Prosecutorial Discovery and the Privilege Against Self-Incrimination: Accommodation or Capitulation

By GORDON VAN KESSEL*

Introduction

> [O]ur Bill of Rights guarantees are essential to individual liberty and . . . they state their own values leaving no room for courts to "weigh" them out of the Constitution.[1]
>
> [The People suggest] a balancing test in which the state's interest is weighed against and may offset the accused's interest in the risk of self-incrimination. [The privilege against self-incrimination] leaves no room for a balancing of interests.[2]

Perhaps no other constitutional guarantee offers a judge a more difficult challenge or more clearly reveals his assessment of the relative importance of primary constitutional values than the privilege against self-incrimination, particularly when asserted by a criminal defendant in the face of a prosecutor's request for pre-trial discovery. On the one hand, our system of criminal justice is based upon an accusatorial rather than an inquisitorial method of fact determination, and the privilege against self-incrimination is the "mainstay" of that system.[3] In order to maintain a proper balance between the state's interest in law enforcement and the individual's right to freedom from unjustified restraint, the state has the burden of proving the defendant's guilt. Moreover, the state must respect the dignity of the individual in meeting its burden; the prosecution may not resort to coercion of evidence from the lips of the accused, rendering him an unwilling instrument of his own destruction.[4] It follows that a defendant should not be

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1. Cohen v. Hurley, 366 U.S. 117, 134 (1961) (Black, J., dissenting) (footnote omitted).

2. Allen v. Superior Court, 18 Cal. 3d 520, 525, 557 P.2d 65, 67, 134 Cal. Rptr. 774, 776 (1976) (Wright, C.J., writing for the majority).

3. Malloy v. Hogan, 378 U.S. 1, 7 (1964); *see, e.g.,* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). *See generally* 8 J. WIGMORE, EVIDENCE § 2251 (McNaughton rev. 1961) [hereinafter cited as WIGMORE].

4. Tehan v. Shott, 382 U.S. 406, 414 (1966); WIGMORE, *supra* note 3, § 2251, at 315-18.

compelled to give incriminating evidence to the prosecution under the guise of pre-trial discovery.

On the other hand, the adversary system is not an end in itself. A principal justification for the system is the belief that a reasonable approximation of the truth will emerge from the clash of opposing positions. This will not occur, however, unless both adversaries are aware of the relevant evidence and have had a reasonable opportunity to investigate and prepare for their encounter.[5] Recognition of the state's superior resources and more effective position as a factfinder suggests that it should, to some extent, share its information with the defense. The discovery process must, however, necessarily be reciprocal; otherwise, the state would be left at such a disadvantage that the integrity of the adversary system would be severely compromised.

During his term on the California Supreme Court, Chief Justice Donald R. Wright twice faced what Professor Louisell has characterized as the "hard questions"[6] involved in attempting to resolve the conflicts inherent in these fundamental values. In *Reynolds v. Superior Court*,[7] the California Supreme Court struck down a trial court discovery order directing the defendant to give advance notice of alibi witnesses. Writing for the majority, Chief Justice Wright concluded that the court should refrain from creating a notice-of-alibi rule by judicial decision because of the intricate state and federal constitutional questions involved and should thus defer judgment on the constitutionality of such a rule until enacted by the legislature. In *Allen v. Superior Court*,[8] Chief Justice Wright again wrote the majority opinion in which the court reviewed a trial court order directing disclosure of the names of prospective prosecution and defense witnesses for the purpose of discovering any acquaintance with the prospective jurors. Although the order was not couched in terms of pre-trial discovery, it was found to impinge upon the privilege against self-incrimination because it could "conceivably . . . lighten the prosecution's burden of proving its case-in-chief"[9] and therefore might "possibly have a tendency to incriminate" the defendant.[10]

While aware of the need for judicial efficiency in pre-trial discovery, Chief Justice Wright demonstrated in both cases his respect for the privilege

5. Williams v. Florida, 399 U.S. 78, 81-82 (1970); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228 (1964) [hereinafter cited as Traynor].

6. Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF. L. REV. 89 (1965) [hereinafter cited as Louisell].

7. 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974).

8. 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976).

9. *Id.* at 525, 557 P.2d at 67, 134 Cal. Rptr. at 776 (emphasis ommitted) (quoting Prudhomme v. Superior Court, 2 Cal. 3d 320, 326, 466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970)).

10. *Id.* at 520, 526, 557 P.2d at 68, 134 Cal. Rptr. at 777.

against self-incrimination and his determination to limit encroachments upon it. His broad view of the privilege in the context of prosecutorial discovery was, however, contrary to both that held by his predecessor, Chief Justice Roger Traynor, and the view to which a majority of the United States Supreme Court now subscribe.[11] It is their belief that limited prosecutorial discovery should be allowed because the mere acceleration of disclosure does not constitute compulsion within the meaning of the privilege. Under the leadership of Chief Justice Wright, therefore, the California Supreme Court has embarked upon an independent and far-reaching interpretation of the privilege against self-incrimination under the California Constitution.

The purpose of this article is to determine whether a proper interpretation of the privilege against self-incrimination permits any form of prosecutorial discovery of defense evidence. Part I will initially focus on the development of prosecutorial discovery in California in light of concurrent rulings of the United States Supreme Court. The present status of the California rule, as articulated by Chief Justice Wright, will then be reviewed. In Part II, the author analyzes the threat prosecutorial discovery poses to the values protected by the privilege. The dangers posed by the manner in which the prosecution intends to use defense evidence will be specifically addressed. This analysis will be followed by an examination of the state's interest in the effective operation of the criminal justice system. Finally, possible avenues of accommodation will be suggested and evaluated. In light of the difficulty in arriving at an accommodation that will both permit prosecutorial discovery and remain solicitous of the values underlying the privilege, the author concludes that California courts should proceed with caution when considering prosecutorial requests for reciprocal discovery rights.

I. Development of Prosecutorial Discovery in California

A. Changing the Direction of Traffic

Until two decades ago, criminal discovery in California, as in other jurisdictions, was the stepchild of the law. While there was both experimentation with criminal discovery and a trend toward more liberal discovery rules, most jurisdictions took a position similar to that of the federal courts—they remained cautious. Nevertheless, the California Supreme Court embarked upon a full-scale expansion of criminal discovery for the defense in 1956.[12] By the mid-1960's, California was at the forefront of all other

11. *See* Williams v. Florida, 399 U.S. 78 (1970); Traynor, *supra* note 5.
12. *See* People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956).

jurisdictions in the development of criminal defense discovery.[13] The liberal principles articulated by Chief Justice Traynor, in fact, continue to be relied upon today by the California Supreme Court:

> Defendant must show better cause for discovery "than a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime." A showing, however, that the defendant cannot readily obtain the information through his own efforts will ordinarily entitle him to pretrial knowledge of any unprivileged evidence, or information that might lead to the discovery of evidence, if it appears reasonable that such knowledge will assist him in preparing his defense.[14]

In 1962, the California Supreme Court confronted the prosecutor's demand for a *quid pro quo*. In *Jones v. Superior Court*,[15] the court affirmed, in part, an order granting a prosecutor's pre-trial motion to discover evidence relating to a particular defense that the defendant had previously revealed he would claim against a charge of rape. On the day of his trial the defendant moved for a continuance on the ground that he should be allowed to gather medical reports showing that he had suffered injuries that had rendered him impotent. The motion was granted, and four days later the prosecution filed a motion for discovery requesting: (1) the names and addresses of all physicians and surgeons subpoenaed to testify on the defendant's behalf with respect to the claimed injuries; (2) the names and addresses of all physicians who had treated defendant prior to trial; (3) all medical reports pertaining to the physical condition of the defendant in regard to the injuries and the question of impotence; and (4) all x-rays of defendant taken immediately following the injuries. The trial court granted the motion over the defendant's objection. The defendant then sought a writ of prohibition from the California Supreme Court.

Writing for the court, Justice Traynor acknowledged that the order would violate the privilege against self-incrimination to the extent that it sought the benefit of the defendant's knowledge of the existence of possible witnesses, reports, or x-rays. Moreover, to the extent that it sought reports made by physicians to whom defendant had been sent by his attorney for examination, Justice Traynor recognized that the order would violate the attorney-client privilege. With respect to the names and addresses of witnesses defendant intended to introduce at trial, however, Justice Traynor felt that this information was analogous to alibi evidence, which may be com-

13. Louisell, *supra* note 6, at 90; Traynor *supra* note 5, at 229-30. The phenomenal growth of criminal discovery in California has been noted earlier. *See* Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 59 (1961). *See also* Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 297 (1960).

14. Traynor, *supra* note 5, at 244.

15. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

pelled without violation of the privilege because the defendant would voluntarily disclose such evidence at trial.

