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> To shackle counsel so that they cannot effectively seek out the truth and afford the accused the representation which is not his privilege but his absolute right seriously imperils our bedrock presumption of innocence.[1]

EXPRESSING THIS COGENT ARGUMENT for broad discovery[2] rights in criminal cases is Justice William J. Brennan Jr.,[3] dissenting in the leading New Jersey case of *State v. Tune*.[4]

Predicated upon concepts of equity,[5] discovery is the procedure by which one litigant is enabled to force his opponent to make some or all of his evidence available for examination.[6] When authorized prior to actual trial, such disclosure is termed "pre-trial discovery."[7]

The purpose of a trial is to ascertain the facts.[8] Proponents of liberal discovery assert that knowledge of the facts and, hence, discovery are necessary for fundamental justice.[9] They contend that adoption of broad disclosure practices will eliminate the surprise and guesswork from the courtroom,[10] and transform the aura of a trial from a "sporting event" to a "quest for truth."[11]

In recent years, great strides toward broad discovery rights have been made in the area of civil procedure.[12] Litigants in Ohio, for example, are afforded inspection and copy of books, papers and other

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1 State v. Tune, 13 N.J. 203, 98 A. 2d 881, 897 (1953).

2 The terms, "discovery" and "disclosure," will be used interchangeably throughout this paper.

3 At the time of State v. Tune, Mr. Justice Brennan was a member of the New Jersey Supreme Court. He was appointed Justice of the United States Supreme Court in 1956, three years after the decision in Tune.

4 *Supra,* n. 1.

5 17 Am. Jur. 5 (1957).

6 Perkins, Cases and Materials on Criminal Law and Procedure 855 (1966).

7 *Id.*

8 Comment, Pre-Trial Disclosure in Criminal Cases, 60 Yale L. J. 626 (1951).

9 *See generally,* Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan. L. Rev. 293 (1960); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149 (1960); Editorial Note, Pretrial Criminal Discovery: the Need for Expansion, 35 Cin. L. Rev. 195 (1966); Katz, Pretrial Discovery in Criminal Cases, Crim. L. Bull. 5: 441 (Ohio 1969); Kranz, Pretrial Discovery In Criminal Cases: A Necessity for Fair and Impartial Justice, 42 Neb. L. Rev. 127 (1963); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L. Rev. 228 (1964).

10 Sunderland, Foreword to Ragland, Discovery Before Trial iii (1932).

11 See, Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth, 1963 Wash. U. L. Q. 279 (1963).

12 Hickman v. Taylor, 329 U.S. 495 (1947); Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P. 2d 266 (1961).

documents containing evidence relating to the merits of the action or defense in a civil suit.[13] Such practices, it is purported, facilitate litigation by narrowing the issues to be considered at trial, and causing many other cases to be settled out of court.[14] Yet, despite the proven success of liberal discovery in civil cases,[15] courts and legislatures have been recalcitrant to extend this right to defendants in criminal causes.[16] The Ohio Revised Code, for example, provides that the rules of evidence in civil causes, insofar as they are applicable, are controlling in criminal causes.[17] Nevertheless, Ohio courts have persistently refused to interpret this statute (O.R.C. § 2945.41) as encompassing the right to discovery.[18] It is argued that rights extended to a civil litigant should, *a fortiori,* be extended to the criminally accused whose life and/or liberty is at stake.[19]

The injustice of the rule which limits or denies pre-trial discovery rights to criminal defendants is apparent from an examination of the facts in *Tune:*[20]

In the early morning hours of August 24, 1952, John Henry Tune, without the aid of counsel and surrounded by Newark police detectives, confessed to the murder of William Prather. His statement was taken down in what turned out to be a fourteen-page narrative.

