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COMMENTS

PROSECUTORIAL DISCOVERY IN CALIFORNIA AFTER PEOPLE v. COLLIE: THE NEED FOR LEGISLATION

I. INTRODUCTION

In less than twenty years, California criminal procedure witnessed the court-created recognition, limitation, and disapproval of prosecutorial discovery. The dispute surrounding prosecutorial discovery has troubled the California legislature since 1925 when the first notice of alibi statute was considered. The California Supreme Court decided the

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1. Prosecutorial discovery was first judicially recognized in Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). In 1981, the California Supreme Court adopted the opposite position and disapproved all judicial attempts to frame prosecutorial discovery orders. See People v. Collie, 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981). The Collie court held that absent explicit legislative authorization, courts could not compel production of defense evidence. Id. at 54-56, 634 P.2d at 540-41, 177 Cal. Rptr. at 465-66.

2. Few issues have more sharply raised the basic ideological clash between theories of criminal justice. As recently as 1927, 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." People ex rel. Lemon v. Supreme Court, 245 N.Y. 24, 32, 156 N.E. 84, 86 (1927).

Supreme Court Associate Justice William J. Brennan, Jr. posed the question as follows:

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?"


3. The interplay between prosecutorial discovery and the privilege against self-incrimination has been at the forefront of legislative attempts to adopt notice of alibi statutes. Notice of alibi statutes require a defendant intending to assert an alibi defense to disclose this intent to the prosecutor before trial. The defendant is also required to disclose the names of witnesses that will be called to support the alibi de-
prosecutorial discovery issue for the first time in Jones v. Superior Court where Justice Traynor reasoned that criminal discovery "should not be a one-way street" and that, absent any privilege, a defendant "has no valid interest in denying the prosecution access to evidence that can throw light on issues in the case." The Jones precedent led to wide-ranging discovery orders directed at defendants and a broad principle of reciprocity in criminal discovery.

Judicial acceptance of prosecutorial discovery was not unanimous, however, and left several questions unanswered. The permissible scope of discovery, the constitutional privilege against self-incrimination, sanctions for non-compliance, and the propriety of judicial rule-making were frequent topics of debate. Perhaps in response to the growing disenchantment with Jones, a new "test," or standard, was developed in Prudhomme v. Superior Court to minimize the risk of violating a defendant's constitutional or statutory rights. This "test" narrowed Justice Traynor's "reciprocity" approach to

fense. Thus, alibi statutes are considered a form of prosecutorial discovery.

A notice of alibi statute was considered by the California legislature in 1925 and was disapproved, as were others in the following decades. To this day, California still does not have a notice of alibi statute. See Moss, Criminal Discovery: California's Treatment of Pretrial Notice of Alibi, 7 Sw. L.J. 338, 342 (1975). Other states and the Federal Rules of Criminal Procedure, rule 12.1, have codified notice of alibi requirements. See infra notes 102 and 143.

5. Id. at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881.
6. Id. at 59, 372 P.2d at 920, 22 Cal. Rptr. at 880.
8. Justice Peters, concurring and dissenting in Jones, argued that discovery "is a 'one-way street'" since a defendant may stand silent and not take part or cooperate in the state's ascertainment of the facts. Justice Peters believed that despite the imbalance created by allowing defense discovery of the prosecution's case, such imbalance is inherent in our system of criminal procedure. 58 Cal. 2d at 62-68, 372 P.2d at 922-26, 22 Cal. Rptr. at 882-86.
11. Id. The CAL. CONST. art. I, § 15 provides that: "Persons may not . . . be compelled in a criminal cause to be a witness against themselves . . . ." (West Supp. 1983).

The California Evidence Code provides that: "To the extent that such privilege [against self-incrimination] exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him." CAL. EVID. CODE § 940 (West Supp. 1983).
discovery and progressively limited a prosecutor’s right to discover defense information. In *Prudhomme*, the California Supreme Court struck down a discovery order on the grounds that it “conceivably might lighten the prosecutor’s burden of proving its case in chief” or “serve as a ‘link in a chain’ of evidence tending to establish guilt.” The court left open the possibility that some form of prosecutorial discovery could be permitted.

During the 1970’s, the cases produced inconsistent results as several appellate courts grappled with the *Prudhomme* qualifier. Conflicting federal precedent exacerbated the confusion. Finally, in 1981, the California Supreme Court completed its full circle retreat to the pre-*Jones* position and disapproved all judicial attempts to frame prosecutorial discovery orders and any compelled production of defense evidence absent explicit legislative authority.

The purpose of this comment is to propose a solution to the presently unsettled state of prosecutorial discovery in California. The solution follows the comment’s thesis that discovery rules can be drafted by the California legislature and pass judicial scrutiny. Part II examines criminal discovery’s case law evolution in California and highlights the difficult issues that accompanied prosecutorial discovery to its ultimate disapproval in *People v. Collie*.

Part III extracts the legal principles involved in the prosecutorial discovery debate. Constitutional interpretation, effective law enforcement concerns, and Justice Richardson’s

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13. 2 Cal. 3d at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133.
14.  Id. at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134.
17. Noting concerns regarding the defendant's privilege against self-incrimination, right to assistance of counsel, the attorney-client privilege and the work product doctrine, Justice Mosk, writing for the *Collie* majority, concluded that there are “almost insurmountable hurdles [which are] likely to thwart any attempts to devise constitutionally permissible discovery rules applicable to defendant or defense material . . . . [Such a] discovery rule . . . will inevitably raise serious state and federal constitutional questions.”  Id. at 54, 634 P.2d at 540, 177 Cal. Rptr. at 464.
18.  Id. at 56, 634 P.2d at 541, 177 Cal. Rptr. at 465.
concurring opinion in Collie delineate these principles and illustrate the abstract, practical, and matter-of-fact approaches to the prosecutorial discovery analysis. Finally, Part IV develops dicta from Justice Mosk's majority opinion in Collie:

We can do justice neither to the legitimate needs of the prosecution nor to the rights of the defendant [in the discovery context] if we undertake judicial rule-making in an attempt to accommodate both ends simultaneously. Any effort to further the truth-seeking function bears considerable risk of encroaching on constitutional and other protections . . . . We realize the same problems would confront the Legislature . . . and we have grave doubts that a valid discovery rule affecting criminal defendants can be devised.19

After concluding that valid discovery rules affecting criminal defendants can be devised by the California legislature, Part IV sets forth guidelines from which such a legislative scheme can be drafted. This comment predicts that prosecutorial discovery legislation will eventually become a reality in California.

II. CASE LAW EVOLUTION OF CRIMINAL DISCOVERY

Discovery is designed to ascertain the truth in criminal as well as in civil cases.20 In addition to enabling each side to obtain relevant information from the other,21 discovery safeguards against surprise at trial and indirectly defines the issues for litigation.22

19. Id. (emphasis added).
21. Discovery is defined as the use of devices that can be used by one party to obtain facts and information about the case from the other party in order to assist the party's preparation for trial . . . . Term generally refers to disclosure . . . of facts, deeds, documents, and other things which are in his exclusive knowledge or possession and which are necessary to [the] party seeking discovery as a part of a cause of action . . . .

BLACK'S LAW DICTIONARY 418 (5th ed. 1979). An "order," as in "discovery order," is "a mandate; precept; command or direction authoritatively given . . . . [A] [d]irection of a court or judge made or entered in writing . . . ." Id. at 988.

No right to discovery in criminal cases existed at common law. Developed through judicial initiative on a case by case basis, discovery is a relatively recent addition to criminal procedure. California has been considered a leader in this development. The primary objective of discovery is to promote efficiency in the search for the truth by giving the defendant access to the evidence that the prosecutor intends to use against him. As to preventing the chance of surprise at trial, "the day has long since passed when a case is to be tried from ambush."

Three basic arguments have been offered against the development of criminal discovery. First, it has been suggested that exposing the prosecutor's files to the defense would promote perjured testimony and falsification of evidence to "meet" the state's case. Second, knowledge of prosecution

production of documents, physical and mental examinations, and requests for admissions. See also Nakell, Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations, 50 N.C.L. Rev. 437 (1972).


24. Judicial attitudes, however, have been expressed regarding criminal discovery throughout this century. See infra note 33. A frequently cited case in vehement opposition to defense discovery is State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953). Chief Justice Vanderbilt, speaking for the majority, suggested that:

the 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.

Id. at 208, 98 A.2d at 885.

This "almost insurmountable task" is eased by well-known contemporary investigative methods employed by district attorneys including: trained and experienced personnel, skilled laboratory technicians, sophisticated technical facilities, cumulative/computerized files, cooperation with other law enforcement agencies and private citizens, search warrants, constitutional interrogation, electronic eavesdropping, informants, government agents, handwriting exemplars, line-ups, fingerprints, voice identifications and blood-breath-urine analysis.


29. For a discussion of the effect of liberal discovery on perjury and fabrication, see Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan. L. Rev. 293, 310-11 (1960). Fletcher suggests that the defendant's awareness of how much of the case
witnesses' names would lead to witness bribery and tampering. Third, broad discovery of the state's case coupled with the defendant's constitutional privilege against self-incrimination would create an imbalance—a "one-way street"—of discovery rights within the adversary system.  

The first California case authorizing defense discovery in a criminal case was People v. Riser. The evidence against Riser on charges of robbery and murder included an eyewitness whose testimony on direct examination was inconsistent with her statement to the police after the incident. The California Supreme Court authorized defense discovery of the prior statement.

is recorded in the state's files may serve to deter, rather than to promote, perjury and fabrication. Id. at 310-11.

30. The Anglo-American accusatorial system of criminal justice inherently recognizes a fundamental procedural imbalance favoring the accused. This imbalance may be deemed "so rooted in the traditions and conscience of our people as to be ranked fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). In Williams v. Florida, 399 U.S. 78 (1970), Justice Black observed that "tactical advantage to the defendant is inherent in the type of trial required by our Bill of Rights. The Framers were well aware of the awesome investigative and prosecutorial powers of the government . . . ." Id. at 111-12. See United States v. Garsson, 291 F. 646 (S.D.N.Y. 1923) and People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956). See also Louisell, Criminal Discovery: Dilemma Real or Apparent ?, 49 CALIF. L. REV. 56-57 (1961).

As early as 1923, in the case of United States v. Garsson, 291 F. 646 (S.D.N.Y. 1923), Learned Hand made clear his position:

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

Id. at 649.