> The identity of the defense witnesses and the existence of any reports or X-rays the defense offers in evidence will necessarily be revealed at the trial. The witnesses will be subject to study and challenge. Learning the identity of the defense witnesses and of reports and X-rays in advance merely enables the prosecution to perform its function at the trial more effectively.[16]

Accordingly, the court upheld that part of the discovery order pertaining to "the names of the witnesses . . . [defendant intended] to call and any reports and x-rays he [intended] to introduce in evidence in support of his affirmative defense of impotence."[17] Justice Traynor emphasized both the recent advances in criminal discovery for the defense and the importance of discovery in general as a device by which to ascertain the truth in criminal as well as civil cases. Absent some governmental requirement of secrecy, "the state has no interest in denying the accused access to all evidence that can throw light on issues in the case."[18] Conversely, "absent a privilege . . . , the defendant in a criminal case has no valid interest in denying the prosecution access to evidence . . . ."[19] Since the purpose of pre-trial discovery is to ascertain the truth, Justice Traynor concluded that "[t]hat procedure should not be a one-way street."[20]

In a sharply worded dissent, Justice Peters strongly objected to that part of the decision upholding the discovery order. According to his view, the reasoning of the majority "fundamentally alters our concepts of the rights of the accused and forces him to come forward with evidence before the prosecution has presented its case against him."[21] Justice Peters noted that "until today . . . a defendant [in California] could weigh his proposed evidence against the prosecution's case, and not make up his mind until he heard the strength or weakness of the case against him whether he would rely on a straight not guilty defense or urge an 'affirmative defense.' Now he must make that decision before the state's presentation."[22] While cognizant that a criminal trial should be fair to the prosecution as well as to the defense, Justice Peters emphasized that the defendant has additional constitutional and statutory rights not given to the prosecution. He reasoned that all of these rights—the right not to incriminate oneself, the right to remain mute until a prima facie case has been established, the right to the presump-

16. *Id.* at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882.
17. *Id.*
18. *Id.* at 59, 372 P.2d at 920, 22 Cal. Rptr. at 880.
19. *Id.*
20. *Id.* at 60, 372 P.2d at 921, 22 Cal. Rptr. at 881.
21. *Id.* at 65, 372 P.2d at 924, 22 Cal. Rptr. at 884 (Peters, J., dissenting).
22. *Id.* at 66, 372 P.2d at 925, 22 Cal. Rptr. at 885 (Peters, J., dissenting).

tion of innocence until proven guilty beyond a reasonable doubt—demonstrate "that our system of criminal procedure is founded upon the principle that the ascertainment of the facts is a 'one-way street.' "[23]

At the time of the *Jones* decision, the United States Supreme Court was embarking upon the selective incorporation of the Bill of Rights into the due process clause, which is enforceable against the states under the Fourteenth Amendment.[24] Because the Fifth Amendment privilege against self-incrimination had not, as yet, been incorporated,[25] however, the *Jones* opinion relied on an interpretation of the privilege as contained in the California Constitution. Two broad currents were thus forming at the same time, but they appeared to run in different directions. On the one hand, trial and appellate courts in California were experimenting with various forms of prosecutorial discovery, thus bearing out Justice Peters' admonition that *Jones* would not be limited to particular and narrow "affirmative defenses" but would be extended to "any defense other than a mere attempt to refute the prosecution's witnesses."[26] On the other hand, the United States Supreme Court applied the Fifth Amendment privilege against self-incrimination to the states,[27] and began to show a greater concern for protection of the privilege both at the trial and at the pre-accusatory stage of criminal proceedings.[28]

The California Supreme Court squarely faced these two cross-currents in 1970 when it was forced to interpret the Fifth Amendment privilege in the case of *Prudhomme v. Superior Court*.[29] In that case, a discovery order attempted to compel the defense attorney to disclose the names, addresses, and expected testimony of the witnesses the defendant intended to call at trial. In recognition of the increasing scope of the Fifth Amendment guarantee as interpreted by the United States Supreme Court and of the Court's recent grant of certiorari in a case upholding Florida's notice-of-alibi statute against a claim that it violated that Amendment,[30] the court reasoned that,

23. *Id.* at 64, 372 P.2d at 924, 22 Cal. Rptr. at 884 (Peters, J., dissenting).

24. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

25. Adamson v. California, 332 U.S. 46 (1947).

26. 58 Cal. 2d at 66, 372 P.2d at 925, 22 Cal. Rptr. at 885. *See* People v. Pike, 71 Cal. 2d 595, 455 P.2d 776, 78 Cal. Rptr. 672 (1969); Ruiz v. Superior Court, 275 Cal. App. 2d 633, 80 Cal. Rptr. 523 (1969); McGuire v. Superior Court, 274 Cal. App. 2d 583, 79 Cal. Rptr. 155 (1969); People v. Dugas, 242 Cal. App. 2d 244, 51 Cal. Rptr. 478 (1966).

27. Malloy v. Hogan, 378 U.S. 1 (1964).

28. Adverse comment or instruction on a defendant's invocation of the privilege at the time of trial was forbidden on the ground that it would make invocation of the privilege more costly. Griffin v. California, 380 U.S. 609 (1965). Strict procedural protections were enunciated for the maintenance of the privilege during the investigatory stage. Miranda v. Arizona, 384 U.S. 436 (1966).

29. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

30. *Id.* at 324, 466 P.2d at 675, 85 Cal. Rptr. at 131. The court also noted that the existing Federal Rules of Criminal Procedure allowed prosecutorial discovery of physical evidence

> significant developments in the law since *Jones* . . . caution us not to extend its holding beyond its facts without careful consideration of the possible effects which such extension could have upon the accused's rights and privileges, and especially his fundamental right not to be compelled to be a witness against himself.[31]

The court concluded that the state must bear the burden of proving its case-in-chief, without assistance either from the defendant's silence or his compelled testimony:

> [I]t is apparent that the 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. Although the prosecution should not be completely barred from pretrial discovery, defendant must be given the same right as an ordinary witness to show that the disclosure of particular information could incriminate him.
>
> An ordinary witness need not actually prove the existence of an incriminatory hazard as that would surrender the very protection which the privilege against self-incrimination was designed to guarantee. Instead, the privilege forbids compelled disclosures which could serve as a "link in a chain" of evidence tending to establish guilt of a criminal offense; in ruling upon a claim of privilege, the trial court must find that it clearly appears from a consideration of all the circumstances in the case that an answer to the challenged question cannot possibly have a tendency to incriminate the witness.[32]

The court hypothesized several situations in which the information sought might provide "an essential link" in the prosecutorial chain of evidence.[33] Since the discovery order was not limited to any particular defense or category of witnesses from which the court might assess the incriminatory nature of the information, it was found to violate the Fifth Amendment privilege. The court did not, however, entirely disapprove *Jones*:

> We do not intend to suggest that the prosecution should be barred from any discovery in this, or any other, case. A reasonable demand for factual information which, as in *Jones*, pertains to a particular defense or defenses, and seeks only that information which defendant intends to introduce at trial, may present no

only, there being no provision for disclosure of names, addresses, or expected testimony of defense witnesses. *Id.*

31. *Id.* at 323, 466 P.2d at 675, 85 Cal. Rptr. at 131.

32. *Id.* at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133.

33. For example, pre-trial disclosure of a self-defense witness in a murder case might provide the prosecution with its only eyewitness to the homicide, and pre-trial disclosure of a witness who would testify that the defendant committed a lesser included offense but whom defendant intended to call only as a last resort would directly incriminate defendant as to the lesser offense. *Id.* at 327, 466 P.2d at 677, 85 Cal. Rptr. at 133.

> 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 defendant.[34]

Although the door opened in *Jones* was not closed, passage was clearly not available to every intruder. The majority left room for prosecutorial discovery in cases meeting the following criteria: (1) the demand is reasonable and relates to a particular defense or defenses; (2) the order is limited to information that the defendant intends to introduce at trial; and (3) the trial court has found from a review of the facts and circumstances in the case that the disclosures ordered cannot possibly tend to incriminate the defendant, that is, to lighten the prosecution's burden of proving its case.

Two months later, in *Williams v. Florida*,[35] the United States Supreme Court upheld Florida's notice-of-alibi rule against a claim that it violated the Fifth Amendment privilege against compelled self-incrimination. That rule required a defendant, upon written demand of the prosecuting attorney, to give notice in advance of trial if the defendant intended to raise an alibi defense, and to furnish the prosecutor with information as to the place where he claimed to have been and with the names and addresses of the alibi witnesses he intended to use. In exchange for this information, the state was required to notify the defendant of any witnesses it proposed to offer in rebuttal. Both sides were under a continuing duty to disclose the specified information as it became available. As a sanction for failure to comply, the rule provided for exclusion of the alibi or rebuttal evidence at trial, with the exception of defendant's own testimony.[36]

Noting the ease with which an alibi can be fabricated, the legitimacy of the state's interest in protecting itself against an "eleventh-hour defense,"[37] and the wide acceptance of notice-of-alibi provisions in many jurisdictions, the United States Supreme Court found no violation of due process. "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played."[38] With respect to the Fifth Amendment privilege against self-incrimination, the court in *Williams* adopted the rationale of the *Jones* majority. Although disclosed information is often testimonial and at times incriminating, the court concluded that it could not be considered compelled:

> At most the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date

34. *Id.*
35. 399 U.S. 78 (1970).
36. *Id.* at 80.
37. *Id.* at 81.
38. *Id.* at 82.

> information that the petitioner from the beginning planned to divulge at trial. Nothing in the 5th Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the state's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the state's case-in-chief before deciding whether or not to take the stand himself.[39]

In a strong dissent, Justice Black expressed his fear that the *Jones* rationale provided a basis for extension of discovery far beyond alibi defenses:

> The rationale of today's decision is in no way limited to alibi defenses, or any other type or classification of evidence. The theory advanced goes at least so far as to permit the state to obtain under threat of sanction complete disclosure by the defendant in advance of trial of all evidence, testimony, and tactics he plans to use at the trial. In each case the justification will be that the rule affects only the "timing" of the disclosure, and not the substantive decision itself.[40]

By the end of 1970, it was thus clear that the Fifth Amendment privilege against self-incrimination did not always foreclose discovery by the prosecution in a criminal case.[41] A properly drawn notice-of-alibi rule or statute would survive an attack based upon the federal Constitution; the door was open for discovery of certain other defenses. Yet the question remained: Would the California Supreme Court in interpreting the self-incrimination privilege of the California Constitution be content with the meaning given the Fifth Amendment privilege by the United States Supreme Court? If not, could a narrowly drawn order aimed at discovery of alibi or other defenses satisfy the *Prudhomme* standard? When Chief Justice Wright joined the California Supreme Court, he was presented with this dilemma.

B. The Two-Way Street as Creating or Curing the Balance

In *Reynolds v. Superior Court*,[42] the California Supreme Court indicated that it would not be content to limit the California constitutional privilege against self-incrimination to the scope given the Fifth Amendment

39. *Id.* at 85.

40. *Id.* at 114 (Black, J., dissenting in part).

41. In two subsequent decisions, however, the United States Supreme Court made it clear that the privilege against self-incrimination was not to be disregarded during discovery. In Brooks v. Tennessee, 406 U.S. 605 (1971), the Court invalidated a state statute requiring a defendant, if he intended to testify, to do so before any other defense witness because it placed a heavy burden on defendant's right not to testify by exacting a price for his silence. In Wardius v. Oregon, 412 U.S. 470 (1973), the Court struck down Oregon's notice-of-alibi statute because it did not give the defendant a corresponding right to discover the state's rebuttal evidence. The Court concluded in that case that due process poses limits to prosecutorial discovery: "It is fundamentally unfair to require a defendant to divulge the details of his own case while . . . subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state." *Id.* at 476.