Over two months later, the court appointed counsel to represent Tune. He explained to them that he remembered signing something, but was uncertain as to its contents. Counsel moved the trial court to produce for the defendant's examination, *inter alia,* a copy of the aforementioned statement. The trial judge allowed the motion for discovery, on the grounds that it was "essential to elemental justice." [21] On appeal to the New Jersey Supreme Court, however, that decision was reversed. Chief Justice Vanderbilt, speaking for a four-to-three majority, reasoned that to allow pretrial discovery "lead[s] not to honest fact-finding, but on the contrary to perjury and suppression of evidence." [22]

The effect of this rationale, as Mr. Justice Brennan alluded to in

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[13] Ohio Rev. Code § 2317.33.

[14] Editorial Note, *op. cit. supra* n. 9.

[15] *Id.* at 195.

[16] See, Brennan, *op. cit. supra* n. 11 at 288.

[17] Ohio Rev. Code § 2945.41.

[18] State v. Corkran, 3 Ohio St. 2d 125, 209 N.E. 2d 437 (1965); State v. Yeoman, 112 Ohio St. 214, 147 N.E. 3 (1925); State v. Johnson, 57 Ohio L. Abs. 524, 94 N.E. 2d 791 (App., 1950); State v. Hahn, 10 Ohio Op. 29, 25 Ohio L. Abs. 449 (CP, 1937).

[19] McCullough, The Right of Discovery in Criminal Cases, or the Lack Thereof Under Ohio Law, 44 Ohio Op. 175 (1968).

[20] *Supra,* n. 1.

[21] *Id.,* at 897.

[22] *Id.,* at 884.

his dissent,[23] is that "our bedrock presumption of innocence" is imperiled. If the defendant were presumed to be innocent, as the law provides, then there would be little reason to anticipate perjury, witness-tampering and suppression of evidence. The result is that defense counsel must fight in the dark, without adequate knowledge essential to the proper preparation of the defense.

In his opinion denying defendant Tune the right to disclosure of evidence in possession of the prosecution, the Chief Justice cited *State v. Rhoads,*[24] an Ohio case, as authority for the rule. In that case, Justice Price stated:

> The state cannot compel the prisoner at the bar to submit his private papers or memoranda to the state for use or even examination, for he cannot be required to testify in the case, nor to furnish evidence against himself. Then why should the accused be allowed to rummage through the private papers of the prosecuting attorney? Neither the sublime teachings of the Golden Rule to which we have been referred, nor the supposed sense of fair play, can be so perverted as to sanction the demands allowed in this case.[25]

Despite such contentions in established case law, advocates of liberal discovery practices in criminal causes rely on the premise that the balance of advantage in any criminal trial rests with the prosecution,[26] which usually has extensive financial and manpower resources at its disposal. The argument for the supporters of the rule, however, is that the accused is protected from discovery by the prosecution by virtue of the Fifth Amendment,[27] and that discovery should be a reciprocal right.[28] Although some proponents of discovery reform would allow some reciprocity, others are reluctant to make such concessions.[29]

The recent recognition by the United States Supreme Court of the right of the accused to be apprised of his rights,[30] to have counsel provided when he is indigent,[31] and to be protected against unreasonable searches and seizures,[32] is of little avail when he cannot even discover evidence to be used against him where it is essential to the preparation of his defense. Based upon the premise that the adversary system

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[23] *Id.* at 894.

[24] 81 Ohio St. 397, 91 N.E. 186 (1910).

[25] *Id.* at 425.

[26] See Goldstein, *op. cit. supra* n. 9 at 1180-1199.

[27] U.S. Const., amend. V, provides in part that ". . . nor shall be compelled in any criminal case to be a witness against himself. . . ." *See also,* Jones v. Superior Court, 58 Cal. 2d 56, 69, 372 P. 2d 919, 927 (1962).

[28] *Supra* n. 24.

[29] McCullough, *op. cit. supra* n. 19 at 175.

[30] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

[31] Gideon v. Wainwright, 372 U.S. 335 (1963).

[32] Mapp v. Ohio, 367 U.S. 643 (1961).

elicits justice, current limited discovery practice is predicated upon the legal fiction that all counsel are equally competent.[33] Advocates of change assert that due process of law cannot be realized in a proceeding which merely places one attorney's research abilities and powers of oral advocacy against another's. Such is a mere sporting event, as opposed to a quest for truth. The need for knowledge is apparent.

