must surely have resulted in some unjust convictions. Indeed, it may remind us of the historical inadequacies of criminal discovery in this country that, according to Justice Jackson, Soviet prosecutors at the War Crimes Trials at Nuremberg protested against adoption of American procedures on the ground that they were not fair to defendants.<sup>7</sup>

Twenty-six years ago a criminal defendant was entitled to very little in the way of discovery of the prosecution’s case or disclosure of information in the government’s hands relevant to his defense. The Supreme Court had not at that time considered the question whether there is a constitutional right to any sort of discovery, and in fact the constitutional dimensions of criminal procedure in general had only recently begun to be understood. Thus, it was not until a few days after my lecture here in 1963 that the Court decided the seminal case of *Gideon v. Wainwright*,<sup>8</sup> holding that a criminal defendant has a constitutional right to representation by counsel. It must be unthinkable to most of you in the audience that a defendant had no right to counsel until so recently, but much of constitutional criminal procedure is of similarly recent vintage.

The Supreme Court’s major foray into the discovery area prior to my first visit here had been our decision in *Jencks v. United States*<sup>9</sup> that a federal defendant is entitled to obtain the prior statement of a government witness if the statement is related to the witness’ trial testimony, because of the singular importance of such statements to the defendant’s effort to impeach the government’s witnesses. Despite confrontation

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6. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

7. See Jackson, *Some Problems Developing an International Legal System*, 22 TEMP. L.Q. 147, 150-51 (1948).

8. 372 U.S. 335 (1963).

9. 353 U.S. 657 (1957).

clause overtones, the *Jencks* decision was based on the Court's supervisory authority rather than upon the Constitution,<sup>10</sup> and Congress promptly limited its potential effect on pretrial discovery by passing a statute, the Jencks Act,<sup>11</sup> that prohibited disclosure of witness statements until after the witness had testified on direct examination.<sup>12</sup>

Discovery under court rules was similarly little developed. In 1927, Justice Cardozo had been able to identify only "the beginnings or at least the glimmerings" of a "power in courts of criminal jurisdiction to compel . . . discovery,"<sup>13</sup> and although by 1963 the power to regulate discovery was firmly entrenched, it had not been used to require broad disclosure by the government. Rule 16 of the Federal Rules of Criminal Procedure, which governs discovery to federal criminal defendants, at that time provided only that a district court might upon motion of the defendant order the prosecutor to disclose certain documents or real evidence, provided the defendant showed they might be material to the preparation of his case.<sup>14</sup> The rules in some states, notably California, permitted broader discovery, but in most states the defendant still had few rights in this area.<sup>15</sup>

Why was so little discovery required? The reasons for courts' and legislators' reluctance to require the prosecution to show its hand prior to trial received perhaps their fullest judicial airing in a case decided in 1953 when I sat on the New Jersey Supreme Court—*State v. Tune*.<sup>16</sup> In that case, a narrow majority of the court held in a much-discussed opinion by Chief Justice Arthur Vanderbilt that an accused was not entitled to discovery of a copy of his own confession. That particular holding may strike us today as startling,<sup>17</sup> but in arriving at his conclusion Chief Justice Vanderbilt set out four arguments of much more general application that remain even now the most powerful claims of those who oppose broader criminal discovery, and on which the contemporary debate still centers.

The first argument is that greater discovery leads not to more accurate

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10. The confrontation clause of the sixth amendment might independently mandate the same result, however. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 68 (1987) (Brennan, J., dissenting).

11. Pub. L. No. 85-269, 71 Stat. 595 (1957) (codified as amended at 18 U.S.C. § 3500 (1988)).

12. 18 U.S.C. § 3500(a) (1988).

13. *Lemon v. Supreme Court*, 245 N.Y. 24, 32, 156 N.E. 84, 86 (1927).

14. Fed. R. Crim. P. 16, 18 U.S.C. app. pt. IV (1958).

15. See Brennan, *supra* note 1, at 283.

16. 13 N.J. 203, 98 A.2d 881 (1953).