42. 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974).

privilege by the United States Supreme Court. In that case, the superior court granted the state's motion for discovery, which directed the defendant to give at least three days' notice of calling any alibi witness at trial, together with names, addresses, and telephone numbers of such witnesses. The prosecution was in turn ordered to provide the defendant with any evidence impeaching the alibi witnesses. The court's sanction provided for the exclusion at trial of any witness' testimony or other evidence covered by the order that had not been disclosed. Speaking for the court, Chief Justice Wright first reviewed the relevant authorities since *Jones* and concluded that the order under review "presented delicate and difficult questions of constitutional law, both state and federal."[43] With respect to state constitutional questions, he reasoned:

> While *Williams* may have laid to rest the contention that notice-of-alibi procedures are inconsistent with the federally guaranteed privilege against self-incrimination, this privilege is also secured to the people of California by our state Constitution, whose construction is left to this court, informed but untrammelled by the United States Supreme Court's reading of parallel federal provisions.[44]

Since *Prudhomme's* more stringent standard was, in part, based upon the California Supreme Court's reading of pre-*Williams* federal law, Chief Justice Wright maintained "that *Prudhomme* put this court on record as being considerably more solicitous of the privilege against self-incrimination than federal law currently requires."[45] Accordingly, the court would have to address the validity of a notice-of-alibi procedure under the California Constitution were it to establish such a rule.

With respect to federal constitutional questions, Chief Justice Wright found that the order under review failed to meet the criteria of fundamental fairness in two respects. First, it did not require the prosecution to name with specificity the time and place of the alleged crimes for which the defendant might offer alibis. Second, the order did not provide for a reciprocal discovery right as recently mandated by the United States Supreme Court in *Wardius v. Oregon*;[46] that is, there was no requirement that the prosecution furnish the names and addresses of witnesses who would be called to rebut the alibi defense.[47] Thus, even if the court were to find the

43. *Id.* at 842, 528 P.2d at 49, 117 Cal. Rptr. at 441.

44. *Id.*

45. *Id.* at 843, 528 P.2d at 50, 117 Cal. Rptr. at 442.

46. 412 U.S. 470 (1973). See note 41 *supra*.

47. Although the trial court indicated its willingness to comply with *Wardius*, Chief Justice Wright noted that that case required a greater degree of predictability when reciprocal disclosure beyond the text of the order is to be relied upon for validation. 12 Cal. 3d at 845, 528 P.2d at 52, 117 Cal. Rptr. at 444.

order consistent with the California Constitution, it would necessarily have to restrain enforcement absent compliance with the required reciprocal discovery. In determining what was required, the court would be creating by judicial act "a comprehensive notice-of-alibi procedure for California courts";[48] this Chief Justice Wright was hesitant to do. He noted, in particular, the difference between the prescription of judicial procedures that were necessary to protect constitutional guarantees and the design of procedures that were permissible in spite of constitutional rights or guarantees: "In the former instance, constitutional principles guide the court's hand; in the latter instance constitutional principles may well have to stay the court's hand."[49] Chief Justice Wright was therefore reluctant to "present this court with a conflict between its role as a common law rule-maker and its role as a constitutional umpire."[50]

Other jurisdictions had established notice-of-alibi procedures either by statute or by vesting rule-making authority in their supreme courts through their state constitutions. The notice-of-alibi procedure in the federal courts was established by amendments to the Federal Rules of Criminal Procedure rather than by the United States Supreme Court under its inherent supervisory powers. The California Supreme Court, however, has no quasi-legislative rule-making powers and the Judicial Council is vested with only limited powers, because its rules are subordinate to statutory law.[51] Accordingly, Chief Justice Wright concluded in *Reynolds*:

> [D]ue regard for this court's function as a 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.[52]

While *Reynolds* did not explicitly reject either the reasoning or the holding of *Jones*, it raised serious doubts concerning the continued validity of the *Jones* principles. First, *Reynolds* strongly implied that the stricter *Prudhomme* standard would be applied if the court were to rule on the merits. Had the court looked upon the protections provided by the Fifth Amendment of the federal Constitution and those provided by the California constitutional privilege as identical, it probably would not have found such "delicate and difficult questions" of state constitutional law. Second, al-

48. *Id.*

49. *Id.* at 846, 528 P.2d at 52, 117 Cal. Rptr. at 444. This principle was later applied by Chief Justice Wright in another context—an invitation to rewrite the California death penalty statutes to conform with subsequent United States Supreme Court decisions. *See* Rockwell v. Superior Court, 18 Cal. 3d 420, 445-46, 556 P.2d 1101, 1116, 134 Cal. Rptr. 650, 665 (1976).

50. 12 Cal. 3d at 847, 528 P.2d at 54, 117 Cal. Rptr. at 446.

51. *Id.* at 849 n.23, 528 P.2d at 55 n.23, 117 Cal. Rptr. at 447 n.23.

52. *Id.* at 849-50, 528 P.2d at 55, 117 Cal. Rptr. at 447.

though the court did not question the validity of *Jones'* recognition of the inherent power of the court to provide for the orderly administration of justice through judicially declared rules of criminal discovery, it plainly rejected language in *Jones* indicating that it is no less appropriate to develop prosecutorial discovery rules than defense discovery rules.[53]

It is ironic that the question left open in *Reynolds* with respect to the continuing validity of the strict *Prudhomme* standard would be answered by a case that did not involve a prosecutorial discovery order. In *Allen v. Superior Court*,[54] the trial court on its own motion ordered both the people and the defendant to disclose, on the day of trial, the names of prospective witnesses so that any potential juror's acquaintance with them might be ascertained. The court advised counsel that the names would not be identified to the jurors as defense or prosecution witnesses and also proposed to enjoin the prosecutor from contacting any individual named by the defense until the name of such person was otherwise disclosed during the course of the trial. Chief Justice Wright, writing for the majority, found that the order of disclosure violated the privilege against self-incrimination guaranteed by the California Constitution, resting his decision on the standards previously set forth in *Prudhomme*.[55] Moreover, he rejected the contention that the application of that standard should depend on the importance of the competing governmental interests, which in this case were the interests in securing a trial by an unbiased jury and in avoiding the possibility of trial disruption. "[Such a] proposition suggests a balancing test in which the state's interest is weighed against and may offset the accused's interest in the risk of self-incrimination. The *Prudhomme* standard leaves no room for a balancing of interests."[56] The Chief Justice also rejected a limitation of the *Prudhomme* test to either pre-trial discovery orders or discovery orders resulting from a motion by the prosecutor.

Applying these principles, Chief Justice Wright found that the trial judge had failed to make the requisite inquiry and that if the court had so inquired, it would have found that the disclosure might possibly have tended to incriminate the defendant. Like *Prudhomme*, the order covered the names of all witnesses and was not limited to any particular defense; revealing the names of witnesses could thus reveal the nature of the defense. Unlike *Prudhomme*, the order did not encompass the addresses of prospective witnesses, and the prosecution was enjoined from contacting the witnesses until their names were otherwise revealed in the course of the trial.

53. *See* Jones v. Superior Court, 58 Cal. 2d 56, 59, 372 P.2d 919, 921, 22 Cal. Rptr. 879, 881 (1962).

54. 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976).

55. *Id.* at 525, 557 P.2d at 68, 134 Cal. Rptr. at 777.

56. *Id.*

Nevertheless, Chief Justice Wright pointed out that names of witnesses ordinarily lead to their addresses and that the restriction on witness contact would not preclude investigation of other matters suggested by those names, which could then lead to details of the defenses and to impeachment or rebuttal evidence.[57]

Supporters of the two-way street rationale find little comfort in *Allen*. *Allen* is not just another example of judicial resort to independent state grounds. The holding in *Jones* rested on the California Constitution. By rejecting the rationale of that case, *Allen* represented a reinterpretation of the California constitutional privilege against self-incrimination. *Allen* also appears to view the *Prudhomme* standard in a more severe light than the *Prudhomme* court itself did. While the court in the latter case reaffirmed the validity of *Jones* and expressly recognized that some discovery orders could pose "no substantial hazards of self-incrimination,"[58] the *Allen* court neither referred to *Jones* nor alluded to such a possibility. In applying the *Prudhomme* test to the facts, *Allen* relied upon hypotheticals that suggested that *any* required disclosure of defense information or evidence would violate the standard.

> For example, if the defense witnesses identified are friends or relatives of an accused, the prosecution can anticipate an alibi defense; if police officers, the defense of entrapment can be projected. The trial judge's qualification of the instant order in no way

57. Justice Sullivan viewed the rationale of *Prudhomme* as too limited. He concurred in the judgment on the ground that an accused should not be compelled to provide information before the prosecution has made its case against him. 18 Cal. 3d at 527, 557 P.2d at 68, 134 Cal. Rptr. at 777 (Sullivan, J., concurring). Justices Clark and McComb dissented, taking the position that the California privilege should not be interpreted more broadly than the federal privilege. *Id.* at 534, 557 P.2d at 72, 134 Cal. Rptr. at 781 (Clark, J., dissenting). Justice Richardson dissented, finding himself in a position "at a point roughly midway between that of the majority and that of the dissent." *Id.* at 527, 557 P.2d at 68, 134 Cal. Rptr. at 777 (Richardson, J., dissenting). First, in the absence of strong countervailing circumstances or policy reasons, Justice Richardson would "defer to the leadership of the nation's highest court in its interpretation of nearly identical constitutional language, rather than attempt to create a separate echelon of state constitutional interpretations . . . .' " *Id.* at 529, 557 P.2d at 70, 139 Cal. Rptr. at 779 (quoting People v. Disbrow, 16 Cal. 3d 101, 119, 545 P.2d 272, 284, 127 Cal. Rptr. 360, 372 (1976) (Richardson, J., dissenting)). While not necessarily advocating that *Prudhomme* be overruled, Justice Richardson would not adopt its strict test without further analysis of the recent United States Supreme Court decisions and of the possibility of adopting a position between the rationale of those decisions and the reasoning of *Prudhomme*. Assuming acceptance of the *Prudhomme* standard, however, he did not feel that the order in *Allen* violated it. "[T]he freest speculation yields little to support any fear of self-incriminations"; advance disclosure of potential witnesses would provide only "the barest indication of possible defenses." *Id.* at 531-32, 557 P.2d at 71, 134 Cal. Rptr. at 780. In addition, the order restricting witness contact would allow the prosecution only a few additional days in which to investigate potential witnesses to accumulate impeachment evidence, an opportunity the state may have in any event when the defendant presents his case and the names of his witnesses become known.