History

The avant-garde for broad discovery rights in criminal trials often assert that the general rule limiting disclosure was born in the "vestiges of trial by combat."[34] Perhaps the earliest known English case on the subject, *King v. Holland*,[35] was heard in 1792. In that case, Lord Kenyon denied the defendant's motion for pre-trial discovery, promulgating that "there is no principle or precedent to warrant it."[36] He concluded that the granting of such rights would indeed "subvert the whole system of criminal law."[37]

One of the first American cases dealing with pre-trial discovery rights of the accused was the famous case of *United States v. Burr*,[38] where Chief Justice Marshall held that a letter, being relevant to the defense, could not fairly be withheld from Aaron Burr, the defendant.

In 1923, Judge Learned Hand found little merit in the force of Marshall's opinion, in *United States v. Garsson*,[39] where he denied the accused certain discovery rights on the basis that the balance of advantage in criminal trials rests with the accused, and to grant discovery rights would be to add to the imbalance.[40]

Four years later, in the 1927 case of *People ex rel. Lemon v. Supreme Court*,[41] Mr. Justice Cardozo, speaking for the majority in that New York Court of Appeals case, foresaw "the beginnings or at least the glimmerings" of expansion in the area of criminal discovery.

Two Ohio cases which have established long-lasting precedent in the area of pre-trial discovery in criminal cases are *State v. Rhoads*[42] and *State v. Yeoman*.[43]

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[33] See generally, Traynor, *op. cit. supra* n. 9.

[34] Comment, *op. cit. supra* n. 8 at 626.

[35] 100 Eng. Rep. 1240 (K.B., 1792).

[36] *Id.* at 1249.

[37] *Id.*

[38] 25 Fed. Cas. 30 (C.C.D. Va. 1807).

[39] 291 F. 646 (S.D.N.Y., 1923).

[40] *Id.* at 649.

[41] 245 N.Y. 24, 156 N.E. 84 (1927).

[42] *Supra*, n. 24.

[43] 112 Ohio St. 214, 147 N.E. 3 (1925).

The former case, decided in 1910, was sound authority in this state for nearly sixty years. Counsel for the defendant in this criminal prosecution moved that the trial judge order the prosecuting attorney to produce (1) a transcript of an interview with a witness who was later called and examined before the grand jury and (2) minutes of evidence taken before the grand jury. Justice Price held that the transcript of the interview was not "evidence" but private "memoranda" of the prosecutor.[44] Reasoning that discovery of this record would be a "search and seizure" of the prosecutor's private notes, the Justice distinguished the case where the witness reads from the notes while on the witness stand. In the latter case, the statements would become part of the cross-examination and, hence, subject to inspection.

As to the second issue, Justice Price held that the Revised Statutes[45] required secrecy in grand jury proceedings and that evidence before the grand jury is not discoverable. The defendant has no absolute right to be present at the grand jury proceedings, his rights being adequately safeguarded by the presentment of the indictment which specifies the nature of the charge, and the elements to be proved for a conviction. Adhering to the "sporting event" concept of criminal prosecutions, the Justice espoused the theory that "it is a contest between the people and the criminals for the mastery." [46]

The right of a defendant to inspect his own written confession was treated in the case of *State v. Yeoman.*[47] In this case before the Ohio Supreme Court, the defendant was indicted on a charge of murder. After his arraignment, but prior to trial, his counsel moved the trial court for an order directing the prosecuting attorney to allow them the right to inspect and copy Yeoman's signed confession. The trial judge sustained the motion and the prosecuting attorney brought exceptions. Reversing the lower court's decision, the highest Ohio court called the *Rhoads* decision "analogous." Neither G.C. § 11552 nor G.C. § 13664, the court held, required such inspection by the defendant. The former statute allows for inspection of "evidence" in civil trials and the latter makes certain rules of evidence in civil cases applicable to criminal causes. As in the *Rhoads* decision, however, the court reiterated the rule that when a document is offered into evidence, or if the prosecuting attorney should examine a witness in relation to such a document, the defendant gains the right to discover the same.