17. This rule, of course, is no longer the law in New Jersey.

factfinding but to an increase in perjured testimony by defendants or their witnesses. According to Chief Justice Vanderbilt—and I quote him—“in criminal proceedings long experience has taught the courts that often discovery will not lead 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.”<sup>18</sup> His second argument was that greater discovery leads to interference with witnesses, or with the state’s ability to procure them. He wrote, and again I quote, “that the criminal defendant who is informed of the names of all of the State’s witnesses may take steps to bribe them 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.”<sup>19</sup>

The continuing influence of these two arguments is illustrated by the fate of a 1974 proposal to amend Rule 16 of the Federal Rules to require the prosecution to disclose before trial the identity and addresses of persons it proposes to call as witnesses. The Justice Department opposed the change, stating that the prospect of prosecutors having to disclose witness lists was “dangerous and frightening in that government witnesses and their families will even be more exposed than they are now to threats, pressures, and physical harm.”<sup>20</sup> Congress deleted the provision before passing the act amending the Federal Rules after Senator McClellan, repeating exactly the arguments made by Chief Justice Vanderbilt, predicted that disclosure of witness lists would allow defendants to tailor their defenses to the government’s evidence and to fabricate testimony, and would result in witness intimidation.<sup>21</sup> The Justice Department maintains its opposition to witness-list disclosure today on these same grounds,<sup>22</sup> though I will talk later about why I believe its arguments lack foundation and why, in any event, the standard arguments cannot require a general rule against the discovery of the identity of prosecution witnesses.

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18. 13 N.J. at 210, 98 A.2d at 884.

19. *Id.*

20. H.R. REP. NO. 247, 94th Cong., 1st Sess. 41, reprinted in 1975 U.S. CODE CONG. & ADMIN. NEWS 674, 712, quoted in Imwinkelried, *supra* note 4, at 268.

21. See 121 CONG. REC. 23,324 (1975).

22. JUSTICE DEPARTMENT, UNITED STATES ATTORNEYS’ MANUAL § 9-2.103.

The third reason given in *State v. Tune* for limited discovery was that broad discovery would put the defendant in too favorable a position. An accused's constitutional protection against self-incrimination places some limits on what he may be required to disclose to the prosecution, and there has been a feeling that it is somehow unfair to force the government to disclose elements of its case when the defendant may hide his own and surprise the government at trial. Chief Justice Vanderbilt thus wrote that

the State is completely at the mercy of the defendant who can produce surprise evidence at 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.<sup>23</sup>

The classic statement of this view that discovery in criminal cases is a one-way street and that this is unfair to the prosecution is Judge Learned Hand's. He said:

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 to 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. . . . What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.<sup>24</sup>

The fifth amendment has not proved quite the barrier to reciprocal discovery that Learned Hand envisaged, for modern discovery rules require that a defendant give the prosecution advance notice of some defenses that may be particularly hard to deal with if they are sprung upon the prosecution by surprise—notably alibi or insanity defenses.<sup>25</sup> Nevertheless, this third argument is still commonly seen, for it remains true that the privilege against self-incrimination prevents full discovery of a defendant's case, so that, for example, if a rule were adopted permitting depositions in criminal cases, it could not require the defendant to submit to being deposed by the prosecutor or to answer interrogatories.

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23. 13 N.J. at 211-12, 98 A.2d at 885.

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

25. 2 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE: CRIMINAL PRACTICE SERIES* § 19.4, at 510 (1984).

The final argument against broad discovery given in the *Tune* case was really a response to claims often made by those calling for more liberal disclosure. It was that the example of other countries—in which liberal discovery has not been accompanied by the evils of perjury or witness intimidation—hold important lessons for the United States. England, in particular, has long allowed broad discovery, with no discernable ill effects. But, Chief Justice Vanderbilt argued, the English experience could be no guide for America because the English are so much more law-abiding as a people than we are.<sup>26</sup>

These arguments have not on the whole prevailed. In spite of them, there has been a significant liberalization of criminal discovery. A commentator even felt able to conclude a few years ago that “both the federal and state systems today provide far greater discovery than was available during the 1960s. The winners of the discovery debate, except in a handful of states, have clearly been the proponents of liberal defense discovery.”<sup>27</sup> I would not go so far as to claim such a complete victory, for it seems to me, as I shall explain, that the four arguments made by opponents of liberal discovery in fact remain substantial barriers to the adoption of a number of very important discovery principles. It is true, however, that improvements have come, and on all fronts.