58. Prudhomme v. Superior Court, 2 Cal. 3d 320, 327, 466 P.2d 673, 678, 85 Cal. Rptr. 129, 134 (1970).

> prevents the People from investigating the background of the designated witnesses or questioning their friends or acquaintances. Such investigation may reveal the details of the alibi or other defenses, or may yield other evidence useful to the prosecution including impeachment witnesses, inconsistent statements, and admissible evidence of specific instances of misconduct by the prospective witnesses.[59]

It is difficult to conceive of a defense disclosure order that would not enable the prosecutor to "anticipate" or "project" a particular defense or that might not lead to some "details" of a particular defense or to some "impeachment" evidence.

It is doubtful, however, that Chief Justice Wright meant to eliminate all procedures that require advance notice of an asserted defense, or, more particularly, to sweep away the long-recognized requirement of advance notice of an insanity defense.[60] The language of the *Prudhomme* standard refers to the possibility that the disclosures might lighten the prosecutor's burden of proving its case-in-chief; this may be interpreted to mean that evidence that would be of no value to the state in its own case, although possibly helpful for impeachment or rebuttal purposes, would not fall within the prohibition of the standard. The brief opinion in *Allen* does not touch upon these conundrums.

II. The Future of Mutual Discovery

A. Purposes of Privilege

In view of the current uncertainty and the breadth of interpretation left to the court in the area of prosecutorial discovery, it is important to ask whether the court should re-examine the principles stated by Chief Justice Wright. Should the implications of *Allen* be adopted or should the court endeavor to raise *Jones* from the ashes and recognize some mutuality in criminal discovery? In order to answer this inquiry, the purposes of the privilege against self-incrimination must first be examined. This is itself a formidable undertaking, particularly in light of the extensive development of other constitutional guarantees that serve to protect overlapping of sometimes identical values.[61] Yet, of the many reasons for the privilege, two are paramount. By depriving the state of any authority to compel self-incriminating disclosures, the privilege (1) prevents brutality, torture, and other forms of abusive and inhuman treatment of an individual at the hands of the state's agents; and (2) maintains a system of proof by which the state

59. 18 Cal. 3d at 526 n.4, 557 P.2d at 68 n.4, 134 Cal. Rptr. at 777 n.4.

60. *See* CAL. PENAL CODE § 1026 (West Supp. 1977).

61. *See* McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 194 [hereinafter cited as McKay].

is forced to "shoulder the entire load."[62] In the first instance, official misconduct arises most often in extra-judicial contexts, such as police interrogations. The preventative function of the privilege, therefore, has little to do with judicially-controlled discovery, which arises in the environment of a public courtroom with a reporter and defense counsel present.

In the second instance, however, application of the privilege has a direct bearing on the judicial process. The conclusion that the state must "shoulder the entire load" in proving guilt is thought to follow from the need to serve a number of purposes, such as the need to protect the innocent,[63] and the preservation of the privilege as the mainstay of our adversary system of justice.[64] Such statements, however, are themselves conclusory in nature. Application of the privilege, at least in the context of judicial proceedings, has only the most tenuous relationship to protection of the innocent, and more often frustrates rather than enhances the search for truth.[65] Likewise, the maintenance of our adversary system of justice is only

62. WIGMORE, *supra* note 3, § 2251, at 315-18; *see* Tehan v. Shott, 382 U.S. 406, 414-15 (1966).

63. *See* Griffin v. California, 380 U.S. 609, 614-15 (1965); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

64. "[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay." Malloy v. Hogan, 378 U.S. 1, 7 (1964). "The privilege against self-incrimination . . . reflects . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice." Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

65. "[The] basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction . . . ." Tehan v. Shott, 382 U.S. 406, 415 (1966). *See* Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541, 547-49 (1956); McNaughton, *The Privilege Against Self-Incrimination, its Constitutional Affectation, Raison d'Etre and Miscellaneous Implications*, 51 J. CRIM. L.C. & P.S. 138 (1960). "The implication that the privilege protects the innocent at the trial stage must be drastically qualified. It is unlikely that it will be invoked by an innocent defendant except where he fears prejudicial impeachment or where he is trying to achieve ends which the law does not recognize as legitimate . . . . [I]t seems highly unlikely that an innocent defendant, properly advised, will exercise the privilege in order to avoid prejudice from his unprepossessing appearance, from his nervousness, his halting speech, or from his inability to cope with a clever or unscrupulous cross-examiner. The dangers of such prejudices are generally more remote than the almost certain risk of an adverse inference from the defendant's silence." Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 690-91 (1951) (footnotes omitted).

It should be noted that the fear of prejudicial impeachment, the factor relied upon in *Griffin* for its conclusion that the inference of guilt from silence "is not always so natural or resistible." Griffin v. California, 380 U.S. 609, 615 (1965). *Griffin* has been greatly diminished in California by the recently developed and highly restrictive rules on impeachment of a defendant by prior felony conviction, beginning with Chief Justice Wright's opinion in People v. Beagle, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972). *See also* People v. Rist, 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976); People v. Antick, 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 495 (1975); People v. Fries, 67 Cal. App. 3d 657, 113 Cal. Rptr. 759 (1977); People v. Nelson, 63 Cal. App. 3d 11, 133 Cal. Rptr. 552 (1976); People v. Roberts, 57 Cal. App. 3d 782, 129 Cal. Rptr. 529 (1976).

as important as the values it perpetuates. These values are premised upon several notions of individual dignity and worth and of the proper position of the individual in our society in any confrontation with the government: (1) protecting individual liberty and privacy; (2) assuring fairness to the individual; and (3) maintaining a civilized and humane procedure for the contest. Whether the privilege should therefore be applied to prosecutorial discovery depends upon whether judicially compelled defense disclosure would impinge upon the values the privilege is designed to protect.

1. The Defendant's Liberty

The belief that citizens should be free from governmental disturbance without just cause is the foundation of our concept of individual privacy.[66] If individuals could become arbitrary sources of evidence, the government would be tempted to "intrude too much."[67] While undoubtedly important in the pre-accusatory context, this value normally does not require as much protection when the prosecutor seeks discovery during formal pre-trial proceedings. By that time the defendant has been charged and counsel has been retained, appointed, or waived. If the offense is a felony and tried in federal court, a grand jury has returned an indictment.[68] In most states, cause to hold the defendant for trial will have been found by either a grand jury or a magistrate.[69] In a California felony case, probable cause to place the defendant on trial will have been found by either a grand jury or a magistrate at a preliminary examination.[70] Thus, except in those few cases

66. "There is a strong policy in favor of government's leaving people alone . . . It follows that the government should not disturb the peace of an individual by way of compulsory appearances and compulsory disclosures which may lead to his conviction unless sufficient evidence exists to establish probable cause. Obviously, if the individual's peace is to be preserved, the government must obtain its prima facie case from sources other than the individual." WIGMORE, *supra* note 3, at 317 (footnote omitted).

"[The privilege against self-incrimination requires] the government to leave the individual alone until good cause is shown for disturbing him," reflecting "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' . . . ." Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

67. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1197 (1960) [hereinafter cited as Goldstein].

68. A defendant charged with a felony in federal court is entitled to an indictment as a matter of right. FED. R. CRIM. P. 7(a). Nevertheless, there is little judicial control over or review of the nature and quantity of evidence sufficient to support an indictment. Costello v. United States, 350 U.S. 359 (1956); Holt v. United States, 218 U.S. 245 (1910).

69. *See* L. KATZ, L. LITWIN, & R. BOMBERGER, JUSTICE IS THE CRIME 247-365 (1972); Spain, *The Grand Jury, Past and Present: A Survey*, 2 CRIM. L.Q. 119 (1961).

70. CAL. CONST. art. 1, § 14 (Supp. 1955-1976) and CAL. PENAL CODE §§ 737, 738 (West 1970) together require that all felony offenses be prosecuted by either grand jury indictment or an information following a preliminary examination before a magistrate. The sufficiency of the evidence to support the accusation is subject to pre-trial review. *See* People v. Uhlemann, 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973); Jones v. Superior Court, 4 Cal. 3d 660, 483 P.2d 1241, 94 Cal. Rptr. 289 (1971); CAL. PENAL CODE § 995 (West 1970).

and jurisdictions in which the prosecutor may proceed by information or other accusation without a review of cause,[71] the state's justification for proceeding against an individual has been demonstrated by the time the prosecutor requests discovery. Intrusion upon the defendant's liberty is, therefore, permissible at this stage. And the justification for such intrusion is even greater after the prosecutor has made out its case-in-chief and the defendant's motion for a directed verdict has been denied.[72]

2. *Assuring a Fair Contest*

The emphasis on fairness in criminal proceedings stems from the idea that the individual standing alone is helpless before the awesome power of the state. In light of this imbalance, a procedure would not be fair if the state could, in addition to relying upon its own immense resources, depend upon the defendant as a further source of evidence.[73] At the outset of a criminal case, the advantage lies with the state because of its ability to gain access to the facts. Generally, the prosecution has both a greater opportunity, including prompt on-the-scene investigations, and more formidable resources with which to gather and preserve evidence.[74] Other factors add to the prosecution's strength in the adversary contest. Witnesses may be more willing to cooperate with the prosecution than with the defense because of their respect for governmental authority. The defense does not have the benefit of the search and seizure powers of the police. In addition, the defendant is

71. Even then, if the accused is in custody, he may contest probable cause for continued detention for trial. Gerstein v. Pugh, 420 U.S. 103 (1975); *In re* Walters, 15 Cal. 3d 738, 593 P.2d 607, 126 Cal. Rptr. 239 (1975).