32. Id. at 588, 305 P.2d at 14.
33. The Riser court concluded that:

Originally at common law, the accused in a criminal action could not compel production of documents or other evidence in the possession of the prosecution. Production was denied before trial on the ground that to compel the prosecutor to reveal the evidence beforehand would enable the defendant to secure perjured testimony and fabricated evidence to meet the state's case. It was felt furthermore, that to allow the defendant to compel production when the prosecution could not in return compel production from the defendant because of the privilege against self-incrimination would unduly shift to the defendant's side a balance
In *Powell v. Superior Court*, the supreme court allowed pretrial defense discovery of Powell's signed statement made to the police and a typed transcript of a tape recording made at the police station immediately after arrest. Further extensions of defense discovery developed rapidly during the next few years. Unlike civil discovery which is governed by statute, defense discovery in criminal cases continues to be a judicially created doctrine subject to broad discretion in the trial court.

A. Jones v. Superior Court: The First Prosecutorial Discovery Case

California's first judicial recognition of the "two-way street" approach to discovery was in *Jones v. Superior Court*. In *Jones*, the need for reciprocity in discovery proceedings was balanced against the self-incrimination privilege.

of advantages already heavily weighted in his favor . . . . [Today], absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case . . . . To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts.

47 Cal. 2d at 586, 305 P.2d at 13 (emphasis added).

Note that *Riser* predated *Mapp v. Ohio*, 367 U.S. 643 (1961), which extended fourth amendment protections of the United States Constitution to the states through the fourteenth amendment and suggested that admission of all relevant facts is not the "true purpose" of a criminal trial.

34. 48 Cal. 2d 704, 312 P.2d 698 (1957).
35. The court held:
   In the circumstances of the present case, to deny inspection of defendant's statements would . . . be out of harmony with the policy of this state that the goal of criminal prosecutions is not to secure a conviction in every case by any expedient means, however odious, but rather, only through establishing the truth upon a public trial fair to defendant and the state alike.

Id. at 707, 312 P.2d at 699-700.
38. Professor Louisell addressed this discretion and expansion and observed:
   "[T]he seedling planted with People v. Riser and Powell v. Superior Court bids fair to become a full-grown tree. Doubtless there are district attorneys who would allege that it already has, and that the tree needs pruning." Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 74-75 (1961).
On the date set for a rape trial, Jones filed a motion for continuance and an affidavit in which he alleged that he was impotent and needed time to gather medical evidence in connection with the injuries that rendered him impotent. The prosecution then filed a motion for discovery which requested the following defense evidence: 1) the names and addresses of all physicians and surgeons to testify for the defense regarding impotence; 2) the names and addresses of all physicians who had treated the defendant; 3) all doctors' reports that related to the defendant's condition and impotence; and 4) all of the defendant's x-rays taken after the injuries alleged to have caused the impotence.

Justice Traynor reasoned that as a valuable tool for ascertaining the truth, discovery should be conducted along a "two-way street." The motion was granted as to discovery of information bearing on Jones' affirmative defense of impotence. Since the discovery order "simply require[d] petitioner to disclose information that he [would] shortly reveal anyway" and would not assist the prosecution in preparing

40. Id. at 57-58, 372 P.2d at 920, 22 Cal. Rptr. at 880.
41. Id. at 58, 372 P.2d at 920, 22 Cal. Rptr. at 880.
42. Id. at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881. The Jones majority stated that "[a]bsent the privilege against self-incrimination or other privileges provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access to evidence that can throw light on issues in the case." Id. at 59, 372 P.2d at 920, 22 Cal. Rptr. at 880.
43. Id. at 62, 372 P.2d at 922, 22 Cal. Rptr. at 882. The prosecution was allowed to discover the names and addresses of the witnesses that the accused intended to call and any reports and x-rays he intended to introduce into evidence in support of his particular affirmative defense of impotence. The prosecution was not entitled to the names and addresses of all physicians who had treated the accused prior to trial or all reports from doctors pertaining to the accused's physical condition or all x-rays taken following the injuries. Id. at 60-61, 372 P.2d at 921-22, 22 Cal. Rptr. at 881-82.
44. Id. at 62, 372 P.2d at 922, 22 Cal. Rptr. at 882. The majority apparently saw Jones as not requiring the defendant to "disclose" anything, but merely as establishing a principle to regulate the timing of a disclosure, by accelerating it from the presentation of a defense at trial to the pretrial stage.

Jones dealt with the affirmative defense of impotence, prompting Justice Traynor to compare the trial court's discovery order with notice of alibi statutes in other states that have been upheld against self-incrimination claims. Id. at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882. Justice Traynor reasoned that an alibi statute "in no manner compels a defendant to give any evidence other than that which he will voluntarily and without compulsion give at trial." Id. Accordingly, Justice Traynor concluded that notice of affirmative defenses does not violate the self-incrimination privilege. Id.

This reasoning may not be sound if "alibi" is understood as a denial of participation (i.e., accused was not at the scene of the crime) as compared to an "affirmative defense" which denies guilt, not participation. Discovery of an affirmative defense
its case in chief, neither the privilege against self-incrimination nor the attorney-client privilege would be violated.\textsuperscript{46}

Justice Peters, concurring and dissenting in Jones, vigorously attacked the majority’s “two-way street” approach which placed a defendant in the same constitutional position as the prosecution.\textsuperscript{46} Justice Peters disagreed with the majority’s argument that the ultimate goal of a criminal trial is the ascertainment of truth. He viewed the real purpose of the criminal justice system as ensuring that truth is acquired only through a constitutionally mandated process which demonstrates respect for the individual and therefore necessarily limits the state’s power.\textsuperscript{47} Justice Peters’ conclusion that, absent statutory authority, courts should not extend discovery

may carry more potential for a self-incrimination violation than does discovery of an alibi defense. This distinction has not yet been confronted in any California or federal cases.

\textsuperscript{45} Id. at 62, 372 P.2d at 922, 22 Cal. Rptr. at 882. After Jones, a number of California courts broadened the right to pretrial prosecutorial discovery to include matters not restricted to “particular affirmative defenses” which the Jones court had held discoverable. See generally People v. Pike, 71 Cal. 2d 595, 455 P.2d 776, 78 Cal. Rptr. 672 (1969); People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963); Ruiz v. Superior Court, 275 Cal. App. 2d 633, 80 Cal. Rptr. 523 (1969); People v. Dugas, 242 Cal. App. 2d 244, 51 Cal. Rptr. 478 (1966).

\textsuperscript{46} 58 Cal. 2d at 62-68, 372 P.2d at 922-26, 22 Cal. Rptr. at 882-86. Justice Peters stated that Powell and Riser effectively held that the accused is entitled to discovery as part of the fair trial impliedly granted by Article I, § 13 [now § 15] of the California Constitution. Consequently, to allow the accused pretrial discovery might create an imbalance between prosecution and defense, an imbalance that is inherent in our system of criminal procedure. Id.

Justice Peters observed that:

Our system of criminal procedure is founded upon the principle that the ascertainment of the facts is a “one-way street.” It is the constitutional right of the defendant, who is presumed to be innocent, to stand silent while the state attempts to meet its burden of proof, that is, to prove the defendant’s guilt beyond a reasonable doubt.

\textsuperscript{47} Id. at 65, 372 P.2d at 924, 22 Cal. Rptr. at 884. (Emphasis in original).

While, of course, a criminal trial should be “fair” to the prosecution as well as to the defense, it should not be forgotten that the defendant has additional constitutional and statutory rights not given to the prosecution. The right not to incriminate himself, the right to remain absolutely mute [and] the right to the presumption of innocence . . . are a few of these rights that completely refute the ["two-way street"] argument.

\textsuperscript{Id} at 65, 372 P.2d at 924-24, 22 Cal. Rptr. at 884-85.

To add to the difficulty, in Justice Peters' view, deciding whether information requested by the prosecution relates to an affirmative defense or simply to a denial of the charge would be a “logical impossibility for a trial court . . . .” Id. at 66, 372 P.2d at 925, 22 Cal. Rptr. at 885.
rights to the prosecution was precisely the holding adopted by the Collie majority nineteen years later.48

B. Prudhomme v. Superior Court: The “Link in a Chain” Test

Prudhomme v. Superior Court49 was the next California Supreme Court case to raise the important questions regarding prosecutorial discovery’s permissible scope. Prudhomme objected to a pretrial discovery order compelling her attorney to disclose to the prosecution the names, addresses, and expected testimony of defense witnesses to be called at her murder trial.50 Recognizing the tension between truthseeking goals51 and constitutional fairness to criminal defendants, the court held that the order was too broad and thus violative of Prudhomme’s constitutional rights.52

48. Id. at 67-68, 372 P.2d at 925-26, 22 Cal. Rptr. at 885-86. Justice Peters felt that the majority was clearly legislating in excess of its authority. Furthermore, he explained that the previous holdings in reference to pretrial discovery did not suggest, “far less compel,” a conclusion in favor of prosecutorial discovery. Justice Peters explained:

[Since] the Legislature has not elected to tackle the ticklish problems of discovery in criminal cases directed against defendants . . . I do not find any inherent judicial power to preempt this excursion into procedural reform. [I]f the innovation is to come it should be the product of the lawmakers, not of the courts.

Id. at 68, 372 P.2d at 926, 22 Cal. Rptr. 886.

Justice Peters exhibited concern that information in an affirmative defense situation could serve to prove the prosecution’s prima facie case, thus undermining the attorney-client and self-incrimination privileges. Id. at 66, 372 P.2d at 925, 22 Cal. Rptr. at 885.

49. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

50. Id. at 322, 466 P.2d at 674, 85 Cal. Rptr. at 130.

51. Id. at 323, 466 P.2d at 675, 85 Cal. Rptr. at 131. The court acknowledged that pretrial disclosure would greatly facilitate the administration of criminal justice by minimizing the element of surprise, avoiding unnecessary delays and continuances, reducing inconvenience to the court, counsel, jurors and witnesses, and permitting more effective pretrial preparation. Id.