A very few months after my 1963 lecture, the Supreme Court began the modern development of constitutional disclosure requirements with our decision in *Brady v. Maryland*,<sup>28</sup> which held that upon request a prosecutor has a duty to disclose material exculpatory evidence—that is, evidence that might affect the outcome of a trial. The precise contours of the *Brady* rule have gone through considerable refinement in subsequent cases. Although the existence of a constitutional disclosure requirement is an important safeguard, the *Brady* rule has developed in such a way as clearly to have very significant limitations when considered in light of a defendant's discovery needs. The first is that disclosure under *Brady* is limited to exculpatory evidence. The call for broader discovery in criminal cases, however, as commentators have pointed out, has “*not* focus[ed] on the disclosure of exculpatory evidence, but on making available to the

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26. 13 N.J. at 219, 98 A.2d at 889.

27. 2 W. LAFAYE & J. ISRAEL, *supra* note 25, § 19.3, at 510.

28. 373 U.S. 83 (1963). Others might date modern constitutional disclosure back to *Mooney v. Holohan*, 294 U.S. 103 (1935), which held that a prosecutor violates due process when she knowingly introduces perjured testimony.

defendant a wide range of information collected by the prosecution.”<sup>29</sup>

A second and related limitation under *Brady* is that it is the prosecutor who initially decides whether information in her hands is exculpatory so that it must be disclosed. Thus the Supreme Court has held that

[i]n the typical case where a defendant makes . . . a general request for exculpatory material under *Brady* . . . , it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court’s attention, the prosecutor’s decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State’s files to argue relevance.<sup>30</sup>

If we assume that prosecutors are unlikely to search as long and hard as would defense counsel for possible exculpatory arguments that might be based on evidence in the prosecutor’s files, then this reliance on the prosecutor’s decision as to what must be disclosed makes the *Brady* rule of limited utility as a discovery device. In general, it is important to remember that despite great strides forward in the constitutionalization of criminal procedure, as yet, as the Court has said, “[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one . . . .”<sup>31</sup> It has been held, for example, that the Constitution does not require disclosure of a confession,<sup>32</sup> or of a witness’ prior statement.<sup>33</sup> As things currently stand, therefore, federal and state rules, rather than the Constitution, are the main source of discovery rights.

The Jencks Act continues to regulate a federal defendant’s right to discovery of prior statements by prosecution witnesses that relate to their trial testimony, and to relieve the government of any obligation to disclose them before the witness has testified.<sup>34</sup> But a federal defendant’s right to discovery under Federal Rule 16 has expanded since 1963. Rule 16 now provides that the prosecution upon request—but without any need for the defendant to make a motion to the court—has a continuing duty to disclose “any relevant written or recorded statements by the defendant,” the substance of oral statements by the defendant that it intends to offer at trial, and the defendant’s recorded grand jury testimony

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29. 2 W. LAFAVE & J. ISRAEL, *supra* note 25, § 19.3, at 482 (emphasis added).

30. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) (citation omitted).

31. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

32. *Cicenia v. Labay*, 357 U.S. 504 (1958).

33. *Moore v. Illinois*, 408 U.S. 786 (1972).