72. Historically, the primary purpose of the privilege was to prohibit the state from compelling the individual to initiate his own prosecution: "The old maxim, no man shall be compelled to accuse himself, which the antagonists of the Star Chamber and High Commission seized upon, meant to them merely that no man should be compelled to be his first accuser, that is, to answer without a charge." McCormick, *Law of the Future: Evidence*, 51 N.Y.U. L. REV. 218, 221 (1956).

73. "The privilege contributes toward a fair state-individual balance . . . . There is a . . . strong policy which demands that any contest between government and governed be a 'fair' one. . . . [T]he individual may not be conscripted to assist his adversary, the government, in doing him in. It would not be a 'fair fight.' " WIGMORE, *supra* note 3, § 2251, at 317-18. The privilege against self-incrimination reflects "our sense of fair play which dictates 'a fair state-individual balance' . . . ." Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). "[T]he inherent inequality in investigative resources, as between the state and the accused, suggests . . . that the defendant does not get so much on the total scale when his limited immunity is left him." Goldstein, *supra* note 67, at 1197.

74. Even after *Williams*, the United States Supreme Court recognized that "the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." Wardius v. Oregon, 412 U.S. 470, 475 n.9 (1973).

severely inhibited from assisting in investigation while in custody.[75] Nevertheless, the government may not always be in a superior position such that allowing it to seek information from the defendant would result in an unfair contest; the balance of power depends in large part on the extent of the defendant's knowledge of the facts at the plea negotiation or trial stage. This, in turn, frequently depends on the extent to which defendants can gain access to the state's evidence. For example, if the defendant is so unaware of the state's case that he does not know the identity of the witnesses against him until they are called to testify at trial, any compelled disclosure of defense information might tip the balance in favor of the prosecution and upset the fairness of the proceedings.[76] If, on the other hand, the defendant were able to obtain nearly all the information that the state possesses by means of pre-trial discovery, from his own investigatory resources, or from a combination of the two, it would not be unfair to allow limited prosecutorial inquiry into defendant's evidence.

Defense discovery in California is very broad.[77] While a defendant is not entitled as a matter of right to the prosecutor's entire file, in practice the liberal rules of defense discovery very nearly achieve this result. All police and crime reports are provided to the defense automatically within two days of the first appearance of counsel or a determination that the defendant will represent himself.[78] All names, addresses, and statements of witnesses, whether or not they will be called to testify against the defendant, as well as reports and physical evidence, are generally available by court order on a proper showing.[79] In addition, most felony cases in California proceed by way of preliminary examination rather than indictment and the California preliminary examination, though not technically available as such, is a most effective discovery device.[80] Before trial, a defendant is entitled to a transcript of the examination and, if indicted, he is entitled to a transcript of the grand jury proceedings.[81] The prosecution is not only prohibited from preventing the defense from gathering evidence,[82] it is in certain cases obligated at the defendant's request and upon a proper showing to actually

75. *See generally* Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 HARV. L. REV. 994, 1018-19 (1972) [hereinafter cited as *Prosecutorial Discovery*].

76. This much was clear to the Supreme Court in *Wardius*. See note 41 *supra*.

77. See notes 12-14 and accompanying text *supra*.

78. CAL. PENAL CODE §§ 859, 1430 (West 1954).

79. Funk v. Superior Court, 52 Cal. 2d 423, 340 P.2d 593 (1959); Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957); People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956); Vetter v. Superior Court, 189 Cal. App. 2d 132, 10 Cal. Rptr. 890 (1961). *See generally* Traynor, *supra* note 5.

80. Coleman v. Alabama, 339 U.S. 1 (1970); Jennings v. Superior Court, 66 Cal. 2d 867, 428 P.2d 304, 59 Cal. Rptr. 440 (1967).

81. CAL. PENAL CODE §§ 870, 938.1 (West 1970).

82. *In re* Newbern, 175 Cal. App. 2d 862, 865, 1 Cal. Rptr. 80, 82 (1959).

create evidence.[83] A substantial showing of need is required only for a limited number of privileged or highly sensitive matters.[84] In fact, many metropolitan courts have established a standard discovery order that is applicable to most cases.[85] A defendant who takes full advantage of his discovery rights would be aware of virtually all the prosecutor's important evidence when his case proceeds to trial.

By contrast, the prosecution's knowledge of the defense is often very limited in California since the defendant rarely testifies at the preliminary examination and the prosecutor cannot otherwise depose him. The defendant will not necessarily make a statement to the police and the police may not be independently aware of defense witnesses. In such a case, the prosecution can only speculate on the nature of the defense and on possible defense witnesses. While some cases readily lend themselves to such speculation, others do not. If, for example, a defendant is arrested at the scene of a crime, standing over the victim with a smoldering gun, it is most unlikely that he will claim an alibi; or if a young healthy man is charged with assault on an elderly woman in her home, it would be surprising if he asserted self-defense. On the other hand, in the case in which a defendant is not arrested at the scene of the crime but rather is identified by an eyewitness and no "solid" circumstantial evidence such as fingerprints connects him to the crime, defendant has several options. He may admit his presence but claim lack of knowledge or participation, duress, insanity, or diminished capacity; or he may contest the accuracy of the identification and present alibi witnesses. Even when the prosecutor can reasonably anticipate the nature of the defense, it may be difficult to investigate. For example, the prosecution would ordinarily not have independent access to sources of information concerning an alibi or a defense of physical incapacity. Thus, by the time a

83. Evans v. Superior Court, 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974).

84. *See* Pitches v. Superior Court, 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974); Hill v. Superior Court, 10 Cal. 3d 812, 518 P.2d 1353, 112 Cal. Rptr. 257 (1974); Gonzales v. Municipal Court, 67 Cal. App. 3d 101, 136 Cal. Rptr. 475 (1977); *In re* Valerie, 50 Cal. App. 3d 213, 123 Cal. Rptr. 242 (1975). Even the prosecutor's notes, taken at interviews with his witnesses, are generally available to the defense. People v. Moore, 50 Cal. App. 3d 989, 994, 123 Cal. Rptr. 837, 840-41 (1975). The work product doctrine presents slight, if any, limitation: "[T]here is presently no standard protecting the prosecutor's work product from criminal discovery and . . . the applicability of civil standards is questionable." Craig v. Superior Court, 54 Cal. App. 3d 416, 423, 126 Cal. Rptr. 565, 568 (1976). In addition, the California Supreme Court is now considering the propriety of allowing the defense to depose prosecution witnesses outside the narrow parameters now provided by CAL. PENAL CODE §§ 1335-1345 (West 1970), which allows similar discovery only with witnesses who are about to leave the state or who are sick or infirm. People v. Municipal Court, 63 Cal. App. 3d 814, 134 Cal. Rptr. 106 (1976), *hearing granted* Jan. 13, 1977.

85. *See, e.g.*, Standing Order of the Superior Court of the County of San Francisco, filed April 26, 1977. *See generally* J. JENNER, CRIMINAL LAW PRACTICE SERIES: DISCOVERY (CEB) §§ 8-9 (1975).

criminal case proceeds to trial in California, the defendant may often possess knowledge of the facts that is equal to, if not better than, that possessed by the prosecution. It would, therefore, be stretching the concept of fairness to assert that the state's superior position should always preclude pre-trial disclosure of defense evidence.

Nevertheless, there are dangers in forcing a defendant to choose his defense before hearing the state's case against him. For example, a defendant charged with assault with a hand gun may tell his lawyer that the victim was advancing with a knife, that the gun had a "hair-trigger" and went off when he raised it to frighten the victim, and that he had consumed a significant quantity of beer immediately before the incident. To force the defense attorney to select either self-defense, mistake, or dimished capacity before the state presents its case might result in unfairness to the defendant and actually hinder the search for truth. Of several viable defenses, the state's evidence may preclude reliance on some or show that advantage would best lie with others. Alternatively, only one defense may initially appear valid, but evidence at trial may reveal support for others. Thus, if defendant has chosen to rely on diminished capacity and, at trial, the victim on cross-examination confesses to a history of violence coupled with a desire to "get even" with the defendant, the defendant would be unfairly disadvantaged if he were precluded from asserting defenses he was earlier forced to waive.[86] As Justice Black pointed out in *Williams*:

> Before trial the defendant knows only what the State's case *might* be. Before trial there is no such thing as the "strength of the State's case"; there is only a range of possible cases. At that time, there is no certainty as to what kind of case the State will ultimately be able to prove at trial. Therefore, any appraisal of the desirability of pleading alibi will be beset with guesswork and gambling far greater than that accompanying the decision at trial itself. Any lawyer who has actually tried a case knows that, regardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about.[87]

By contrast, the state ordinarily has no duty to specify its theory when more than one alternative exists. In a prosecution for murder in California,

86. The United States Supreme Court has not squarely faced the sanction issue, either in terms of precluding an announced defense that was required to be disclosed or of preventing deviation from an announced defense. Williams v. Florida, 399 U.S. 78, 83 n.14 (1970). It has been suggested, however, that such a preclusion sanction would not be unconstitutional: "On these facts then, we simply are not confronted with the question of whether a defendant can be compelled in advance of trial to select a defense from which he can no longer deviate. We do not mean to suggest, though, that such a procedure must necessarily raise serious constitutional problems." *Id.* at 84 n.15.

87. Williams v. Florida, 399 U.S. 78, 109 (1970).

for example, the state need not allege the degree of murder sought, much less the basis for the degree. Yet, the state may prove first degree murder by any number of theories: that the murder was premediated, that it was perpetrated by means of torture, or that it was committed in the course of a robbery.[88] If the state is not required to specify its theory of the case among several alternatives, it is arguable that, in the interests of fairness, the defendant should not be put to the choice.[89]

3. *Civilizing the Contest*

The third value, that of avoiding the use of cruel or uncivilized procedures in the contest between the individual and the state, is probably the primary justification for application of the privilege to judicially compelled disclosures in general and to prosecutorial discovery in particular. It is thought that it is inherently inhumane to force an individual to choose between condemning himself and subjecting himself to perjury or contempt.[90] Either alternative leads to punishment. To leave a person with no way out—to force him to inflict injury upon himself, to be an instrument of his own destruction—is cruel.[91] This policy applies with greatest strength

88. *See* CAL. PENAL CODE § 189 (West 1970).