52. Id. at 327, 466 P.2d at 677-78, 85 Cal. Rptr. at 133-34. The court was unwilling to take the position, ultimately adopted in Collie, of barring pretrial prosecutorial discovery in a criminal proceeding. Qualifying the “link in a chain” test, the court added:

A reasonable demand for factual information which . . . pertains to a particular defense or defenses, and seeks only that information which defendant intends to introduce at trial, may present no substantial hazards of self-incrimination and therefore justify the trial judge in determining that under the facts and circumstances in the case before him it clearly appears that disclosure cannot possibly tend to incriminate [the] defendant. However, unless those criteria are met, discovery
Jones was not directly controlling since the defendant in that case was not required to disclose the names and addresses of all defense witnesses nor did Jones involve an order seeking disclosure of the expected testimony of defense witnesses. The Prudhomme court did, however, consider Jones in articulating its new test:

[T]he principal element in determining whether a particular demand for discovery should be allowed is not simply whether the information sought pertains to an "affirmative defense," or whether defendant intends to introduce or rely upon the evidence at trial, but whether disclosure thereof conceivably might lighten the prosecution's burden of proving its case in chief.

The court further stated that the self-incrimination privilege forbids compelled disclosures which could serve as a "link in a chain" of evidence tending to establish guilt of a criminal offense.

Applying this new test, the court could not say that it "clearly appear[ed]" that prosecutorial discovery of the names, addresses, and expected testimony of defense wit-

should be refused.

Id. at 322-25, 466 P.2d at 674-76, 85 Cal. Rptr. at 130-32. The court was reluctant to extend Jones beyond its facts in light of certain significant developments since 1962 bearing on an accused's fundamental right not to be compelled to be a witness against himself. See Miranda v. Arizona, 384 U.S. 436 (1966) (applying the fifth amendment to the accusatory stage); Griffin v. California, 380 U.S. 609 (1965) (forbidding the prosecution or the court to comment on the accused's silence); Malloy v. Hogan, 378 U.S. 1 (1964) (extending the fifth amendment privilege against self-incrimination to the states via the due process clause in the fourteenth amendment); Fed. R. Crim. P. 16(c) promulgated by the United States Supreme Court in 1966, which provided for limited prosecutorial discovery of physical evidence but not authorizing disclosure of names, addresses, or expected testimony of defense witnesses.

2 Cal. 3d 326, 466 P.2d at 677, 85 Cal. Rptr. at 133.

The court stated that the fifth amendment privilege is the essential mainstay of America's accusatorial system of criminal prosecution. The People must shoulder its burden of proof "without assistance either from the defendant's silence or from his compelled testimony." Id. at 325, 466 P.2d at 676, 85 Cal. Rptr. at 132 (quoting People v. Schader, 71 Cal. 2d 761, 770, 457 P.2d 841, 846, 80 Cal. Rptr. 1, 6 (1969)).

The court in Cantillon v. Superior Court, 305 F. Supp. 304 (C.D. Cal. 1969), aff'd, 442 F.2d 1338 (9th Cir. 1970), demonstrated an increased concern that an accused's fifth amendment rights not be overlooked in the course of pursuing the truth along Jones' "two-way street." Id. at 307. The court annulled a discovery order which required disclosure of the names of alibi witnesses to be called at trial as violative of defendant's privilege against self-incrimination, attorney-client privilege, and right to effective counsel. Id. at 307-09.
nesses could not “possibly tend to incriminate” the defendant. Unlike Jones, the order was not limited to any particular defense or category of witnesses from which a court could determine its potential for incrimination.

C. People v. Collie: The Disapproval of Prosecutorial Discovery

Prudhomme’s dicta, that discovery may sometimes be allowed, resulted in confusion among the appellate courts in reconciling the maximum discovery consistent with a defendant’s rights. An unanimous supreme court in Reynolds v. Superior Court cautioned that the judiciary is not the proper body to formulate prosecutorial discovery rules. Nevertheless, courts continued to struggle with the decision to limit the self-incrimination privilege to facilitate effective

56. 2 Cal. 3d at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133. Justice Peters concurred but disagreed with the failure to “forthrightly” overrule Jones and discredit the “two-way street” model. Peters undoubtedly had difficulty comprehending how Jones could pass the Prudhomme “cannot possibly tend to incriminate” test. Id. at 328, 466 P.2d at 678, 85 Cal. Rptr. at 134. One author has noted that the qualification that a discovery order must be limited to a particular defense or set of witnesses may actually channel inquiry into areas most susceptible to incrimination since requiring particularity may more clearly point to the strength and weaknesses of the accused’s defense. The Supreme Court of California 1969-1970, 59 CALIF. L. REV. 225, 229 (1971).

57. See generally People v. Ayers, 51 Cal. App. 3d 370, 124 Cal. Rptr. 283 (1975); People v. Chavez, 33 Cal. App. 3d 454, 109 Cal. Rptr. 157 (1973); People v. Bais, 31 Cal. App. 3d 663, 107 Cal. Rptr. 519 (1973). These conflicting cases utilized “screening procedures” in which defense documents or statements were reviewed by the trial court before authorizing discovery. In Collie, Justice Mosk attributed the inconsistent results to such standardless procedures and the “theoretical disparities” employed by the trial and appellate courts. 30 Cal. 3d at 53, 634 P.2d at 539, 177 Cal. Rptr. at 463 (1981).


59. Id. at 845-46, 528 P.2d at 53-54, 177 Cal. Rptr. at 444-45. The Reynolds court opined that the wisest course was to refrain from any attempt to create or adopt a prosecutorial discovery scheme through its inherent power to administer matters of criminal procedure. “It is far better for this court to pass judgment, if and when necessary, on an integrated legislative document.” Id. at 846, 528 P.2d at 53, 177 Cal. Rptr. at 445.

People v. Thornton, 88 Cal. App. 3d 795, 152 Cal. Rptr. 77 (1979), provided the foundation for the rule eventually articulated in Collie. Thornton held that the defendant’s privilege against self-incrimination extended even to statements that impeach defense witnesses without otherwise inculpating the defendant. Thornton found no basis for a screening process. Under its analysis, anything that would be of use to the prosecution in securing a conviction would for that reason be incriminatory and thus privileged. People v. Collie, 30 Cal. 3d at 53, 634 P.2d at 539, 177 Cal. Rptr. at 463.
prosecution.

The defendant in *People v. Collie* was convicted of attempted first degree murder, attempted second degree murder, and forcible sodomy. On appeal, the California Supreme Court held that the trial court erred in granting the prosecutor's discovery motion requesting inspection of defense investigator notes. The court disapproved all further judicial attempts to frame prosecutorial discovery orders and any compelled production of defense evidence absent explicit legislative authority. The majority stated its reluctance to step out of its traditional role, as final interpreter and guardian of the Constitution, to define procedures by judicial fiat in the


61. 30 Cal. 3d at 49, 634 P.2d at 536, 177 Cal. Rptr. at 460.

62. *Id.* at 56, 634 P.2d at 541, 177 Cal. Rptr. at 468. A defense witness, who Collie had claimed to have visited on the night of the crimes, revealed during cross-examination that she had talked to a defense investigator. Over defense counsel's objection on the basis of the work product and attorney-client privileges, the trial court granted the prosecution's request for discovery of notes prepared by the investigator. The notes were used to impeach the witness on further cross-examination. *Id.* at 49, 634 P.2d at 536, 177 Cal. Rptr. at 460.

The court left established precedents intact that hold the self-incrimination privilege inapplicable to, and allow mandatory production of, nontestimonial evidence such as fingerprints, blood and breath samples, line-ups, and handwriting and voice exemplars. *Id.* at 55-56 n.7, 634 P.2d at 541 n.7, 177 Cal. Rptr. at 465 n.7. See *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967); *Schmerber v. California*, 384 U.S. 757 (1966); *Cramer v. Tyars*, 23 Cal. 3d 131, 588 P.2d 793, 151 Cal. Rptr. 653 (1979).

The court acknowledged the attorney-client privilege, the work product doctrine, and the prohibition of forced revelation of allegedly privileged material for the purpose of ruling on its status as "undeniably contributing to the monumental complexity of the problem." 30 Cal. 3d at 55, 634 P.2d at 540-41, 177 Cal. Rptr. at 464-65.

In explicitly holding for the first time that the work product doctrine applies to criminal cases, the Collie court quoted from *United States v. Nobles*, 422 U.S. 225, 238 (1975): "[T]he role [of the work product doctrine] in assuring the proper functioning of the criminal justice system is even more vital [than in civil litigation]." 30 Cal. 3d at 59, 634 P.2d at 543, 177 Cal. Rptr. at 473. In so holding, the court clarified that the doctrine extends beyond defense counsel and protects the work product of defense investigators. *Id.*

The discussion of work product included reference to the attorney-client privilege: "[A] rule that would open the defense files ... could penalize the defendant whose attorney was most vigilant in gathering, documenting, recording, and studiously analyzing evidence to prepare the defense." *Id.* at 55, 634 P.2d at 540, 177 Cal. Rptr. at 467.

63. *Id.* at 55, 634 P.2d at 541, 177 Cal. Rptr. at 465.

64. *Id.* at 56, 634 P.2d at 541, 177 Cal. Rptr. at 465. The opinion did not specify whether reference was to the United States Constitution or to the California Constitution. This distinction is significant in the discussion of federalism and independent
context of a single case. Forecasting "grave doubts that a valid discovery rule affecting criminal defendants can be devised," the court concluded: "Ours is likely to be the last word on the subject; for that reason, it should not be the first." Justice Richardson concurred in the judgment but dissented from the "sweeping injunction" against further prosecutorial discovery. He described the "absolute prohibition . . . in the absence of legislation . . . as an inexplicable rejection of our inherent power . . . to develop fair and reasonable discovery procedures to assist in the search for the truth . . . ." Citing Jones' "ascertainment of truth" objective and Prudhomme's "reasonable demand" standard, Justice Richardson concluded that the majority "wraps a further curtain of secrecy . . . ['judicially constructed blinders'] . . . around evidence which the jury may have found very useful . . . material, competent, relevant, and nonincriminatory."

interpretation of state constitutions. See infra text accompanying notes 174-82.
65. 30 Cal. 3d at 56, 634 P.2d at 541, 177 Cal. Rptr. at 465.
66. Id. at 56, 634 P.2d at 541, 177 Cal. Rptr. at 465.
67. Id.
68. Id. at 65, 634 P.2d at 547, 177 Cal. Rptr. at 471. Justice Richardson noted that the courts, since Powell, have exercised their inherent powers to develop, within constitutional limits, discovery rules aimed at facilitating the administration of criminal justice and ascertaining the truth. In regard to, first, the majority's position that the discovery area is of legislative responsibility and, second, the "grave doubts" attitude, Justice Richardson characterized the majority's message to the legislature as "[i]t's up to you, but don't try it." Id. at 66, 634 P.2d at 547, 177 Cal. Rptr. at 471. Justice Newman concurred, but did "not share with the majority 'grave doubts that a valid discovery rule affecting criminal defendants can be devised.'" 30 Cal. 3d at 65, 634 P.2d at 546-47, 177 Cal. Rptr. at 470-71.
69. Id. at 65, 67, 634 P.2d at 547, 549, 177 Cal. Rptr. at 471, 473.
70. Id. at 66, 634 P.2d at 548, 177 Cal. Rptr. at 472.
71. Id. at 67, 634 P.2d at 548, 177 Cal. Rptr. at 472.
72. Id. at 68-69, 634 P.2d at 549, 177 Cal. Rptr. at 473. Justice Richardson cited Nobles regarding the self-incrimination privilege: "'[T]o conclude that the Fifth Amendment renders criminal discovery "basically a one-way street" . . . [l]ike many generalizations in constitutional law, . . . is too broad. The relationship between the accused's fifth amendment rights and the prosecution's ability to discover materials at trial must be identified in a more discriminating manner.'" Id. at 67-68, 634 P.2d at 548-49, 177 Cal. Rptr. at 472-73 (quoting United States v. Nobles, 422 U.S. 225 (1975)).