34. The Jencks Act is implemented by FED. R. CRIM. P. 26.2.

relating to the offense charged.<sup>35</sup> It must also furnish the defendant with a copy of his prior criminal record,<sup>36</sup> and disclose documents or real evidence obtained from the defendant or which the government plans to use at trial,<sup>37</sup> and any reports made by experts material to preparation of the defense or intended for use at trial.<sup>38</sup> Reciprocally, a defendant who requests disclosure of expert reports or documents and real evidence must supply the government with any such evidence in the defense's files that it intends to rely upon at trial.<sup>39</sup> Upon motion, however, a court may enter a protective order modifying the parties' Rule 16 obligations upon a showing of good reason why the discovery should not take place.<sup>40</sup> Other rules provide that the defendant must disclose in advance any alibi defense,<sup>41</sup> and allow depositions of witnesses upon court order for the purpose of preserving evidence for trial, but *not* as a discovery device.<sup>42</sup> Also of relevance to discovery is the provision that the government may give pretrial notice of evidence it intends to use at trial that it believes may be the object of a suppression motion.<sup>43</sup> Finally, of great importance to the discovery process is the rule providing for pretrial conferences, for these are often the vehicle of discussions and agreements about the parties' discovery obligations, and facilitate the smooth operation of the Rules.<sup>44</sup> Local federal court rules sometimes require broader discovery of the prosecution than does Rule 16,<sup>45</sup> though for reasons that escape me the Justice Department opposes all such local experimentation.<sup>46</sup>

Most states require at least as much discovery as the federal rules, and some go a good deal farther. Fourteen states, for example, allow the defendant access to prosecution witness statements as of right prior to trial, and another eight permit such access at the court's discretion—

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35. FED. R. CRIM. P. 16(a)(1)(A).

36. FED. R. CRIM. P. 16(a)(1)(B).

37. FED. R. CRIM. P. 16(a)(1)(C).

38. FED. R. CRIM. P. 16(a)(1)(D).

39. FED. R. CRIM. P. 16(b)(1).

40. FED. R. CRIM. P. 16(d)(1).

41. FED. R. CRIM. P. 12.1.

42. FED. R. CRIM. P. 15.

43. FED. R. CRIM. P. 12.

44. FED. R. CRIM. P. 17.1. *See generally* 2 C. WRIGHT, CRIMINAL PRACTICE AND PROCEDURE §§ 291-93 (1982).

45. *See, e.g.*, U.S. DIST. CT., N.D. ILL., LOCAL CRIM. R. 2.04-a.1(f) (1988) (prosecutor to disclose before trial "any evidence favorable to the defendant").

46. *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 22, § 9-2.102.

rules considerably more liberal than the Jencks Act.<sup>47</sup> Others require pretrial disclosure by the prosecution of relevant recorded statements not just of its witnesses, but of any person.<sup>48</sup> Many states require the prosecution to disclose in advance a list of persons it intends to call as witnesses.<sup>49</sup> And a few states permit discovery depositions, either as of right or upon a showing of need.<sup>50</sup> There have been important advances, then. But they are spotty, and a number of states and the federal system lag far behind.

The American Bar Association has produced a blueprint for criminal discovery rules, which in my view states the bare minimum of discovery that should be required. Insofar as Rule 16 and state rules require less, they are deficient and detract from the truth-finding function of the trial and deny the accused the fair trial to which he is entitled. The ABA *Standards for Criminal Justice* recommend a general rule of "full and free discovery,"<sup>51</sup> under which the norm will be open disclosure of the contents of the prosecutor's file.<sup>52</sup> Under these standards, the prosecution would be required to disclose prior to trial "all of the material and information" within its control, including witness lists, statements, and grand jury testimony, and codefendant statements and criminal records.<sup>53</sup> Adoption of this principle would be a very significant improvement upon the discovery practices of systems like the federal one, under which disclosure of witness statements is delayed until too late, witness lists are not discoverable, and information about codefendants is not made available. The ABA Standards would also mandate that the prosecution disclose expert reports made in connection with the case, not just those it deems material to the defense or intends to use at trial.<sup>54</sup> In addition, the prosecutor would be obliged to inform the defense if she intends to perform scientific tests that would destroy evidence, or if she intends to offer other-offense evidence at trial.<sup>55</sup> To deal with exceptional cases in which open-file discovery may be problematic, the standards

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47. See Note, *Defendant Access to Prosecution Witness Statements in Federal and State Criminal Cases*, 61 WASH. U.L.Q. 471, 501-02 (1983).