The decisions in *Rhoads* and *Yeoman* dealt only with pre-trial requests for discovery of confessions, grand jury minutes and statements which are part of the prosecutor's "work product." As a result, their

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[44] *Supra* n. 24 at 409.

[45] O.R.C. § 7195, 7190.

[46] *Supra* n. 24 at 425.

[47] *Supra,* n. 43.

holdings left much room for speculation and interpretation as to other forms of evidence.

In 1929, in *State v. Lewis,*[48] the Court of Common Pleas had occasion to interpret the Supreme Court's decision in *State v. Yeoman.* Lewis, in the former case, was indicted for forgery and, so as to allow him to better prepare his defense, the trial court allowed discovery privileges with regard to the alleged forged documents. The lower court explained and distinguished the Supreme Court's holding on the basis that a new statute, G.C. § 13444-1[49], superseded that statute in *Yeoman,* G.C. § 13664.[50] The latter, it should be noted, made "certain" civil rules applicable to criminal cases, the "certain" rules being rather strictly defined. It was held that discovery was not one of those "certain" rules to be applied to crimnial cases. The former statute, however, was an enlargement over G.C. § 13664 in that it did not specify "certain" rules, but rather provided that rules of evidence in civil causes would control in criminal causes "where applicable." This new statute was, indeed, an expansion of those rules which could be applied to criminal cases.

Other decisions following *Rhoads* and *Yeoman* illustrate the indefiniteness of any rule. In the same year as *Lewis,* for example, the Ohio Court of Appeals refused to apply the rationale of *Lewis* in the case of *Arnold v. State.*[51] Likewise, in *State v. Hahn,*[52] the Court of Appeals affirmed a judgment denying the accused the right to inspect *all* documents in possession of the prosecuting attorney. The court held that the trial court has no authority to grant such a motion until the statements are offered into evidence, and that the Ohio Code of Civil Procedure has no applicability to criminal trials in the area of discovery.

In dictum in the 1938 case of *State v. Fox,*[53] the Ohio Supreme Court further clouded the issue of criminal disclosure by stating what was an apparent contradiction of some of the prior cases. In a prosecution for chicken-stealing, three individuals were tried as codefendants.

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[48] 27 N.P. (n.s.) 460 (CP, 1929).

[49] Gen. Code of Ohio § 13444-1 (now Ohio Rev. Code § 2945.41) reads: "Rules applicable in criminal cases. The rules of evidence in civil causes insofar as the same are applicable, shall govern in all criminal causes except as otherwise provided in this code."

[50] Gen. Code § 13664 (later G.C. § 13444-6 and now Ohio Rev. Code § 2945.46) reads "How attendance to be enforced. Except as otherwise provided, the code of civil procedure relative to compelling the attendance and testimony of witnesses, their examination, the administering of oaths and affirmations and proceedings for contempt to enforce the remedies and protect the rights of parties, shall extend to criminal cases as far as applicable."

[51] 33 Ohio App. 185, 168 N.E. 848 (1929).

[52] 10 Ohio Op. 29, 25 Ohio L. Abs. 449 (C.P., 1937).

[53] 133 Ohio St. 154, 12 N.E. 2d 413 (1938).

In delivering the opinion, the court remarked in passing that the defendant could have evoked the provisions of G.C. § 13444-1 (now R.C. § 2945.41) and discovered the confession of one of the codefendants. The court's statement, in effect, was a reaffirmance of the ruling in *State v. Lewis, supra.*

Again, in a 1940 case before the Ohio Court of Appeals, *Yeoman* and *Fox* were gently cast aside, and a new interpretation of pre-trial disclosure evinced. Here, in *State v. Cala,*[54] the question was posed whether defendants were entitled to inspection as a matter of "absolute right." Discounting *Yeoman* as the old rule, established under a superseded statute,[55] and rejecting *Fox* (and, in effect, *Lewis*) as mere dicta not carried over into the syllabus, the court recognized the power of discretion in the trial judge. Assuming, *arguendo,* that the civil rules of evidence were applicable to criminal cases, the court interpreted the term "may order" in the provision for civil discovery as being discretionary and not absolute.