Justice Richardson identified Collie as a case in which the defense investigator's notes added nothing to the prosecution's case in chief and would not have lightened the burden of proof. Id. He concluded that prohibition of discovery in such a case "blocks the People's access to 'Discovery Street' . . . without knowledge as to . . . how the obstruction can be cleared . . . ; an example of "justice defeated."
Id. at 69, 634 P.2d at 549, 177 Cal. Rptr. at 473.
III. LEGAL PRINCIPLES WITHIN THE PROSECUTORIAL DISCOVERY DEBATE

Opponents of prosecutorial discovery do not base their reservations on the main purpose of discovery, that of fact ascertainment. Rather, their opposition is generally that other legal principles, particularly the privilege against compulsory self-incrimination, override an uncompromising fact-gathering objective. In other words, while there can be no argument against discovery from the standpoint of achieving access to all the facts, other interests challenge this objective as the primary goal of a criminal case.\(^7\)

It is analytically senseless and practically useless to pit Justice Traynor's "two-way street" model against Justice Peters' "one-way street" approach and declare one as right, the other wrong, and the choice dispositive. Instead, the give and take of each view must be balanced. Through this balancing, a resolution emerges. The following sections focus on the principles to be balanced in arriving at such a resolution.

A. Virtues of Discovery

[Both sides would be well served by discovery. There is more tensile strength in the adversary system and a deal more nobility in the profession when adversaries foster procedures that set them free from trick and device and enable them to meet in grand encounter on the issues.\(^7\)4

To ensure "grand encounter" at trial, mutual accessibility to evidence is a vital ingredient. If prosecution and defense are to vigorously test each other's legal contentions and evidence, then discovery must be reciprocal. Further, if the integrity of the criminal justice system depends on the just resolution of the evidence, then perhaps fairness dictates that discovery be available to both sides so that the issues can be clearly streamlined.\(^7\)5

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73. See supra text accompanying notes 46-47.
75. Kane, Criminal Discovery—The Circuitous Road To A Two-Way Street, 7 U.S.F.L. Rev. 203, 204 (1973). See also State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953). The court in Tune noted that "[i]n any judicial proceeding, civil or criminal, the purpose of broad discovery is to promote the fullest possible presentation of the facts, minimize opportunities for falsification of evidence, and eliminate the vestiges of trial
Examined out of context, the numerous virtues of criminal discovery are obvious. As noted above, the problem begins when "discovery" and "the basic premise of the adversary system," or similar language, are discussed in the same sentence. One author has described the arguments for and against the ascertainment of truth as the primary objective of criminal justice as "ritual incantations" of little value. Instead, the consequences of criminal discovery should be examined.

Surprise at trial is less frequent with prosecutorial discovery. Effectively preparing cross examination, gathering rebuttal evidence, and discouraging fabricated defenses and perjury are other results of discovery that benefit state law enforcement interests. The ability to best achieve these goals is contingent upon access to defense information.

An argument against prosecutorial discovery, within the "access" discussion, is that more discovery would result in exploratory prosecutions and intrusions into private lives. This fear is not well founded for three reasons. First, this reasoning confuses police investigation of suspects with prosecutorial discovery of an accused. Second, increased access may lead to a finding of exculpatory evidence and the dropping of charges against the accused. Third, exploratory prosecutions seem incompatible with heavy workloads in district attorney offices and overcrowded criminal court calendars.

Developing relevant legal arguments to present to the jury is a fundamental tenet of our adversary system. It is obvious that the ends of criminal justice would be compromised if verdicts were founded on a partial or untested presentation of the facts. Prosecutorial discovery plays an important role in evading this pitfall. Before prosecutorial discovery can serve its purpose, however, certain obstacles must be overcome.

B. The Adversary System and "Balancing" of Interests

The essence of the adversary system is that each side participates in the decision that is reached, a participation that takes place through the presentation of evidence and

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by combat." Id. at 207, 98 A.2d at 884.


arguments. Lack of opportunity to present these would characterize the inquisitorial system.  

Law enforcement objectives are often balanced against the protection provided by the privilege against self-incrimination. In the discovery area, this balancing is permissible as long as it does not result in compelling a defendant to incriminate himself through disclosure of testimonial information. Theoretically, prosecution and defense should be equal adversaries. Constitutionally, the accusatorial system maintains an imbalance favoring the defendant, but practically, the prosecution probably has the advantage.  

Remarking on the preference for an accusatorial rather than an inquisitorial system of criminal justice, Justice Goldberg stated that America's sense of "fair play" compels "a fair state-individual balance." This balance requires the government to shoulder the entire burden of proof and to leave the individual alone "until good cause is shown for disturbing him."  

In California v. Byers, Justice Harlan questioned.
whether state goals can ever be so paramount as to preclude the application of the privilege against self-incrimination. The Byers plurality concluded that balancing is appropriate when the public need for truth-seeking conflicts with traditional constitutional safeguards. If warranted, the truth-seeking function may supersede constitutional protection.

In addition to the ascertainment of truth, prosecutorial discovery promotes other state interests. These interests include expediting cases; avoiding delay, continuance, and surprise at trial; encouraging plea bargaining; and ensuring undistorted factual presentations for the jury. The efficiency of the criminal justice system flows from the realization of these interests. In addition to loss of time and money, continuances are counterproductive because they follow the presentation of the state’s case and thus “its evidence . . . get[s] ‘cold.’”

The danger inherent in the “surprise at trial” issue is that the defendant may escape conviction by presenting an “eleventh hour” defense for which the prosecution is unprepared. Truth is more likely to emerge when each side attempts to win through production of evidence rather than by surprise. Prosecutorial discovery serves this objective. Since a continu-

found not to involve a testimonial act. Id. at 432-33. The Court explained that a question of infringement of the privilege against compulsory self-incrimination must be resolved by “balancing the public need and the individual claim to constitutional protections.” Id. at 427.

The Court took the position that even if incrimination were involved, the disclosure is not “testimonial” within the parameters of the privilege and would be an extravagant extension of the privilege to so hold. Id. at 431. The “accusatorial” burden remains with the state. Id. at 450 (Harlan, J., concurring). The Court cautiously remarked that “[w]henever the court is confronted with the question of a compelled disclosure that has incriminating potential, the judicial scrutiny is invariably a close one.” Id. at 427. However, in order to invoke the privilege, it is necessary to show that the compelled disclosures will themselves confront the defendant with substantial hazards of self-incrimination.

In response to charges that the identification could provide a link in a chain of evidence to prove guilt, the Court alluded to Wade and Schmerber: “[O]f course a suspect’s normal voice characteristics, like his handwriting, blood, fingerprints, or body may prove to be the crucial link in a chain of evidentiary factors resulting in prosecution and conviction. Yet such evidence may be used against a defendant.” 402 U.S. at 433.

83. Id. at 427. See also Doyle v. Ohio, 426 U.S. 610 (1976).
84. Id. at 427, 430-34.
85. Epstein, Advance Notice of Alibi, 55 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 29, 36 (1964). See CAL. PENAL CODE § 1050 (Expediting trials; precedence of criminal cases; continuances; notice; proof required; prior commitments of witnesses; attorney member of legislature; minute entry of facts; notice of necessity of dismissal); and § 1051 (testimony of defense; continuances) (West Supp. 1983).
ance to gather rebuttal evidence after a "surprise" would not impinge upon an accused's fifth amendment rights, those rights are not violated through a search for rebuttal evidence at the pretrial discovery stage.

By asserting an alibi defense, the defendant chooses to "prove" his own affirmative case. The rationale behind disclosure of affirmative defenses is that disclosure does not aid the prosecution's case in chief, but helps to meet and rebut those defenses. Thus, the accused is not supplying the prosecution with evidence tending to establish an element of the offense or of guilt. Similarly, the accused is not compelled to incriminate himself by furnishing evidence against himself.

Defense counsel may assert that it is difficult and unfair to decide prior to trial if it will be strategically necessary to introduce particular evidence or witnesses to establish a certain defense. For example, a discovery order may interfere with the right to await the close of the prosecution's case before making this decision. Further, to disclose the information before trial or be prohibited from introducing it at trial places the defendant in an awkward position. The defendant must either provide the prosecution with potentially incriminating information or be precluded from offering elements of his defense.

This argument is countered by three responses. First, it is

86. Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L. Rev. 228, 248 (1964). Justice Traynor reasoned:

The good coin of discovery gains in value when it is fairly exchanged at the appropriate procedural hours. Neither the privilege against self-incrimination nor the due process requirements of a fair trial fix the time when the prosecution has presented its evidence at the trial as the only procedural hour at which the defendant can be required to make his decision whether to remain silent or to present his defense.

Id.

87. Justice Black, dissenting in Williams v. Florida, 399 U.S. 78 (1970), argued that pretrial disclosure of a defense is most certainly "compelled" in the prohibited sense:

Any lawyer who has actually tried a case knows that, regardless of the amount of pre-trial preparation, a case looks far different when it is actually being tried than when it is only being thought about . . . .

Clearly the pressures on defendants to plead an alibi . . . are not only quite different from the pressure operating at the trial itself, but are in fact significantly greater. Contrary to the majority's assertion, the pretrial decision cannot be analyzed as simply a matter of "timing," influenced by the same factors operating at the trial itself.