48. See 2 W. LAFAVE & J. ISRAEL, *supra* note 25, § 19.3, at 496.

49. See Imwinkelried, *supra* note 4, at 269-70.

50. 2 W. LAFAVE & J. ISRAEL, *supra* note 25, § 19.3, at 508-09.

51. ABA, STANDARDS FOR CRIMINAL JUSTICE § 11-1 (2d ed. 1980).

52. *Id.* § 11-2.1.

53. *Id.* § 11-2.1(a).

54. *Id.* § 11-2.1(a)(iv). Cf. FED. R. CRIM. P. 16(a)(1)(D).

55. ABA, *Standards for Criminal Justice* § 11-2.1(b).

provide that evidence may be withheld if it would identify a secret informant or pose a grave risk to national security.<sup>56</sup> Moreover, the government may upon a showing of good cause obtain a protective order for other sorts of evidence that would otherwise have to be disclosed to defense counsel.<sup>57</sup> The ABA drafters concluded that "experience with broad discovery suggests . . . that protective orders are an appropriate method of coping with the occasional case in which pretrial disclosures will jeopardize victims, witnesses, or evidence."<sup>58</sup>

The ABA Standards, if widely adopted by the states and incorporated into the Federal Rules, would certainly improve a defendant's opportunity to investigate evidence, to interview witnesses, and in general to prepare for trial. But even the ABA Standards fall short in some respects of the ideal of open discovery. Three other areas in which changes are essential if discovery practices are fully to serve the interest in a fair trial in which the truth is most likely to be determined come to mind. The first is the prosecution's use of uncharged misconduct evidence for the purposes permitted by Federal Rule of Evidence 404(b). Only pretrial disclosure of such evidence will allow the defense adequate opportunity to investigate the claim of misconduct and to prepare objections to admission. The second is the current lack of discovery for the criminal records of government witnesses, which is vital information for impeachment purposes, so that prosecution suppression of this information improperly interferes with the defendant's ability to cross-examine.<sup>59</sup> Third, the general prohibition on taking depositions for discovery purposes is surely due for reconsideration. Depositions have proved an important discovery tool in civil cases, and when a defendant's freedom, rather than civil liability, is at stake, we should enhance rather than limit the discovery that is available. Neither witness statements nor an opportunity to cross-examine at a preliminary hearing, when one is held, provide an adequate substitute for a deposition. While depositions may be costly and time-consuming—as Griffin Bell complained in his 1983 Tyrrell Williams lecture<sup>60</sup>—nevertheless this argues at best for the solution of granting courts

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56. *Id.* § 11-2.6.

57. *Id.* § 11-4.4.

58. *Id.* § 11-4.4 commentary at 11.61.

59. When Congress overrode in 1974 a proposal that would have amended the Federal Rules so as to require discovery of witness lists, it also struck down a proposal to give the defendant a right to disclosure of the prosecution witnesses' criminal records. See 2 C. WRIGHT, *supra* note 44, § 254, at 91.

60. Bell, *Assuring the Adversary System*, 61 WASH. U.L.Q. 673, 678-79 (1983).

discretion to order discovery depositions in an appropriate case, rather than for the current practice of not allowing them at all.

Why do current federal and state rules go only part way in providing for open discovery? Because the four arguments made by Chief Justice Vanderbilt that I described earlier still have proponents, and have effectively barred the further broadening of disclosure. Time and again the opponents of more liberal criminal discovery conjure pictures of that old hobgoblin perjury, and of witness intimidation; they suggest that further discovery would be a one-way street, favoring the defendant at the expense of the government's ability to obtain convictions; and they assert that England's experience with broad discovery has no application here. I explained in my 1963 lecture why I thought that these arguments lack merit. Now, twenty-six years of experience during which discovery has become more readily available makes it considerably easier to assess the merits of these arguments, and to conclude that they should be no barrier to open-file disclosure and the other changes I have suggested.