The Ohio Law Today

Today, sixty years after the decision in *Rhoads* and forty-five years after *Yeoman,* Ohio courts now afford the criminally accused some degree of pre-trial discovery by virtue of the recently-enacted discovery deposition statute. R.C. § 2945.50[56] provides that either the defendant or the prosecution may apply to the court for permission to take the deposition of any witness in a criminal case. The statute is permissive,[57] and places Ohio in the foreground as one of a few states with discovery deposition provisions that place so much discretion in the trial judge.[58] Proponents of broad discovery practice claim that this statute is a giant step toward more liberal disclosure rights, as it frees the Ohio criminal process from its hunter-hunted quality.[59]

In *State ex rel. Jackman v. Court of Common Pleas of Cuyahoga County,*[60] the Supreme Court of Ohio upheld the statute's constitutionality, and stated that "civil guidelines are available to the presiding

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54 20 Ohio Op. 400, 31 Ohio L. Abs. 97, 35 N.E. 2d 758 (App., 1940).

55 *Supra,* n. 50.

56 Ohio Rev. Code § 2945.50 provides that "At any time after an issue of fact is joined upon an indictment, information, or an affidavit, the prosecution or the defendant may apply in writing to the court in which such indictment, information, or affidavit is pending for a commission to take the depositions of any witness. The court or a judge thereof may grant such commission and make an order stating in what manner and for what length of time notice shall be given to the prosecution or to the defendant, before such witness shall be examined."

57 McCullough, *op. cit. supra* n. 19 at 178.

58 Ratnoff, The New Criminal Deposition Statute in Ohio—Help or Hindrance to Justice, 19 Case W. Res. L. Rev. 279 at 281 (1968).

59 *Id.*

60 9 Ohio St. 2d 159, 224 N.E. 2d 906 (1967).

judge in the trial of criminal causes."[61] The court also stated that the judge is "clothed with the same discretion as is the judge in a civil cause."[62] As a result of *Jackman,* the gap between civil and criminal practices was narrowed.

Still, despite this legislative and judicial step towards broader discovery rights through the use of depositions, other areas of criminal discovery continue to lag behind. The courts have come a long way since *Rhoads* and *Yeoman,* but much of the law remains nebulous and badly in need of judicial elucidation. It is well-settled that there is no absolute right to pre-trial discovery in Ohio criminal cases. *State v. Laskey,*[63] a 1970 case before the Ohio Supreme Court provides a current statement of the rule:

> It is also well settled that the allowance or overruling of various discovery motions in a criminal case rests within the sound discretion of the trial court, and only in cases of clear abuse will that discretion be disturbed upon review.[64]

Recognition of discretionary power in the trial judge, however, is not new. In 1940, *State v. Cala,*[65] enunciated that same rule, and in 1963 in the case of *State v. Hill,*[66] a Court of Common Pleas announced guidelines by which it would vest its discretionary power. The accused must file affidavits, according to the court, stating that he cannot recall the contents of statements made by him, and must make such request seasonably before trial. Again, in 1965, the Ohio Supreme Court held that the right of a defendant to inspect his own statements lies in the discretion of the trial judge.[67]

Despite the seeming "discretionary power" of the trial court, there is no statutory authority nor a rule requiring the prosecutor to permit the defendant or his counsel to examine statements or confessions. As stated in *State v. White*:

> A defendant in a felony case does not have the right to inspect and copy or examine statements or confessions of his or of other witnesses and documents or property in possession of the prosecution, unless upon the trial on the merits such evidence is used by the prosecution in such a way as to make such statement or property an issue in the case or unless such evidence or property is of such a character that to keep it from the knowledge of the defendant would constitute the denial of a fair trial.[68]

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[61] *Id.* at 167.

[62] *Id.* at 168.

[63] 21 Ohio St. 2d 187, 50 Ohio Op. 2d 432 (1970).