Id. at 109-10. See also Weston, Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense, 66 Calif. L. Rev. 935 (1978).
unlikely that a defendant would attempt to introduce a fabricated, and therefore incriminating, alibi after being served with discovery orders. Second, if the defendant decided not to introduce certain evidence or a particular defense, then the disclosed information relating to it would be inadmissible. Third, mere disclosure of the elements of an alibi defense does not bind the defendant to its use, as it can be abandoned anytime before actual presentation.

The state’s interests in preventing surprise and gathering rebuttal evidence to test the veracity of affirmative defenses are legitimate. Delay, deception, and distortion that frustrate the criminal process are minimized through pretrial prosecutorial discovery. However, the threat of impinging upon fifth amendment rights compels a look into the role of self-incrimination within the prosecutorial discovery debate.

C. *The Privilege Against Self-Incrimination* 

From its inception, constitutional problems have plagued prosecutorial discovery. The chief impediment has been the fifth amendment. The simplicity of the constitutional language belies the difficulty of applying it in the infinite variety of contexts that arise. The United States Supreme Court’s approach to cases involving the fifth amendment appears to derive from a consideration of two factors: first, the history and purposes of the privilege, and second, the character and ur-


Professor Wigmore indicated that the privilege historically applied only to compelled testimonial disclosures. “[I]t is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion. The latter idea is as essential as the former.” (Emphasis added). 8 J. Wigmore, *Evidence* §§ 2250-2263 (McNaughton rev. ed. 1961). Apparently the privilege developed in reaction to the oath *ex officio* which ecclesiastical courts used to compel the accused to make incriminating testimonial statements. Id. at § 2250. See also Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981).
gency of the other public interests involved. The debate is usually clouded by differing interpretations of the scope of the privilege against self-incrimination. For purposes of this discussion, these interpretations will be referred to as the "broad" and "narrow" constructions.

1. Broad Construction of the Fifth Amendment

Proponents of the broad construction contend that the defendant has no duty to help the prosecutor investigate the facts or any facet of the case. Any discovery rule which would require the defendant to turn over to the prosecutor any evidence or defense witnesses would satisfy the "link in a chain of evidence" test and violate the privilege against self-incrimination. This interpretation adamantly requires the prosecution to shoulder the entire burden of proof while allowing the defendant to stand mute.

Those who favor broad construction oppose any compelled action that does not result from the "unfettered exercise of [the accused's] own will." This construction is not limited to narrowly defined testimonial or incriminating acts. Instead, it is characterized by a liberal view of what constitutes an infringement of self-incrimination protections. According to this interpretation, the basic purpose of the privilege is to preserve the "integrity of [our] . . . judicial system" in which no one is to be convicted unless the prosecution


The Boyd Court suggested that infringement on fifth amendment rights can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. Boyd v. United States, 116 U.S. 616 (1886). See Gerstein, The Demise of Boyd: Self-Incrimination and Privileged Papers in the Burger Court, 27 U.C.L.A. L. Rev. 343 (1979).
proves guilt beyond a reasonable doubt. This construction prevents the defendant from assisting the prosecution in any way.

2. *Narrow Construction of the Fifth Amendment*

Although the fifth amendment is still the major barrier to prosecutorial discovery, its scope has been narrowed by the United States Supreme Court. A fifth amendment argument in one instance was described as an overbroad generalization. To isolate a basic difference between the broad and narrow constructions, it appears that the narrow interpretation is concerned with the character of the evidence whereas the broad interpretation looks forward to the possible effect of the evidence at trial. *Schmerber v. California* is an example

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97. 384 U.S. 757 (1966). In *Schmerber*, a blood test to determine the blood alcohol content of a drunk driver was found not in violation of the fifth amendment. The Court held that even though the test was compulsory and played a part in establishing guilt, it did not violate the fifth amendment because it was not “testimonial or communicative.” *Id.* at 761. Thus, despite conceding that the blood test was compelled and meant to be incriminating, it was distinguished from compulsion “to be a witness against oneself” (i.e., “to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . .”). *Id.* The *Schmerber* dissenters, utilizing a broad construction of the self-incrimination privilege, questioned how compelled disclosures received in court can be anything other than “testimonial or communicative.” *Id.* at 773-78.

The *Schmerber* majority noted that the Court in *Miranda v. Arizona*, 384 U.S. 436, adopted a liberal construction of the privilege as an individual’s fundamental, substantive right. The *Miranda* Court stated that our accusatory system of criminal justice demands that the government must “respect the inviolability of the human personality” and produce evidence against the accused by its own labors, rather than by “the cruel, simple expedient of compelling it from his own mouth . . . .” 384 U.S. at 762. *See Arenella, Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 Am. Crim. L. Rev. 31 (1982).

The *Schmerber* Court felt, however, that even *Miranda* implicitly recognized that the privilege has never been given the full scope which the values it helps to protect suggest. *Id.* at 762-63. By narrowly construing the term “testimonial,” the Court concluded that compulsion which makes a suspect or accused the source of...
of a "narrow construction case." The Schmerber Court established the rule requiring a showing by the defendant that defense evidence is "testimonial or communicative," "incriminating," and "compelled" before the fifth amendment would apply and proscribe the discovery procedure. With this "testimonial limitation" approach, prosecutorial discovery and the privilege against self-incrimination need not be mutually exclusive. In simple terms, under the narrow construction, the self-incrimination privilege does not establish an absolute protection against all incriminating evidence or allow the defendant to be completely "silent;" rather, it protects the defendant from acting as his own accuser.

3. Application of the Broad and Narrow Constructions

The fifth amendment cases in the prosecutorial discovery area deal primarily with the constitutionality of notice of alibi statutes. The Schmerber "testimonial limitation" approach has been used to uphold state alibi statutes and to legitimize Federal Rule of Criminal Procedure 12.1.

"real or physical evidence" does not violate the fifth amendment privilege. Id. at 764.

Justice Holmes, in Holt v. United States, 218 U.S. 245 (1910), recognized that there could be extravagant extensions of the fifth amendment: "The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or mental compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." Id. at 252-53. See Dann, The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence From a Suspect, 43 S. Cal. L. Rev. 597 (1970).

98. 384 U.S. at 761.
99. Id. at 765.
100. Id.
101. See supra note 3.
102. The states that have codified notice of alibi rules include the following:


Federal Rule of Criminal Procedure 12.1 requires the defendant, upon written demand by the government attorney, to serve a written notice of his intention to offer an alibi defense. The notice must specify the place where the defendant claims to have been at the time of the alleged offense and the names and addresses of witnesses upon whom he intends to rely to establish the alibi. After the defendant gives notice, the government must reveal the names and addresses of the witnesses upon whom it
The narrow construction rule applies the term "testimonial or communicative"\textsuperscript{103} to statements relating to the \textit{facts} of the alleged crime, and not to statements or information relating solely to the defendant's \textit{plans} at trial. Thus, the fifth amendment does not apply as long as the information discovered is not used to establish participation in the crime.

The "incriminating"\textsuperscript{104} issue poses little difficulty for narrow constructionists. If an innocent defendant offers an alibi that is subsequently verified, charges are dropped prior to trial. Therefore, the disclosure benefits both the defendant and the criminal process while not violating the fifth amendment. If the prosecutor discovers that the alibi is fabricated, then defense counsel may persuade the defendant to plead guilty, to plea bargain, or to refrain from perjuring himself at trial.

Broad and narrow constructionists also differ on the meaning of "compulsion."\textsuperscript{106} Broad constructionists see a pre-trial notice of alibi requirement as a clear form of compulsion.\textsuperscript{106} Conversely, narrow constructionists do not view an alibi disclosure as compelling the defendant to incriminate himself in any way. Requiring the defendant to disclose information that he does not intend to introduce at trial is compulsion; but, requiring disclosure of the nature of his defense is not.\textsuperscript{107} Since the case will voluntarily be revealed at trial, there has been no compelled disclosure of any defense secret.

Although California does not have a criminal discovery or notice of alibi statute at the present time, it has a statute that requires advance notice of one affirmative defense. Penal Code section 1016\textsuperscript{108} requires a defendant who intends to rely on an

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\textsuperscript{103} 384 U.S. at 761.
\textsuperscript{104} Id. at 765.
\textsuperscript{105} Id.
\textsuperscript{106} Williams v. Florida, 399 U.S. 78, 106-16 (Black, J., concurring in part and dissenting in part).
\textsuperscript{107} See Williams v. Florida, 399 U.S. 78; Fed. R. CRIM. P. 16.
\textsuperscript{108} CAL. PENAL CODE § 1016 (WEST SUPP. 1983) (Kinds of Pleas; entry of multiple plea; presumption of sanity; change of plea; admission of plea of not guilty by reason of insanity without pleading not guilty. There are six kinds of pleas . . . 6. Not guilty by reason of insanity . . . (A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged; provided, that the court may for good cause
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insanity defense to reveal this intention at the time of his plea. Failure to give this notice may result in the denial of the opportunity to prove insanity in court. The state interest in avoiding surprise and continuance at trial is served through discovery of psychiatric examination reports and thorough preparation of complex data. Therefore, in at least this instance, California has recognized that when state interests conflict with the privilege against self-incrimination, the privilege must surrender some force.

D. Judicial or Legislative Responsibility?

Should the use of pretrial discovery in criminal cases continue to develop upon a case-by-case method, with only the most general guides for the trial court, or should specific practices be . . . directed by specific rule or statute? Although Collie indirectly answered this question through its disapproval of judicial discovery orders, the case for a legislative resolution of the prosecutorial discovery problem requires examination of the separation of powers issue. Supporters of the case law method reason that prosecutorial discovery should develop gradually, without “cumbersome legislation which can only be another breeding ground for judicial interpretation.”

shown allow a change of plea at any time before the commencement of the trial)). Federal Rule of Criminal Procedure 12.2 provides that a defendant intending to rely on an insanity defense must notify the prosecution prior to trial. The defendant must also disclose the intention to introduce expert testimony relating to the effect of mental disease, defect, or other condition on the mental state requirement for the offense charged. The court may order the defendant to submit to psychiatric examination. The fruits of the examination may only go to the issue of the defendant’s mental capacity. The purpose of this rule is to protect the defendant’s right against self-incrimination. See, e.g., State v. Raskin, 34 Wis. 2d 607, 150 N.W.2d 318 (1967).

109. FED. R. CRIM. P. 12.2 (d). Contrary to the federal rule, section 1016 does not explicitly enumerate the consequences of noncompliance.