89. In practice, certain defenses are mutually exclusive and will therefore be known to the defense shortly after formal accusation. A defendant charged with rape who contends that he could not have committed the offense because he was impotent, is unlikely to assert a consent defense in the alternative. A defendant accused of robbery who alleges an alibi would not prosper by asserting self-defense as well. The nature of impotency or alibi defenses are likely to be known at the outset and unlikely to be confused with others. To require pre-trial disclosure of such defenses, therefore, ordinarily would not give defendant a tactical disadvantage that would be considered unfair in his contest with the state.

The same reasoning applies to the insanity defense when combined with defenses such as alibi that assume the defendant could not have committed the act, at least in jurisdictions that do not provide for a bifurcated trial procedure. "Where a defendant must argue his insanity defense in the same proceeding in which his defense on the merits is considered, each may suffer from the joint presentation. Where other defenses are available, the insanity defense may only serve to confuse the jury. It is difficult to persuade a jury to acquit with the somewhat convoluted argument that the defendant did not commit the offense, but that if he did do it, it was because he was insane. Thus, presenting evidence to show insanity may result, instead, in convincing the jury that the defendant actually committed the offense." Shadoan, *Raising the Insanity Defense: The Practical Side*, 10 AM. CRIM. L. REV. 533, 538 (1972) (citation omitted).

90. "The privilege against self-incrimination . . . reflects . . . our unwillingness to subject those suspected of a crime to the cruel trilemma of self-accusation, perjury or contempt . . . ." Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

91. "[W]e do not make even the most hardened criminal sign his own death warrant, or dig his grave, or pull the lever that springs the trap on which he stands. We have, through the course of history, developed a considerable feeling for the dignity and intrinsic importance of the individual man. Even the evil man is a human being." E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7-8 (1955).

"[T]he best justification is simply this: It is essentially and inherently cruel to make a man an instrument of his own condemnation. The human tragedy having evinced as much cruelty as

where the accused is required to testify before the trier of fact. In the context of discovery, however, the rules do not force a defendant who desires to remain silent to testify or to give pre-trial disclosure of any evidence that he does not plan eventually to present at trial. Moreover, even when a defendant who claims he is not guilty is required to state the nature of the evidence in support of his plea before trial, the element of cruelty is diminished. On the surface, at least, the defendant is not compelled to accuse himself; rather, he is only compelled to explain why the state's charge is unfounded and if he intends to so declare at trial.

Nevertheless, the humaneness value in judicial proceedings will be impinged upon to the extent that the defendant is forced to reveal information that, while not self-accusatory on its face, could benefit the prosecution and thereby lead to the defendant's conviction because the defendant has been conscripted, though unwittingly, to defeat himself. Chief Justice Traynor would, perhaps, counter that the defendant is not being compelled to give any information that he did not intend to offer freely at trial. The implication of such reasoning is that the natural compulsion to present evidence to overcome the charge is not cruel or unfair and that the acceleration of that compulsion in no greater way leads to defendant's own downfall. The defendant does not in fact face a court-ordered sanction for failure

it has, any nurtured sentiment against sadism is indeed a welcome brake on human passion, a valued friend, not likely to be discarded for newer ones." Louisell, *supra* note 6, at 95.

The guilty, however, are the primary beneficiaries of this policy. Of course, it is true that even an innocent person may be forced into the snares of contradiction by a clever prosecutor or into revealing collateral information that may tend to incriminate, such as drug usage or prior felony convictions, and that in a way it is cruel to force one to admit his past misdeeds or his "tawdry way of life." Cross v. United States, 335 F.2d 987, 990 (D.C. Cir. 1964). Nevertheless, judicial control over the scope of cross-examination through rules of evidence requiring a showing of substantial materiality for the admission of potentially prejudicial matters is available to prevent such examination from descending to a level that could justifiably be called cruel or inhumane. *See generally* CAL. EVID. CODE § 352 (West 1976); People v. Beagle, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1975); People v. Rist, 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976); People v. Antick, 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975); People v. Fries, 67 Cal. App. 3d 657, 113 Cal. Rptr. 759 (1977); People v. Nelson, 63 Cal. App. 3d 11, 133 Cal. Rptr. 552 (1976); People v. Roberts, 57 Cal. App. 3d 782, 129 Cal. Rptr. 529 (1976).

In addition, if the extent of self-accusation or self-condemnation is the measure, the greatest cruelty would be to compel a judicial confession, particularly before a large audience. WIGMORE, *supra* note 3, § 2251, at 316. This rarely occurs, however. As is often the case, a guilty defendant will resort to perjury, thereby avoiding both self-accusation and self-punishment, since prosecutions for perjury at trial are extremely rare. Hibschman, "*You do Solemnly Swear!" or That Perjury Problem*, 24 J. CRIM. L.C. & P.S. 901 (1934); McClintock, *What Happens to Perjurers*, 24 MINN. L. REV. 727, 752-53 (1940). This is true, of course, providing the very act of perjury cannot be characterized as self-destructive; but "[t]he prevalence of perjury today leads one to doubt that it is thought of by the average witness as a soul-destroying experience." WIGMORE, *supra* note 3, § 2257, at 317. This author's experience as a trial lawyer leads him to the conclusion that the situation is no different today.

to testify or to present evidence on his own behalf; rather, the pressure to present evidence results directly from the possibility of conviction following the state's presentation of its own evidence. The compulsion is thus inherent in our accusatory system and not protected by privilege.

As noted in *Prudhomme* and *Allen*, however, acceleration can result in the disclosure of information that could ultimately lead to other evidence useful to the prosecution.[92] To the extent that accelerated disclosure requires incrimination greater in degree or kind than would have occurred during the normal course of trial, it constitutes an intrusion upon the privilege. This point was not adequately considered by the courts in *Williams* or *Jones*. In *Williams*, the court assumed that the prosecution could obtain a continuance after the presentation of the defense at trial and then obtain the contested information by interview and investigation of defendant's witnesses. Pretrial disclosure would merely avoid the disruption of the trial that such a continuance would entail. To the extent that it would eliminate the surprise and confusion caused by presentation of an unexpected defense, it would deprive the defendant of a tactical advantage to which he is not legally entitled in the first place.[93] As Chief Justice Traynor noted, advance disclosure "merely enables the prosecution to perform its function at trial more effectively."[94] He apparently did not consider, however, whether compelling a defendant to assist in making the prosecutor's rebuttal more effective could itself endanger the privilege, nor did he consider whether information that was useful for rebuttal purposes could also lead to evidence that could incriminate in other ways. Thus, despite the disclaimers of Chief Justice Traynor and the *Williams* majority, the acceleration rationale can constitute an encroachment on the privilege[95] and can be extended to authorize compelled disclosure of any defense and of all evidence that defendant plans to present at trial.[96]

In sum, application of the privilege against self-incrimination to prosecutorial discovery is justified to a certain extent. To compel the defense to

92. Allen v. Superior Court, 18 Cal. 3d 520, 526 n.4, 557 P.2d 65, 68 n.4, 134 Cal. Rptr. 774, 777 n.4 (1976); Prudhomme v. Superior Court, 2 Cal. 3d 320, 327, 466 P.2d 673, 677-78, 85 Cal. Rptr. 129, 133-34 (1970).

93. Williams v. Florida, 399 U.S. 78, 85-86 (1969).

94. Jones v. Superior Court, 58 Cal. 2d 56, 61, 372 P.2d 919, 922, 22 Cal. Rptr. 879, 882 (1962).

95. While admiring in many respects Chief Justice Traynor's opinion in *Jones*, Professor Louisell recognized this point: "The defendant's historic immunity from the need to 'show his hand' is something less since *Jones* than it was before. If such immunity is an inherent part of the privilege against self-incrimination, there has been a new encroachment however small on the privilege." Louisell, *supra* note 6, at 98-99 (citation omitted).

96. *See* Williams v. Florida, 399 U.S. 78, 114 (1969) (Black, J., dissenting); Jones v. Superior Court, 58 Cal. 2d 56, 66, 372 P.2d 919, 924, 22 Cal. Rptr. 879, 885 (1962) (Peters, J., dissenting).

select its theory of the case without imposing a corresponding duty on the prosecution may be fundamentally unfair. The judicial procedure of accelerated disclosure may pose an implicit threat to the basic value of humaneness underlying the privilege. What then is the standard by which a court should determine whether a particular prosecutorial request for accelerated disclosure violates the privilege?

B. The Privilege as a Barrier to Accommodation

In adopting the *Prudhomme* standard, Chief Justice Wright recognized the need for greater protection of the privilege than the simple requirement that the defendant intend to introduce or rely upon the evidence at trial. He therefore embraced *Prudhomme's* additional requirement that the compelled disclosure not have any tendency to incriminate, that is, that it not lighten the prosecution's burden of proving its case-in-chief.[97] Without controlling guidelines, however, such a broad standard might encompass all forms of pre-trial notice or disclosure requirements and arguably overshoot the literal bounds of the privilege.[98] The name of any defense witness, for example, might conceivably incriminate by implicating the defendant in the crime charged or in an unrelated offense. It has been pointed out that, in fact, even the order upheld in *Jones* fails the *Prudhomme* test.[99] Moreover, mere notice of an intention to rely on a specific defense, without disclosure of the nature of that defense or the evidence in support of it, could conceivably lighten the prosecution's burden by allowing the prosecutor to concentrate his resources on meeting a certain line of defense.[100] Thus, if the *Prudhomme* test is taken literally, the privilege leaves no room for compromise, so that criminal discovery in California is unconditionally a one-way street. *Jones* would, accordingly, be overruled on its facts[101] and the current

97. Allen v. Superior Court, 18 Cal. 3d 529, 524-25, 557 P.2d 65, 66, 134 Cal. Rptr. 774, 775 (1976).

98. To the extent that it encompasses disclosures that would place a defendant in no worse position than he would have been if he had made the disclosure during trial, the rule seems to go beyond the scope of the privilege. Nevertheless, it could well be argued that in light of the inherent problems in proving such a limitation in practice, see notes 172-73 and accompanying text *infra*, the rule must necessarily extend somewhat beyond the privilege in order to protect it entirely.