Experience should certainly have persuaded doubters that improved criminal discovery does not lead to more perjury. I know of no indication that the very extensive discovery long allowed in civil causes has fostered perjury, nor of any signs that the changes of the last quarter-century have encouraged perjury in criminal actions. On the contrary, one would expect full information often to make perjury more difficult. In any event, we should not allow the presumption in favor of full disclosure, a strong policy deriving from the truth-finding function of the trial, to be overborne by assertions about increased perjury that have never been backed by any evidence, but appear to be based on mere hunches. The mere possibility that a dishonest accused might abuse discovery, Dean Wigmore wrote, "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."<sup>61</sup>

The argument that disclosure may lead to witness intimidation has proved a major obstacle to discovery of witness lists which would enable the defense to interview and investigate prosecution witnesses and which are a prerequisite to the taking of depositions by the defense. It has also stood in the way of pretrial disclosure of witness statements. I do not

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61. 6 J. WIGMORE, EVIDENCE § 1863, at 488 (3d ed. 1940).

deny that discovery may lead to the intimidation—or worse—of some witnesses in some cases, or that it may dissuade some witnesses from coming forward in the first place. We have all read of instances in which informants who have agreed to testify, in particular against organized crime, have been threatened or murdered, and the federal witness protection program is clearly a very costly and disruptive method of protecting witnesses who may be in danger. But the proper response to the intimidation problem cannot be to prevent discovery altogether; it is rather to regulate discovery in those cases in which it is thought that witness intimidation is a real possibility. It is idle to suggest that we cannot tailor discovery of witness lists and the like to particular cases. As one scholar has put it, “there is a considerable difference between a tax evasion or antitrust case and a case involving murder or organized crime, and between the ordinary indigent accused and the hardened professional criminal.”<sup>62</sup> Federal Rule 16 and state rules already contain the answer to the intimidation problem, providing that the government may seek a protective order. Rule 16 does not give the court much guidance in the exercise of its discretion. Some state rules do better. Arizona’s rule states that a protective order should be issued only if the government makes a showing that the disclosure would result in a risk of harm outweighing any usefulness of the disclosure.<sup>63</sup> New Jersey’s rule illustrates what the court should take into account: “Protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; protection of confidential relationships and privileges recognized by law; [and] any other relevant considerations.”<sup>64</sup> There is no good reason why broad discovery under these safeguards should not be adequate to deal with any problem of witness intimidation.

The third argument—that broad discovery would be a one-way street because of the defendant’s privilege against self-incrimination—seems these days almost frivolous, the product of an unthinking law-and-order mentality that looks with intolerance upon any suggestion that the accused may have rights. It surely cannot be the result of rational analysis of the respective positions of the defense and the prosecution. The prose-

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62. 2 C. WRIGHT, *supra* note 44, § 252, at 39.

63. ARIZ. R. CRIM. P. 15.5.

64. N.J. R. CRIM. P. 3:13-3(d)(1). On protective orders generally, see 2 W. LAFAVE & J. ISRAEL, *supra* note 25, § 19.3, at 500-01.

cution is already entitled to disclosure of an alibi or insanity defense, and to reciprocal disclosure of expert reports and of real and documentary evidence. Nor have the limits imposed by the fifth amendment really been tested in the discovery area. Insofar as the Constitution does prevent fully reciprocal discovery, this fact must be considered in light of the many and manifest advantages enjoyed by the prosecutor as an arm of government: the subpoena power, the grand jury, police powers of search and seizure, and, of course, the investigative assistance of the police, and on the federal side of the FBI and a host of specialized investigators—not to mention the government's advantage in having a cadre of talented, specialist lawyers.<sup>65</sup> Discovery allows the defense to focus its investigation, and thus offsets to some extent the enormous advantage that the state otherwise has in terms of resources for investigating a crime. Unsurprisingly, in light of the prosecutor's resources, studies have suggested that defense disclosure to the prosecution is usually unimportant.<sup>66</sup>

We should also look somewhat askance at the claim that the experience of other nations is of no application here because we are a less law-abiding people. Whatever the merits of the factual claim, its relevance to how we should structure discovery escapes me. Broad discovery makes for a fair trial and enhances the likelihood that the truth will come out. Fair trials that determine the truth are of no less importance in a nation with a higher crime rate than elsewhere! I would hope that we are not prepared to try to lower our crime rate by stacking the odds at trial against the defendant, suppressing information that he needs to conduct a defense. That net would catch the innocent as well as the guilty.