111. 30 Cal. 3d at 55, 634 P.2d at 541, 177 Cal. Rptr. at 465. Notwithstanding its inherent power to administer matters of criminal procedure, the Collie court refused to articulate a “unitary principle” upon which prosecutorial discovery could be based. Due to the dangers of impinging upon the traditional and arguably constitutional rights of a defendant, the court found judicial abstention to be its “wisest course.” Id. at 51, 634 P.2d at 537, 177 Cal. Rptr. at 461.

112. Kane, Criminal Discovery—The Circuitous Road To A Two-Way Street, 7 U.S.F.L. REV. 203, 211 (1973). Associate Justice Robert Kane, California Court of
Supporters of the legislative view note the catastrophic results of prosecutorial discovery under judicial aegis. The inconsistent application and utter confusion that accompanied the trend from Jones to Collie spoke poorly for case law development. However, the legislative method could codify the scope of discovery available to both prosecution and defense by balancing fifth amendment privileges with state law enforcement objectives. Those favoring legislative action suggest that giving the trial judge discretion over prosecutorial discovery merely sidesteps the formulation of set rules. Ideally, the rules would be flexible enough to mold to real-life situations, yet firm enough to prevent ad hoc judicial application.

No state has ever adopted a notice of alibi procedure by the common law mechanism of judicial decision. All but four of the states with notice of alibi procedures adopted their rules by statute. Arizona, Florida, New Jersey, and Pennsylvania have recognized alibi procedures through judicial rule, not decision. The constitution of each of these states vests the state's supreme court with quasi-legislative power over judicial procedure. The courts used this power to promulgate notice of alibi rules. Similarly, subject to congressional approval, the United States Supreme Court is explicitly vested by statute with the power to prescribe rules of criminal

Appeal, First District, concludes that criminal discovery can best be left to the judiciary where it began. Id. at 213.


Note that Pitchess was decided in May of 1974, a few months before the November 1974 decision of Reynolds v. Superior Court, 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974), which disapproved of judicial rule-making in criminal discovery.
procedure in the federal courts.\textsuperscript{114} The California Supreme Court has not been vested with such rule-making power by the California Constitution or the California legislature.

The \textit{People v. Collie}\textsuperscript{115} resolution of the separation of powers and judicial abstention issues reflected former California Chief Justice Wright's conclusion in \textit{Reynolds v. Superior Court}\textsuperscript{118} that the courts are not the proper body to formulate prosecutorial discovery rules. Justice Wright explained that "due regard for this court's function as constitutional adjudicator, and solicitude for this state's governmental scheme of shared legislative and judicial responsibility for the sound administration of justice, render it inappropriate for us to create by judicial decision a notice-of-alibi procedure for California courts."\textsuperscript{117} As Justice Mosk noted in \textit{Collie}, any legislation would ultimately be subject to judicial review.\textsuperscript{118}

Justice Richardson prefaced his opposition to the \textit{Collie} majority by characterizing "\textit{discovery of the truth}"\textsuperscript{119} as the "fixed and primary purpose of a criminal trial."\textsuperscript{120} Despite the complex constitutional issues and absence of enabling legislation that so troubled the majority, Justice Richardson approached the separation of powers issue in a most pragmatic way by emphasizing that courts have the inherent power to develop discovery procedures in criminal cases.\textsuperscript{121} Beyond any inherent power, he noted a court's "solemn responsibility to devise rational solutions to constitutional problems" regardless of complexity or difficulty.\textsuperscript{122} In a matter-of-fact assertion, he deemed irrelevant the absence of express legislation authorizing criminal discovery.\textsuperscript{123}

Justice Richardson bluntly offered that the majority "exaggerate[d] [the] monumental complexity" and "overstated the dangers" involved in resolving criminal discovery ques-

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  \item 114. 18 U.S.C. § 3771.
  \item 115. 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981).
  \item 116. 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974).
  \item 117. \textit{Id.} at 849, 528 P.2d at 55, 177 Cal. Rptr. at 447 (emphasis added).
  \item 118. 30 Cal. 3d at 56, 634 P.2d at 541, 177 Cal. Rptr. at 465.
  \item 119. \textit{Id.} at 65, 634 P.2d at 547, 177 Cal. Rptr. at 471 (Richardson J., concurring) (emphasis in original).
  \item 120. \textit{Id.}
  \item 121. \textit{Id.} at 66, 634 P.2d at 548, 177 Cal. Rptr. at 472.
  \item 122. \textit{Id.}
  \item 123. \textit{Id.} at 65-66, 634 P.2d at 547, 177 Cal. Rptr. at 471.
\end{itemize}
tions. "Surely, in the past we have not found . . . prosecutorial discovery . . . too complex for us to resolve." Finally, he could not comprehend the majority's difficulty in applying the Prudhomme standard which allowed discovery where it could not possibly aid the prosecution in proving its case in chief.

Agreement or disagreement with the opinions in Collie does not change one basic fact: court-authorized prosecutorial discovery in California has been disapproved by the state supreme court. Justice Richardson's description of the current state of prosecutorial discovery, "sweeping injunction [and] absolute prohibition," clearly shows the need for criminal discovery legislation. Therefore, for the doctrine to be revitalized, the Collie majority's view that "we have grave doubts that a valid discovery rule affecting criminal defendants can be devised" must not be interpreted merely as consolation in a landmark case, but as a desperate call for legislative action.

IV. DISCOVERY RULES IN CALIFORNIA

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.

Criminal discovery rules can be drafted by the California legislature and pass judicial scrutiny. Past failures to enact notice of alibi statutes and general discovery rules for criminal cases must not dissuade the California legislature. A carefully drawn statute that comports with a defendant's constitutional protections and statutory rights can serve important state goals of fair, effective prosecution. Reciprocal discovery can "confine the contest to the heartland of the actual controversy."

124. Id. at 67, 634 P.2d at 548, 177 Cal. Rptr. at 472.
125. Id. at 66, 634 P.2d at 548, 177 Cal. Rptr. at 472.
126. Id.
127. Id. at 65, 68, 634 P.2d at 547, 549, 177 Cal. Rptr. at 471, 473.
128. Id. at 56, 634 P.2d at 541, 177 Cal. Rptr. at 465.
129. Brennan, supra note 112, at 280.
130. Louisell, supra note 30, at 94.
Theoretical disagreement over the value of Justice Traynor's "two-way street" model and Justice Peters' "one-way street" approach will undoubtedly continue.\textsuperscript{131} Even accepting a reciprocal, "two-way" system of criminal discovery does not solve the equally difficult problem regarding the permissible scope of prosecutorial discovery. As previously discussed, a resolution must be reached through a balancing of state and individual interests which need not be mutually exclusive.\textsuperscript{132}

The California cases from \textit{Jones} through \textit{Collie} struggled with the question whether the gains realized through prosecutorial discovery justify encroachment upon an accused's defense strategy, privacy, or constitutional privilege against self-incrimination. More specifically, these cases questioned the fairness of requiring a defendant to "show his hand" before trial merely because he will voluntarily do so at trial. Also, whether prosecutorial discovery detrimentally throws the adversary system "off balance" attended nearly all the issues scrutinized by the courts. Professor Louisell has summed up the dilemma by observing: "[T]he ultimate question is, or should be, not simply whether discovery tends to tilt the scales, but whether it tends to tilt them to a right conclusion."\textsuperscript{133}

\textbf{A. The Justification for Prosecutorial Discovery}

Prosecutorial discovery contributes to the fair and efficient administration of criminal justice by facilitating an accurate determination of guilt or innocence. The judicial system suffers when the prosecutor functions in an environment hampered by guesswork and surprise. The protections guaranteed by the fifth amendment were never intended to serve such a purpose. Likewise, fifth amendment safeguards do not prescribe rules to obtain advance knowledge of the nature of a defense. When the privilege against self-incrimination, or any statutory privilege,\textsuperscript{134} is inapplicable, the accused has no valid

\begin{itemize}
\item \textsuperscript{131} See supra text accompanying notes 39-48.
\item \textsuperscript{132} See supra notes 78-87 and accompanying text.
\item \textsuperscript{133} Louisell, \textit{supra} note 30, at 97.
\item \textsuperscript{134} \textit{CAL. EVID. CODE} §§ 940 (privilege against self-incrimination), 954 (lawyer-client privilege), 980 (privilege for confidential marital communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege of clergyman), 1035.8 (sexual assault victim-counselor privilege) (West Supp. 1983).
\end{itemize}
interest in denying the prosecution access to pertinent evidence. Of course this is only a conclusion that must not gloss over the crucial question of precisely when discovery procedures trigger fifth amendment protections.

The notice of alibi cases have held that prosecutorial discovery is not unconstitutional compulsion, but a rule of pleading which allows the prosecutor to effectively cross-examine at trial. The clear message from the United States Supreme Court in Williams v. Florida dispelled further doubt as to

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135. Wardius v. Oregon, 412 U.S. 470 (1973); Williams v. Florida, 399 U.S. 78 (1970); Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). Effective cross-examination is not possible when the prosecution is surprised by an "eleventh hour" defense:

Time and again in the courtrooms of [Ohio] I have seen "reasonable doubt" thrown on the testimony of state witnesses by the conflicting testimony of alibi witnesses for the defense, brought into the courtroom at almost the last minute and at a time that afforded the state little or no opportunity to check either the credibility of the witnesses or the accuracy of their statements.


Another commentator's observations are no less eye-opening:

That the manufactured alibi is one of the main avenues for escape of the guilty needs no demonstration. Moreover, the amount of perjury that is annually committed forms a most considerable item in the mass of unpunished crime. This would be checked and the fabricated alibi rendered most difficult, if the accused were to be required to give the prosecution such notice of the intended defense as would enable it to confirm or refute the accused's assertion.


136. 399 U.S. 78 (1970). Williams v. Florida is the most significant United States Supreme Court case involving prosecutorial discovery. The Court stated that criminal trials should not be handicapped by expansive interpretations of the fifth amendment. Williams sustained the constitutionality of Florida's notice of alibi statute (FLA. R. CRIM. P. 1.200) over fifth amendment claims and a vigorous dissent by Justice Black: "[T]hroughout the [criminal] process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: 'Prove it!' " Id. at 106-16.