99. *See* Note, *Prosecutor's Right to Discovery*, 59 CALIF. L. REV. 225, 228-29 (1971).

100. Allen v. Superior Court, 18 Cal. 3d 520, 526 n.4, 557 P.2d 65, 68 n.4, 134 Cal. Rptr. 774, 777 n.4 (1976); *cf.* Comment, *The Rise and Fall of California's Notice of Alibi Rule: Procedural Innovation Yields to Judicial Restraint*, 9 LOY. L.A.L. REV. 392, 417 (1976) [hereinafter cited as *Notice of Alibi Rule*].

101. While the *Jones* facts were peculiar to that case, in that the defendant had revealed the nature of his defense in asking for a continuance, the court did not appear to place any significance on this disclosure. Similarly, the *Prudhomme* court did not take note of this fact, although it stated that the court allowed discovery in *Jones* because of a "conviction that such information could not possible incriminate." Prudhomme v. Superior Court, 2 Cal. 3d 320, 326,

requirement of a pre-trial notice of insanity defense would be unconstitutional.[102] But did Chief Justice Wright in the *Reynolds* and *Allen* opinions intend that the *Prudhomme* test be interpreted as an absolute standard?

Most fundamental constitutional rights protect a number of heterogeneous values that vary in importance according to the setting in which the right is asserted. Chief Justice Wright recognized in other contexts that neither constitutional principles nor judicially-created protective rules should be applied in an identical fashion in every factual environment.[103] Moreover, no constitutional principle is absolute; each has its qualifications and limits, in recognition of both important competing values and of the fact that each right serves its own values most directly in a particular context.[104] At the outset, the privilege against self-incrimination, as embodied in both the Fifth Amendment and the California Constitution, is limited by its own terms—it applies only to "criminal" cases. The assessment of the parameters of the privilege has historically involved a process by which the interests protected by the privilege are defined and balanced against legitimate but countervailing governmental objectives.[105] Numerous qualifications of the privilege have emerged by this process; foremost among them are the following: (1) the limitation to "testimonial" evidence;[106] (2) the availabil-

466 P.2d 673, 677, 85 Cal. Rptr. 129, 133 (1970). Nevertheless, it could be argued that the defendant need not have disclosed the nature of his defense in asking for a continuance and that, having voluntarily done so, the additional information demanded would not tend to incriminate him. This argument is not convincing, however. Certainly, the information that the court required the defendant to disclose would be much more likely to incriminate than mere notice of an impotency defense. See note 148 and accompanying text *infra*.

102. *See generally* Allen v. Superior Court, 18 Cal. 3d 520, 533, 557 P.2d 65, 72, 134 Cal. Rptr. 774, 781 (1976) (Richardson, J., dissenting); CAL. PENAL CODE § 1026 (West 1954).

103. *In re* Love, 11 Cal. 3d 179, 191, 520 P.2d 713, 720, 113 Cal. Rptr. 89, 96 (1974) (holding that "on balance" due process does not provide for an absolute right to counsel at a parole revocation hearing); Drumgo v. Superior Court, 8 Cal. 3d 930, 506 P.2d 1007, 106 Cal. Rptr. 631 (1973) (holding that an indigent's right to appointment of counsel at trial does not include the right to select a particular attorney). *Compare* People v. Edwards, 18 Cal. 3d 796, 557 P.2d 995, 135 Cal. Rptr. 411 (1976) *with In re* Strum, 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974) *and In re* Podesto, 15 Cal. 3d 921, 544 P.2d 1297, 127 Cal. Rptr. 97 (1976).

104. Even when a classification affects a fundamental right, it may nevertheless be valid if necessary to promote a compelling governmental interest and, though the government's burden of justification may be heavy, the test nevertheless involves "a matter of degree." Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Kramer v. Union Free School Dist., 395 U.S. 621, 625-30 (1969); *see* Shapiro v. Thompson, 394 U.S. 618 (1968); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). First Amendment interests are often similarly weighed against competing interests. *See* Allen v. Superior Court, 18 Cal. 3d 520, 532, 557 P.2d 65, 71, 134 Cal. Rptr. 774, 780 (1976) (Richardson, J., dissenting) and cases cited therein.

105. *See* WIGMORE, *supra* note 3, §§ 2250-51; Comment, *The Self-Incrimination Privilege: Barrier to Criminal Discovery?*, 51 CALIF. L. REV. 135, 136 (1963) [hereinafter cited as *Barrier to Discovery*].

106. WIGMORE, *supra* note 3, § 2263, at 378-79. United States v. Mara, 410 U.S. 19 (1973); United States v. Dionisio, 410 U.S. 1 (1973); 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).

ity of immunity from compelled testimony;[107] (3) the inapplicability of the privilege to corporations, associations, or even formal partnerships;[108] (4) the recognition that certain record-keeping or reporting requirements will not violate the privilege although clearly incriminating;[109] and (5) the recently stated view of the United States Supreme Court that the privilege is "personal" and limited to "personal compulsion."[110]

Chief Justice Wright also recognized that the privilege is not unqualified and that accommodation between the values protected by the privilege and legitimate governmental interests may at times be required. Accepting the limitation of the privilege to criminal actions, he refused to find that certain penalties, although characterized as civil in form, were nevertheless "quasi-criminal" in nature[111] for purposes of the privilege.[112] This result obtained even though the penalties in question constituted a severe punitive exaction by the state, were intended as a deterrent against future misconduct, and were closely connected to a criminal scheme of enforcement.[113] Furthermore, in *People v. Superior Court (Kaufman)*,[114] the Chief Justice agreed to authorize trial courts to grant immunity to civil defendants in order to compel deposition testimony in the face of a claim of incrimination. In that case, he was influenced by the "imperative to effect an accommodation that will permit government to collect vitally needed information without impairing the purposes of the privilege."[115] It is clear that the form of immunity authorized was not a complete substitute for invocation of the privilege, and thus, amounted to some qualification of it. In fact, Chief Justice Wright characterized the offered immunity as "a form of accommo-

107. Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972); Kastigar v. United States, 406 U.S. 441 (1972).

108. Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694 (1944).

109. California v. Byers, 402 U.S. 424 (1971); Shapiro v. United States, 335 U.S. 1 (1948); *cf.* Gardner v. United States, 424 U.S. 648 (1976).

110. *Compare* Andreson v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976); United States v. Nobles, 422 U.S. 225 (1975); California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974) *and* Couch v. United States, 409 U.S. 322 (1973) *with* People v. Bais, 31 Cal. App. 3d 663, 107 Cal. Rptr. 519 (1973) *and* People v. Chavez, 33 Cal. App. 3d 454, 109 Cal. Rptr. 157 (1973).

111. Boyd v. United States, 116 U.S. 660, 634 (1886); *accord,* People v. One 1960 Cadillac Coupe, 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964); *see* Note, *New Limitations on the Privilege Against Self-Incrimination*, 64 CALIF. L. REV. 554, 564-73 (1976) [hereinafter cited as *New Limitations*].

112. People v. Superior Court (Kaufman), 12 Cal. 3d 421, 429-33, 525 P.2d 716, 721-24, 115 Cal. Rptr. 812, 817-20 (1974); *see* Segretti v. State Bar, 15 Cal. 3d 878, 544 P.2d 929, 126 Cal. Rptr. 793 (1976).

113. *See New Limitations, supra* note 111, at 564-73.

114. 12 Cal. 3d 421, 525 P.2d 716, 115 Cal. Rptr. 812 (1974).

115. *Id.* at 428, 525 P.2d at 720, 115 Cal. Rptr. at 816 (quoting McKay, *supra* note 61, at 204).

dation which provides the appropriate resolution of the conflicting interests . . . ."[116]

In construing the scope of the privilege, inquiry is perhaps best focused on the relative weight to be given the various values served by the privilege as against competing governmental interests. While stating in *Allen* that the privilege leaves no room for such balancing, Chief Justice Wright noted that the state interest involved in that case could have been served by measures that were not likely to infringe on the privilege.[117] It is one thing to treat the privilege as absolute and quite another to be solicitous of the privilege, giving its values considerable weight in competition with valid state interests. This is particularly true when substantial infringements on the privilege are not necessary to serve the state interests at hand. The values served by the privilege need not be regarded as controlling nor the concerns of the state as irrelevant in order to disagree in many cases with the view that "the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure . . . ."[118]

C. Dangers to the Privilege

When disclosure is likely to be made in the course of a trial, it is not the prospect of immediate incrimination alone that endangers the privilege. The danger from accelerated defense disclosure varies not only with the degree of incrimination posed by its fruits, that is, the extent to which it implicates the defendant in criminal activity, but in large part with the manner and

116. *Id.* (quoting Byers v. Justice Courts, 71 Cal. 2d 1039, 1049, 458 P.2d 465, 472, 80 Cal. Rptr. 553, 560 (1969), *vacated sub nom.* California v. Byers, 402 U.S. 424 (1971)). While it appears that Chief Justice Wright considered the form of immunity as having the same scope and effect as assertion of the privilege, *see* 12 Cal. 3d at 428 n.5, 525 P.2d at 721 n.5, 115 Cal. Rptr. at 817 n.5, even full use plus derivative use immunity constitutes some encroachment on the privilege. In practice, because of the difficulty of tracing the source of trial evidence, this immunity alone is often an insufficient substitute for invocation of the privilege. Kastigar v. United States, 406 U.S. 441, 470-71 (1972) (Marshall, J., dissenting). It has been noted that immunity does not shield the defendant from the personal disgrace or odium that often accompanies one's admission of criminal conduct. McKay, *supra* note 61, at 205. In addition, it is not clear that the immunity considered in *Kaufman* was as broad as that required by the Fifth Amendment. For example, testimony compelled through a grant of use immunity in the face of a claim of Fifth Amendment privilege most likely cannot be used for any purpose, even for impeachment. Kastigar v. United States, 306 U.S. 441, 460 (1972). Nevertheless, in fashioning an immunity protection similar to that involved in *Kaufman*, Chief Justice Wright allowed impeachment use of the evidence in question. People v. Coleman, 13 Cal. 3d 867, 892, 533 P.2d 1024, 1044, 120 Cal. Rptr. 384, 404 (1975). In this context, then, the offered immunity may not protect the values of the privilege to the same extent as would a claim of privilege at the outset. *See* United States v. Frumento, 552 F.2d 534 (3d Cir. 1977); Note, *Use of Probation Revocation Hearing Testimony in Subsequent Criminal Trials*, 64 CALIF. L. REV. 516, 522-23 (1976).