The level of discovery taken in other common-law countries to be necessary for a fair trial surely *is* relevant for us, and in England substantially more disclosure by the prosecution is required. The English prosecutor must, in more serious cases, disclose any material in her files that has some bearing on the offense charged or on the surrounding circumstances, whether or not she intends to use this evidence at trial. Moreover, the prosecutor must disclose her case, handing over witness statements and the like, or alternatively summaries of the facts and of matters she intends to rely upon at trial. And she must give the defense not just a witness list, but a list including names and addresses of all

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65. See 2 W. LAFAVE & J. ISRAEL, *supra* note 25, § 19.4, at 510.

66. See, e.g., R. NIMMER, PROSECUTOR DISCLOSURE AND JUDICIAL REFORM 48 (1975).

persons the prosecution has reason to believe may have material evidence, whether or not they will be called at trial.<sup>67</sup> Finally, the prosecution is required to disclose impeachment material on prosecution witnesses. The court may limit discovery that could result in witness intimidation, or would reveal the identity of an informant, so that the balance between the needs of the defendant and the harms discovery might cause is struck in the individual case, against the background of rules that favor broad discovery. This is fair discovery indeed, and it has not been accompanied by the collapse of the criminal justice system in England, nor by a mass failure to get convictions because of increased perjury or witness intimidation. This suggests, of course, that the arguments raised in the United States against broad discovery—perjury, intimidation, and unfairness to the prosecution—are flawed.

There is little enough merit to the arguments that have stood in the way of broad criminal discovery in this country that I cannot help but feel that some of the reluctance to allow defendants more discovery derives from a declining but still identifiable tendency to regard the criminal trial as being, as Glanville Williams put it, "in the nature of a game or sporting contest," rather than as "a serious inquiry aiming to distinguish between guilt and innocence."<sup>68</sup> Our adversary system of criminal justice has invited many comparisons to sporting events—and generally to the more barbarous among them. Jeremy Bentham likened a trial to a foxhunt.<sup>69</sup> A more common comparison, however, is to a fight, a boxing match—perhaps, as Jerome Frank suggested, because we recall that trials had their origins "as substitutes for private out-of-court brawls."<sup>70</sup> To some observers, the criminal trial has resembled nothing so much as a pugilistic contest between counsel for the government and for the accused, fought according to procedural and substantive rules aimed, like the Marquis of Queensberry's, at ensuring a fair fight. The judge takes an umpireal role, enforcing the rules, and the jury declares the winner.

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67. On discovery in England, see generally J. ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES 328-33 (S. Mitchell & P. Richardson 42d ed. 1985); J. BALDWIN, PRE-TRIAL JUSTICE (1985); ROYAL COMMISSION ON CRIMINAL PROCEDURE, THE INVESTIGATION AND PROSECUTION OF CRIMINAL OFFENCES IN ENGLAND AND WALES: THE LAW AND PROCEDURE 70-74 (1981); Baldwin & Mulvaney, *Advance Disclosure in the Magistrates' Courts: Two Cheers for Section 48*, 1987 CRIM. L. REV. 315.

68. Williams, *Advance Notice of the Defense*, 1959 CRIM. L. REV. 548, 554.

69. J. BENTHAM, *Impropriety of the Exclusion Put Upon Self-Disserving Evidence by English Law*, in 7 THE WORKS OF JEREMY BENTHAM 454 (J. Bowring ed., 1843).

70. J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 80 (1949) (in a chapter entitled "The 'Fight' Theory versus The 'Truth' Theory").