Florida's rule requires a defendant who intends to rely on an alibi to furnish the prosecution with three types of information ten days prior to trial. The defendant must disclose: 1) notice of intention to assert an alibi; 2) the place he claims to have been at the time of the crime; and 3) the names and addresses of defense witnesses to be called to support the alibi. Failure to comply can result in the exclusion of alibi evidence at trial (except for the defendant's testimony). A reciprocal provision requires the prosecution to disclose to the defendant the names and addresses of state witnesses to rebut the alibi. Ironically, Williams was decided a few months after Prudhomme which had established a more solicitous attitude toward the fifth amendment and had suggested that a notice of alibi statute in California would encounter substantial constitutional challenges.

The Williams Court opined that the alibi rule is designed to enhance the search
the constitutionality of requiring a defendant to disclose the nature of his affirmative defense.

The California Supreme Court in *Prudhomme v. Superior Court*\(^{137}\) partly based its deferential adherence to the fifth amendment upon "significant developments in the law [that] placed increasing emphasis upon the role played by the Fifth Amendment . . . in protecting the rights of the accused."\(^{138}\) In fact, rather than supporting *Prudhomme* and *Collie*, the more recent "developments" in fifth amendment interpretation confirm the *Jones* "two-way street" model of criminal discovery.\(^{139}\) In retrospect, neither the force of these rulings nor the

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137. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).
138. Id. at 322-23, 466 P.2d at 675, 85 Cal. Rptr. at 131.
Federal Rules of Criminal Procedure have significantly influenced the California legislature.

A general discovery statute, analogous to Federal Rule of Criminal Procedure 16,140 may not pass judicial scrutiny. Discovery of documents, tangible objects, and reports of examinations and tests may encounter self-incrimination objections. The disclosure of evidence that the defendant "intends to introduce at trial,"141 could possibly incriminate in different ways.142 For this reason, an affirmative/alibi defense statute may be the more palatable first step for fifth amendment broad constructionists. If a notice of alibi statute produced positive results, then a more ambitious general discovery statute could follow.

B. Guidelines for Discovery Legislation

In advocating the need for criminal discovery rules in California, this comment acknowledges the previous failure to enact discovery legislation. Therefore, instead of rephrasing past bills as an outline for a new statute, it is more useful to emphasize the important elements of the Federal Rules that maintain prosecutorial discovery within permissible constitutional bounds.

1. Notice of Alibi

Federal Rule of Criminal Procedure 12.1 could provide a general guideline for California's consideration of a notice of alibi rule.148 An important feature of rule 12.1 is that the gov-


140. See infra text accompanying notes 152-69.

141. See Prudhomme v. Superior Court, 2 Cal. 3d at 327, 466 P.2d at 678, 85 Cal. Rptr. at 134.

142. A document that the defendant intends to introduce at trial may contain information that could lead to other inculpating evidence. For example, in a tax fraud case, receipts or ledgers may be valuable evidence to verify the payment of taxes, yet authentication of the figures through discovery may uncover illegalities. In another instance, documents may be the source of otherwise undiscoverable defense witness names. These witnesses could be located, deposed, and possibly impeached upon offering conflicting testimony at trial.

143. FED. R. CRIM. P. 12.1 Notice of Alibi provides:

(a) Notice by Defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the
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government initiates the notice of alibi procedure.144 The govern-
ment attorney must notify the defendant in writing, stating
the time, date, and place at which the alleged offense was com-
mited,145 and demanding written notice of the defen-
dant's intention to offer an alibi defense.146 In addition to
these requirements, a California statute should emphasize the
need for specificity regarding time-date-place, and require the
prosecutor to notify the defendant of the consequences of fail-
ure to comply with alibi procedures.

The federal statute requires that the defendant state the
specific place where he claims to have been at the time of the
alleged offense and his alibi witnesses' names and ad-
dresses.147 The California legislature may prefer to limit the
disclosure to the place the defendant claims to have been at

government a written notice of his intention to offer a defense of alibi.
Such notice by the defendant shall state the specific place or places at
which the defendant claims to have been at the time of the alleged of-
fense and the names and addresses of the witnesses upon whom he in-
tends to rely to establish such alibi.

(b) Disclosure of Information and Witness. Within ten days thereaf-
ter, but in no event less than ten days before trial, unless the court oth-
erwise directs, the attorney for the government shall serve upon the de-
fendant or his attorney a written notice stating the names and addresses
of the witnesses upon whom the government intends to rely to establish
the defendant's presence at the scene of the alleged offense and any
other witnesses to be relied on to rebut testimony of any of the defen-
dant's alibi witnesses.

(c) Continuing Duty to Disclose. If prior to or during trial, a party
learns of an additional witness whose identity, if known, should have
been included in the information furnished under subdivision (a) or (b),
the party shall promptly notify the other party or his attorney of the
existence and identity of such additional witness.

(d) Failure to Comply. Upon the failure of either party to comply
with the requirements of this rule, the court may exclude the testimony
of any undisclosed witness offered by such party as to the defendant's
absence from, or presence at, the scene of the alleged offense. This rule
shall not limit the right of the defendant to testify in his own behalf.

(e) Exceptions. For good cause shown, the court may grant an ex-
ception to any of the requirements of subdivisions (a) through (d) of this
rule.

(f) Inadmissibility of Withdrawn Alibi. Evidence of an intention to
rely upon an alibi defense, later withdrawn, or of statements made in
connection with such intention, is not admissible in any civil or criminal
proceeding against the person who gave notice of the intention.

144. Id. at (a). "Notice by Defendant. Upon written demand of the attorney for
the government . . . ." 145. Id. 146. Id. 147. Id.
the time of the offense.

Subsection (b) of the federal rule is the Wardius\(^{148}\) reciprocal provision in which the government attorney notifies the defendant in writing of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense, and any other witnesses to be relied on to rebut testimony of the defendant’s alibi witnesses.\(^{149}\) This provision aids the defendant beyond the obvious benefits of mutuality. For example, if the defendant foregoes his alibi defense after notifying the prosecutor of his intent to introduce it, then through reciprocity the defendant nevertheless learns the names of government witnesses.

A notice of alibi statute that requires disclosure of alibi witnesses can be very useful to the prosecution. In the absence of such a statute, even when a defense witness’ identity is known, the prosecutor may be surprised to learn that the witness is to testify to an alibi. Presentation of the alibi witness at trial results in the unnecessary interruption of the trial, in the form of a continuance, in order to permit the prosecution to conduct an investigation for rebuttal evidence. One example of the delay caused by the absence of pretrial notice can be found in the analogous area of mental infirmity. In one case, a jury was recessed for twenty-three days to permit a psychiatric examination by the prosecution’s expert when the defendant presented a surprise lack of mental capacity defense.\(^{150}\)

The state has no way of foreseeing the facts that will be offered in defense. The just resolution of criminal trials requires procedures to correct this problem. In the general discovery context, the state should have the opportunity to examine the authenticity of documents and reports before trial. Similarly, the purpose of an alibi statute is to rebut and dis-

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148. Wardius v. Oregon, 412 U.S. 470 (1973). A statute requiring the defendant to disclose the names and addresses of alibi witnesses prior to trial must include a reciprocal right to obtain from the prosecution the names and addresses of rebuttal witnesses. Justice Marshall, writing for a unanimous Court, stated that reciprocal discovery is required by fundamental fairness and it is insufficient that although the statute does not require it, the state might grant reciprocal discovery in a given case. Id. at 473-79. In the absence of fair notice that the defendant will have an opportunity to discover the state's rebuttal witnesses, the defendant cannot, consistently with due process requirements, be required to reveal his alibi defense. Id.


count exculpatory evidence, not to help the prosecution's case in chief. As such, an alibi statute need not violate an accused's constitutional or statutory rights in order to be effective. The statute could ensure a fair trial for both sides, thereby perpetuating respect for the criminal justice system.\textsuperscript{151}

2. General Discovery

Federal Rule of Criminal Procedure 16 authorizes reciprocal prosecutorial and defense discovery rights.\textsuperscript{152} The origi-

\textsuperscript{151} Interestingly, former United States Supreme Court Chief Justice Earl Warren, as District Attorney of Alameda County in 1931, was “heartily in favor” of a five-day notice of alibi statute. In a 1931 California Crime Commission Report, Justice Warren stated that he could see no reason why a defendant who was not present at the time of the commission of the alleged offense should hide that fact from the prosecutor or the court. \textit{Cal. Crime Comm'n Rep.} (10), 2 Appendix to \textit{Cal. J.S. Sen. and Assem.} (1933 Reg. Sess.).

In 1971, Senate Bill No. 230 was introduced by Senators Cologne and Deukmejian and passed 31 votes to 0 in the Senate, 1 \textit{Cal. Sen. J.} 645 (1971 Reg. Sess.), but was reported without action by the Assembly's Committee on Criminal Justice. 7 \textit{Cal. Assem. J.} 12675. (1971 Reg. Sess.).

In 1972, Senate Bill No. 87 and Assembly Bill No. 2128 were introduced during the regular session. The Senate Bill provided for discovery of alibi evidence only, while the Assembly Bill provided for discovery of “discoverable defenses” (alibi and physical incapacity). The Senate Bill was passed by the Senate, but neither bill was reported out of the Assembly Committee on Criminal Justice. \textit{Cal. S. 87} (1972 Reg. Sess.), \textit{Cal. Assem. 2128} (1972 Reg. Sess.).

\textsuperscript{152} Fed. R. Crim. P. 16 Discovery and Inspection.

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which related to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the
nal rule provided only for the defense discovery of evidence

government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the government, the exercise of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigating or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request by the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his
held by the government.\textsuperscript{183} In 1966, the rule was amended to grant discovery powers to the prosecution; the rule's further amendment\textsuperscript{184} gave greater discovery rights to both prosecution and defense.\textsuperscript{185}

The most important federal rule provision is that of qualifying prosecutorial discovery upon the defendant requesting, and the government complying with, discovery of documents, testimony.

(2) Information Not Subject to Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure to Comply with a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1

\textsuperscript{153} FED. R. CRIM. P. 16. See 327 U.S. 821, 846 (1945) for the rule as originally promulgated.

\textsuperscript{154} Amended Feb. 28, 1966, eff. July 1, 1966. These amendments were opposed by Justices Black and Douglas on the grounds that the proposed rules might impinge on the privilege against self-incrimination. Order Amending the Federal Rules of Criminal Procedure, 383 U.S. 1089 (1965).

objects, and reports. Only if the defendant successfully seeks discovery may the government request inspection of defense documents, objects, and reports. This reciprocal arrangement is further qualified by limiting prosecutorial discovery to information which the defendant intends to introduce as evidence at trial. A California statute should incorporate similar provisions. Placing the initiative upon the defendant to trigger the discovery process lessens the constitutional problem of accommodating the fifth amendment. In order to prevent prosecutorial discovery, the defendant can merely refrain from requesting discovery of comparable items from the state. With the defendant in control, the fifth amendment “compulsion” problem is somewhat obviated.