[64] *Id.* at 188.

[65] *Supra* n. 54.

[66] 23 Ohio Op. 2d 255, 91 Ohio L. Abs. 125, 191 N.E. 2d 235 (C.P., 1963).

[67] State v. Corkran, 3 Ohio St. 2d 125, 209 N.E. 2d 437 (1965).

[68] 95 Ohio App. 2d 271, 38 Ohio Op. 2d 330 (1967).

On appeal to the Ohio Supreme Court[69] however, this Court of Appeals decision, based upon rationale in *Yeoman* and *Rhoads,* was qualified so as to allow the defendant the right to an *in camera*[70] proceeding to determine whether or not inconsistencies exist between a witness's testimony at the trial and his pre-trial statements. To this extent, part one of the syllabus in *State v. Rhoads* was overruled.

Though the decision in *White* does little for the accused's pre-trial discovery rights, it was indeed an iconoclastic step for the Ohio Supreme Court in shedding some of its antipathy for disclosure of state's evidence. An interesting feature of the *White* case is the fact that the court placed some reliance on the United States Supreme Court decision in *Jencks v. United States,*[71] where the high court held that the defendant was entitled to inspect reports made to the F.B.I. by two government witnesses who had testified at the trial. Much broader in its scope, however, the decision in *Jencks* held that the accused was entitled to obtain the witnesses' reports where it appeared that their testimony at the trial related to matters contained in the reports. Though, as in *White,* the discovery was for the purpose of impeaching witnesses, *Jencks* held that the defendant was not required to lay a foundation showing inconsistencies between the witnesses' pre-trial reports and statements made on the witness stand.

Ohio decisions prior to *White* held, as a general rule, that the defendant had no right to inspect statements of state's witnesses or reports until they were offered into evidence,[72] or used by witnesses while testifying at trial.[73] Similarly, it was held in *State v. Sharp,*[74] that the defendant was entitled to discover his own confession or statement if the object of the prosecutor's questioning related to or around such confession or statements in his cross-examination of the defendant.

Perhaps the most blatant repression of pre-trial right of the criminally accused concerns the refusal of the courts to hold that R.C. § 2317.33[75], (formerly G.C. § 11552 under *Yeoman* decision), which provides for disclosure of books, papers and documents, is applicable to criminal causes by virtue of R.C. § 2945.21 (formerly G.C. § 13444-1). The rule holding that civil discovery rules of evidence were not ap-

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[69] State v. White, 15 Ohio St. 2d 146, 239 N.E. 2d 65 (1968).

[70] "In chambers; in private. A cause is said to be *in camera* when the hearing is had before the judge in his private room or when all spectators are excluded from the courtroom." Black's Law Dictionary, Fourth Edition (1951).

[71] 353 U.S. 657 (1956).

[72] *Supra* n. 24.

[73] See Dayton v. Thomas, 118 Ohio App. 165, 193 N.E. 2d 521 (1963); State v. Strain, 84 Ohio App. 229, 82 N.E. 2d 109 (1948).

[74] 162 Ohio St. 173, 122 N.E. 2d 684 (1954). *Compare* State v. Miller, 88 Ohio L. Abs. 533, 176 N.E. 2d 296 (App. 1961); State v. Thomasson, 46 Ohio Op. 402, 97 N.E. 2d 42 (App. 1950).

[75] *Supra* n. 49.

plicable to criminal cases, as mentioned supra, was based upon a superseded statute,[76] yet the new, broader statute continues to be construed under the same rationale as the older statute. This, despite the fact that the Ohio Supreme Court said, in dicta, that the civil rules were applicable to criminal trials.[77] In *State v. Corkran*,[78] a 1965 case, the Ohio Supreme Court said that the former, more liberal, rule was not carried over into the syllabus and, therefore, not binding as precedent. The result of these varied and seemingly irreconcilable positions was the vesting of discretion in the trial judge—a discretion which, more often than not, is a discretionary "no" as opposed to a discretionary "yes."