Even the language in which we describe a criminal trial—the state *versus* the accused—conjures up images of a contest. Other correlates come readily to mind. The coaches sit behind the counsel table, ready to revive a flagging participant with the legal equivalent of Gatorade—an apposite citation, perhaps, or a suggestion as to the basis for an objection. Spectators line up for the big fight and seats may be hard to come by. First in line are the “buffs,” the interested amateur spectators who, experienced counsel will tell you, develop favorites among lawyers and follow their trials closely and insightfully, supplying both encouragement and critical comment. And of course, professional commentators abound, ready to lambaste a lawyer’s performance, or second guess the umpire’s call.<sup>71</sup>

Metaphor certainly has its uses in bringing us to an understanding of the various elements of the legal system. A metaphor may give more depth to an insight than any amount of dry legal discourse. For example, the ceremonial or dramatic elements of a trial—less pronounced here than in England, but nevertheless plainly present—have caused trials to be compared to theatrical events. This theatre metaphor certainly helps in understanding that, in one of its aspects, a trial is a “dramatic enactment” of a clash between individual action and community norms, one that works at many different levels—as symbol, as parable, and even, as the continuing glut of films and TV programs that have trials as their centerpiece evidences, as entertainment.<sup>72</sup> The theatre metaphor is legitimate, I think, because criminal trials are and are intended to be richly symbolic and educational—that is part of their function in a society governed by the rule of law—and because their symbolic and educational effects are made so powerful only because the human drama of the trial is so engrossing and, if you like, entertaining.

The explanatory power of the theatre metaphor is only partial, for it cannot encompass all the functions of the criminal trial. Most important, it is a metaphor that illuminates only the external aspects of the trial, not its internal function of truth-finding. It is a commonplace of discourse among those studying the philosophy of punishment that the internal and external functions of trial and punishment do not operate in

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71. Professor Arthur Leff developed the “trial as sport” metaphor in his article, Leff, *Law and*, 87 YALE L.J. 989 (1978).

72. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1140 (1982). The theatrical metaphor is explored in Ball, *The Play’s the Thing: An Unscientific Reflection On Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81 (1975).

tandem. Most of the broader external or communal benefits of criminal trials—the symbol that the rule of law is operating, the parable about the bad man's lot, the deterrence of criminal activity, and so on—would be equally well served by a “show trial” in which truth-finding played no role.<sup>73</sup> So long as we recognize this very substantial limitation, the theatre metaphor seems to me to be quite helpful.

The dominant sports metaphor has a similar failing. Focusing on the internal function of the criminal trial helps us to see why it is so misleading and dangerous to compare the criminal trial to a sporting contest. The procedural rules that govern a criminal trial, including rules of discovery, should serve the basic internal function of the trial—the determination of the truth. The rules that govern a sporting contest, on the other hand, are designed to ensure that the person or team with the best skills wins. That end is served by rules that put the participants in the same position, that make them evenly matched in all things except their own skills, which are thus put to the test. It is axiomatic, given the purpose of the rules of sports, that all participants must be governed by the *same* rules. This sporting conception of fairness—procedural equivalence in the positions of the participants under the rules, so that skills determine the outcome of the contest—simply has no place in a criminal trial. There is no obvious reason why, within an adversary system of justice, the truth should be most likely to come out if the two sides are evenly matched and governed by the same rules. Rules of fairness in a criminal trial must derive not from some effort evenly to match the sides—the government and the accused—but from careful attention to the trial's internal truth-finding function. Procedural rules ought to be designed to maximize the chance that the outcome of the trial will be a verdict that is based on what truly occurred, and it would be mere happenstance if the set of rules thus derived bore any resemblance to a set of rules that would ensure fairness in the sporting sense of fair play between counsel—evenly matched legal gladiators. I have suggested today that we could go further towards ensuring the fairness of criminal trials if we adopted rules allowing for considerably more discovery to the defense than is now permitted.

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73. The internal and external functions of criminal trials are not, however, mutually exclusive. One function of trial and punishment is specific deterrence—a function obviously served if a convicted defendant is incarcerated so he cannot sin again. This function has an external aspect, since it keeps off the streets someone who might otherwise commit other crimes. A show trial fails to serve this particular external function.