A California statute could also limit the scope of discoverable materials to a range more narrow than that allowed under the federal rule. For example, the federal rule allows discovery of physical and mental examination reports and scientific test results. To lessen the risk of violating the fifth amendment, the California legislature may prefer to include such data in an “Information Not Subject to Disclosure” subsection.

Federal rule 16(b)(2) is a codification of the work product doctrine. This subsection does not allow discovery of defense documents made by the defendant, his attorney, and agents in connection with the investigation or defense of the case. Also, statements may not be discovered if made by the defendant, any witness, or any prospective witnesses to the defendant, his attorney, or agents. The Supreme Court in United States v. Nobles states that the work product rule is vital to the functioning of the criminal justice system. The Nobles

157. Id.
160. See Fed. R. Crim. P. 16 (b)(2) (Information Not Subject to Disclosure) and infra note 165.
162. Id.
163. 422 U.S. 225 (1975).
164. Id. at 238. The United States Supreme Court struck down a fifth amendment claim in Nobles while emphasizing the personal aspect of the self-incrimination privilege as it affects the elements of testimonial communication and compulsion. Id. at 233-34. The Court held that the defendant’s fifth amendment rights were not vio-
Court extended work product protection to all persons involved in preparing the defense. A California general discovery statute should codify this ruling to protect the attorney-client and self-incrimination privileges.

Federal rule 16 does not authorize pre-trial disclosure of witness names. Obviously, a distinction is made between alibi/affirmative defense witnesses and "general" defense witnesses. California should adopt this distinction to ensure that "general" witnesses will come forth to testify and to prevent improper contact with these witnesses directed at influencing their testimony.

Other options are available. A California statute could require greater specificity regarding the type of documents sought and the purpose to be served through their inspection. For example, the legislature may prefer to designate certain defense information as discoverable 1) upon demand without the defense first seeking discovery, 2) only upon in camera inspection if the defendant can show a high probability of self-incrimination, 3) only if it is to be introduced as part of a particular defense, or 4) only during trial. Proposed "timing" and "reciprocal" provisions must not conflict with fifth amendment protections. Unlike federal rule 16, Jones placed the initiative upon the prosecution to commence discovery, rather than upon the discovery-seeking defendant. California
should follow the federal practice which incorporates the reciprocal qualification.

Guided by the federal rule, a California statute should include a protective order provision\textsuperscript{168} employable upon a sufficient showing of self-incrimination dangers. However, this provision should not reopen prosecutorial discovery to judicial discretion. Also, a noncompliance rule and sanction are needed to ensure conformity to the statute.\textsuperscript{169} Although the defendant could not be foreclosed from testifying as he pleases, the legislature may, for example, provide for the preclusion of certain evidence, defenses, or witnesses and may authorize contempt orders as sanctions for noncompliance. Finally, a California statute should mandate a legislative review committee to evaluate the effectiveness and constitutionality of the discovery statute(s) as applied, the number of protective orders sought, and the frequency of non-compliance during the first two years. Positive review should warrant legislative extension.

To summarize, California discovery legislation should incorporate certain crucial elements of federal rules 12.1 and 16. A notice of alibi statute must include a \textit{Wardius} reciprocal provision requiring the state to notify the defendant of prosecution witnesses to rebut alibi testimony. A general discovery statute must place the initiative upon the defendant to trigger the discovery process. Inclusion of these procedural and substantial safeguards prevents violation of the "incrimination,"\textsuperscript{170} "testimonial,"\textsuperscript{171} and "compulsion"\textsuperscript{172} aspects of the fifth amendment.

As long as the underlying premise of criminal discovery is to allow one side to effectively challenge the evidence of the other, a statute authorizing such procedure is essential. Theoretically, a defendant will "introduce at trial"\textsuperscript{173} only exculpatory evidence. Consequently, such evidence would not lessen the prosecution's burden of proving its case.

\textsuperscript{168} \textit{FED. R. CRIM. P.} 16 (d)(1) (Protective and Modifying Orders). See Garison, \textit{Privacy and the Limits of Law}, 89 \textit{YALE L.J.} 421 (1980); but see Gerstein, supra note 91.

\textsuperscript{169} \textit{See FED. R. CRIM. P.} 16 (d)(2).


\textsuperscript{171} \textit{Id.} at 761.

\textsuperscript{172} \textit{Id.} at 764.

\textsuperscript{173} \textit{See} Prudhomme v. Superior Court, 2 Cal. 3d at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133; \textit{FED. R. CRIM. P.} 16 (b)(1)(A).
C. A Final Obstacle

In recent years, state courts have begun to assert themselves as the final arbiters of their own state constitutions in the area of individual rights. Because United States Supreme Court decisions interpreting the Bill of Rights and the 14th Amendment mark the minimum guarantees of individual rights, state courts that give truly independent force to their own constitutions generally reach decisions more protective of those rights than the Supreme Court.\textsuperscript{174}

After the California legislature enacts a notice of alibi and/or general discovery statute, such legislation must pass judicial scrutiny. The United States Supreme Court rulings in \textit{Williams v. Florida}\textsuperscript{175} and \textit{United States v. Nobles}\textsuperscript{176} do not bind the California Supreme Court regarding fifth amendment interpretation. Although California's privilege against self-incrimination is similar to the Bill of Rights' provision,\textsuperscript{177} California may rely on its own interpretation to provide safeguards for defendants beyond those mandated by an interpretation of the United States Constitution. However, "cogent reasons must exist before a state court in construing a provision of the state constitution will depart from the construction placed by the Supreme Court of the United States on a similar provision in the federal constitution."\textsuperscript{178} Fifth amendment broad constructionists undoubtedly assert that any interpretation of a constitutional provision enhancing the protection afforded an accused constitutes "cogent" reasoning.

Article I, section 24 of the California Constitution states

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176. 422 U.S. 225 (1975).
178. Gabrieli v. Knickerbocker, 12 Cal. 2d 85, 89, 82 P.2d 391, 392-93 (1938). See Michigan v. Mosley, 423 U.S. 96 (1975) (Justice Brennan, dissenting at 120-21, stated that "[e]ach State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution," (citing Oregon v. Hass, 420 U.S. 714, 719 (1975); Lego v. Twomey, 404 U.S. 477, 489 (1972); Cooper v. California, 386 U.S. 58, 62 (1967)); "[U]nderstandably, state courts and legislatures are, as matters of state law, increasingly according protections once provided as federal rights but now increasingly depreciated by decisions of this Court."
\end{flushright}
that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."\textsuperscript{179} This pronouncement implicitly conflicts with Article III, section 1 of the California Constitution which states that "[t]he State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."\textsuperscript{180} If Williams and Nobles comport with federal constitutional interpretation, then the question arises whether the principle of federalism permits California to reject "the supreme law of the land" and to develop its own body of constitutional law.\textsuperscript{181} While a responsive analysis of "new federalism" exceeds the scope of this comment,\textsuperscript{182} Arti-

\textsuperscript{179} "Rights not dependent on federal constitution; rights reserved to people. Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.

This declaration of rights may not be construed to impair or deny others retained by the people." \textsc{Cal. Const.} art. I, \S\ 24 (West Supp. 1983).

\textsuperscript{180} \textsc{Cal. Const.} art. III, \S\ 1 (West Supp. 1983).

\textsuperscript{181} In \textit{People v. Disbrow}, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976), the California Supreme Court reaffirmed the independent nature of the California Constitution and the supreme court's responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal constitution. In dissent, Justice Richardson offered the following:

\begin{quote}
In my view, in the absence of very strong countervailing circumstances we should defer to the leadership of the nation's highest court in its interpretation of nearly identical constitutional language [privilege against self-incrimination], rather than attempt to create a separate echelon of state constitutional interpretations to which we will advert whenever a majority of this court differ from a particular high court interpretation. The reason for the foregoing principle is that it promotes uniformity and harmony in an area of the law which peculiarly and uniquely requires them. The alternative required by the majority must inevitably lead to the growth of a shadow tier of dual constitutional interpretations state by state which, with temporal variances, will add complexity to an already complicated body of law.

The vagaries and uncertainties of constitutional interpretations, particularly in the Fourth and Fifth Amendment sectors of our criminal law, are the hard facts of life with which the general public, the courts, and law enforcement officials must grapple daily. This condition necessarily breeds uncertainty, confusion, and doubt. It will not be eased or allayed by a proliferation of multiple judicial interpretations of nearly identical language.
\end{quote}

\textit{Id.} at 119, 545 P.2d at 284, 127 Cal. Rptr. at 372 (Richardson, J., dissenting).

cle I, section 24 of the California Constitution apparently answers this question in the affirmative. Thus, federalism demands recognition of the possibility that despite time-tested federal and sister state precedent, a California discovery statute may be found unconstitutional by the California Supreme Court.

V. CONCLUSION

The absolute ban on prosecutorial discovery in California is unacceptable. The California Supreme Court decision in People v. Collie effectively blocks access to even exculpatory defense evidence. The consequences of this ruling compromise the just resolution of criminal cases and the confidence in the criminal justice system.

Our adversary system relies upon an efficient fact-finding process and upon well-developed presentations to the jury. The ability to streamline these presentations and to challenge the opponent’s evidence depends on mutual access to pertinent information. Prosecutorial discovery facilitates thorough preparation of cross-examination, discovery of rebuttal evidence, and effective law enforcement by minimizing the incidence of fabricated alibis, “eleventh hour” defenses, surprises and delays at trial.

A zealous interpretation of the fifth amendment need not preclude prosecutorial discovery. Although the California Supreme Court’s construction of the state constitution need not automatically follow the United States Supreme Court’s construction of parallel provisions in the federal constitution, the precedential value of federal rulings is nonetheless compelling. The Federal Rules of Criminal Procedure complement federal case law and authorize notice of alibi, notice of insanity, and general discovery procedures. After the California legislature follows this guidance and enacts prosecutorial discovery rules, the California Supreme Court must scrutinize the legislation through a balancing of state and individual interests. An objective appraisal of these interests should remove Justice Mosk’s “grave doubts that a valid discovery rule affecting

criminal defendants can be devised"\textsuperscript{186} and reopen "Discovery Street"\textsuperscript{186} to prosecution and defense.

\textit{Daniel G. Herns}