Conclusion

Despite the seemingly multifarious safeguards now afforded the criminally accused by virtue of *Escobedo*,[79] *Miranda*,[80] *Gideon*[81] and *Mapp*[82]—to name only a few—one who is in jeopardy of losing life, liberty and property is still left to wallow about in the darkness with only an indictment or a bill of particulars upon which to base his defense. Furthermore, his right to be apprised of the evidence against him is denied upon unstable grounds: First, that the accused *may be guilty* and, hence, discovery might tempt him to perform illegal acts to vindicate himself. Second, that a battle of wits in the courtroom between the adversaries will usually elicit justice. Both of these bases are poor grounds upon which to deny the defendant the right to be adequately informed as to the evidence against him.

In Ohio, the judiciary and/or the legislature must act to reform the current practice which limits the accused's right of discovery. In so doing, to be sure, it would not be treading upon untried ground. California, a leading state in criminal discovery rights, has already ventured into the area and, from all indications, has not been unsuccessful.[83] The right of the accused in that state has been extended to allow discovery of confessions and recordings in possession of the prosecution;[84] and the virtually untouched area of reciprocal discovery by the state

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[76] *Supra* n. 50.

[77] *Supra* n. 53.

[78] *Supra* n. 67.

[79] *Supra* n. 30.

[80] *Id.*

[81] *Supra* n. 31.

[82] *Supra* n. 32.

[83] *See* 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).

[84] *Id.*

has also been explored in California.[85] Even in England, where the rule allowing limited discovery originated, the rights of the accused to disclosure have been made much more broad.[86] And under military law, so often referred to as eliciting a "harsh" form of justice, the accused has broad rights in discovering the evidence against him.[87]

The alternatives to the rule currently in force in this state are not Utopian. To be sure, any liberalization of the rule might have the consequences of freeing a few who should not be free, and hindering the prosecutor in developing a expeditious case for the State. This will always be the case, however, where civil liberties lay in the balance. Sometimes a criminal must walk the streets so that the innocent do not suffer at the hands of overbroad and sweeping laws.

What are the alternatives to restrictive discovery practices? A discretionary power in the court might serve, in one alternative, as a check upon misuse of a liberal discovery rule. That is, it might be possible for the courts to extend discovery privileges to all persons as a matter of right, with the one qualification that if, perhaps, a "clear and present danger" would result from the exercise of discovery in a given case, the judge could vest his discretion to control any possible misuse or abuse of the right.

A second alternative is an "absolute" approach to the problem. Discovery, like the right to counsel, would be an absolute right of the defendant in a criminal cause. This practice would allow for no discretionary power in the trial judge except as mentioned in the next paragraph.

In either of these alternatives, any and all evidence *relevant* to the defense would be made available. The determination of relevancy would be reserved to an *in camera* proceeding. At that proceeding, the trial judge would determine if there is the slightest relevancy to the case and, if so, he would grant discovery. Only in cases where the discovery would in no way relate to the case would he exercise his discretionary or veto power. The discoverable area would include defendant's statements, statements of government witnesses who will testify at the trial or who have testified at the grand jury proceedings, copies of the minutes of the grand jury, evidence presented to the grand jury, tests performed by the government, official reports of the state, names and addresses of witnesses and any other evidence relevant to the preparation of the defense.

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[85] *See* Brennan, *op. cit. supra* n. 11 at 283.

[86] *Id.* at 284.

[87] *See,* U.S. Military Justice on Trial, LXXVI, No. 9 *Newsweek* Magazine 22 (August 31, 1970) for comment that military pre-trial investigatory procedure is a "lawyer's dream."

In *State v. Rhoads,* the prosecution stated in its brief:

> Perhaps in some far off Utopia the day may come when counsel for the state and counsel for the defendant engaged in trial will co-operate in a spirit of mutual fairness and candor to assist each other in presenting their respective sides of the case.[88]

And counsel for the defense replied:

> A consummation devoutly to be wished.[89]

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[88] *Supra* n. 24 at 398.

[89] *Id.* at 403.