117. Allen v. Superior Court, 18 Cal. 3d 520, 525-26, 557 P.2d 65, 67, 134 Cal. Rptr. 774, 776 (1976).

118. California v. Byers, 402 U.S. 424, 428 (1971) (Burger, C.J., plurality opinion).

purpose of its use. The important question to ask in considering any pre-trial disclosure, therefore, is the extent to which the values of the privilege will be endangered by the use to which the accelerated disclosure will be put.

1. Use in the State's Case-In-Chief

When an accused is compelled to disclose before trial what he intends to disclose at trial, the values protected by the privilege are most clearly threatened when the disclosed evidence provides the prosecution with information useful in its case-in-chief. In such a situation, the evidence disclosed might be sufficient to overcome the defendant's motion for directed verdict or judgment of acquittal, thereby compelling the defendant either to make a defense or rest and submit the case to the jury.[119] The examples given in *Prudhomme* are illustrative of the type of disclosures that present this danger most directly; that is, self-defense witnesses and "last resort" witnesses implicating the defendant in lesser offenses.[120] Where the disclosed information is necessary to establish the prosecution's case-in-chief, the defendant may not be subject to conviction unless disclosures are compelled prior to trial. The first value protected by the privilege, the defendant's liberty—the freedom from state intrusion unless and until the government has demonstrated independent evidence to justify forcing him to proof—would be severely compromised by such compelled disclosures. The government would also be free to engage in speculative prosecutions in the hope that pre-trial disclosures would reveal information without which the prosecution would not be able to submit its case to the jury, much less obtain a conviction. Moreover, the fairness of the procedure would suffer. Since the state would have the opportunity to use the defendant as the source of the information required for his conviction, thus the principal instrument of his own destruction, such a process would also overstep the bounds of civilized procedure and severely intrude upon the dignity of the individual.[121]

119. In California, the standard upon which a motion for judgment of acquittal is considered at a jury trial is whether the evidence then before the court is sufficient to sustain a conviction on appeal. CAL. PENAL CODE §§ 1118-1118.1 (West 1970). The appellate standard has been phrased as follows: "whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." People v. Lines, 13 Cal. 3d 500, 505, 531 P.2d 793, 796, 119 Cal. Rptr. 225, 228 (1975) (quoting People v. Valerio, 13 Cal. App.3d 912, 919, 92 Cal. Rptr. 82, 86 (1970)). Yet, in moving for a judgment of acquittal at the close of the prosecution's case, procedural fairness requires the defense to specify the defect and insufficiency of evidence, such that the prosecutor may have the opportunity to make a motion to reopen and present witnesses to cure the defect. People v. Belton, 66 Cal. App. 3d 636, 136 Cal. Rptr. 54 (1977).

120. See note 33 *supra*.

121. The United States Supreme Court has not addressed the issue of whether pre-trial disclosures that support the prosecutor's case-in-chief may be compelled. *Williams* concerned use for impeachment and rebuttal purposes only. Williams v. Florida, 399 U.S. 78, 80-81 (1970).

2. Use When the Disclosed Defense is Abandoned

When a defendant does not present his disclosed defense at trial and the incriminating information thus disclosed would not otherwise have been available, the compulsion of accelerated disclosure can again constitute an intrusion on the privilege if the prosecution later makes use of the incriminating disclosure. This danger exists both with respect to evidence that implicates the defendant in the crime charged and to that which connects him to collateral offenses. In the first instance, although the evidence may be unnecessary to establish the prosecution's prima facie case and inadmissible for impeachment or rebuttal purposes, it may nevertheless support an inference of guilt and be admissible even though the defendant has presented no defense at all. Unable to present the evidence in his case-in-chief, the prosecutor may save it for rebuttal. After the defendant has rested his case without presenting any evidence or after presenting evidence not subject to rebuttal, the prosecution may, with the court's permission, reopen its case-in-chief and present the incriminating evidence obtained as a result of the pre-trial disclosure.[122]

In the second instance, the disclosure could lead to the initiation of another prosecution against the same defendant. Indeed, both circumstances could arise in the same case. For example, a defendant charged with theft and possession of morphine may be compelled to disclose, prior to trial, his alibi witness who, upon being interviewed by the police, gives information that reveals that the defendant is an addict and has used heroin. The defendant then abandons the alibi defense and rests without presenting any evidence. Although unnecessary to establish the prosecution's case-in-chief, the prosecutor may nevertheless seek to present the evidence of drug addiction either initially in his case-in-chief or later by reopening after the defense has rested. Although the defendant has not presented a defense that would render the evidence admissible for impeachment or rebuttal purposes, the prosecutor can argue that the evidence of use and addiction is admissible to show knowledge of the narcotic character of morphine,[123] and to show

122. In California, the trial court in its discretion may vary the order of proof at trial. CAL. PENAL CODE §§ 1093-94 (West 1970); People v. Carter, 48 Cal. 2d 737, 757, 312 P.2d 665, 675 (1957); People v. Berryman, 6 Cal. 2d 331, 338-39, 57 P.2d 136, 139-40 (1936). This discretion extends to reopening after jury deliberations have commenced. People v. Newton, 8 Cal. App. 3d 359, 383, 87 Cal. Rptr. 394, 409-10 (1970); People v. Christensen, 85 Cal. 568, 570, 24 P. 888, 889 (1890). It could therefore be argued that it is erroneous to use the terminology "burden of proving its case-in-chief." Nevertheless, the terminology does highlight the danger that the pre-trial disclosure might cure a prosecution's case-in-chief otherwise insufficient to go to the jury. It also seems a greater affront to the privilege to use the fruits of compelled information independently, rather than as a rebuttal of a later voluntary presentation of the same information.

123. *See* People v. Brim, 257 Cal. App. 2d 839, 65 Cal. Rptr. 265 (1968). *See also* People v. Gonzales, 262 Cal. App. 2d 286, 68 Cal. Rptr. 578 (1968).

intent and motive for the theft.[124] Through witness interviews, the prosecutor could also gather information that could be used to charge defendant with such crimes as possession or use of narcotics. Since the defendant did not present the disclosed defense, the incrimination would not have occurred but for the accelerated disclosure. The compulsion to accelerate, therefore, led directly to the incrimination that in turn compromised important values protected by the privilege.

3. *Use for Impeachment or Rebuttal*

In the context of pre-trial disclosure of information useful for impeachment or rebuttal, the question becomes how much more effective the impeachment or rebuttal evidence will be as a result of acceleration and how significantly it will intrude upon the values protected by the privilege.[125] It should be recognized, at the outset, that one of the purposes of pre-trial disclosure is to render rebuttal more effective; a primary aim of prosecutorial discovery statutes, and one of the public policies relied upon in *Williams*, is the avoidance of trial disruption and the elimination of the tactical advantage derived from calling a surprise witness near the conclusion of trial. Chief Justice Traynor thus recognized in *Jones* that advance disclosure would enable the prosecution to better perform its function at trial in that it would lead to more "effective rebuttal."[126] While the prosecution may obtain a mid-trial continuance to interrogate and investigate surprise defense witnesses, such continuances are rarely requested and judges, in any event, tend not to grant such requests because the witnesses are usually called near the conclusion of trial, frequently on the very day the case is expected to go to the jury. The state's inquiry is thus limited to a "seat-of-the-pants" cross-examination, which will hopefully draw out inconsistencies in the defendant's version of the facts or evidence of a relationship with the defendant from which an inference of bias or fabrication may be drawn. Furthermore, pre-trial investigation of defense witnesses is likely to gener-

124. *See* People v. Conrad, 31 Cal. App. 3d 308, 325-26, 107 Cal. Rptr. 421, 433 (1973). *But see* People v. Guzman, 47 Cal. App. 3d 380, 121 Cal. Rptr. 69 (1975); People v. Davis, 233 Cal. App. 2d 156, 43 Cal. Rptr. 357 (1965).

125. It is well-recognized that an unauthorized seizure of evidence will not prohibit later use by the prosecution if it would have been obtained in a proper manner in any event. *See* Brewer v. Williams, 430 U.S. 387 (1977). *See also* People v. McInnis, 6 Cal. 3d 821, 494 P.2d 690, 100 Cal. Rptr. 618 (1972); Lockridge v. Superior Court, 3 Cal. 3d 166, 474 P.2d 683, 89 Cal. Rptr. 731 (1970); People v. Eastmon, 61 Cal. App. 3d 646, 132 Cal. Rptr. 510 (1976). In the discovery context, this principle can be applied with even less threat to the values underlying the rule of exclusion. Unlike the area of search and seizure, the evidence is actually presented in defendant's case and less speculation is thus required as to the likelihood of it being obtained independently by the prosecution. Some speculation would, nevertheless, be required as to the incriminatory fruits of the disclosed information.

126. 58 Cal. 2d at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882.

ate more useful evidence than could any mid-trial effort. State investigators may interview witnesses and even surreptitiously record their statements.[127] Because such investigations normally occur shortly after the crime itself was committed, witnesses are likely to have a better recollection of events and less opportunity to speak with the defendant and contrive a statement. The prosecution may also investigate relatives and acquaintances of the witness and probe for evidence of interest, bias, or bad character. Armed with such information, the prosecutor will have time carefully to plan a cross-examination and to subpeona rebuttal witnesses. In addition, mid-trial interviews are less likely to deter perjury than pre-trial investigation. After testifying at trial, a witness is more aware of the risk of a perjury and has a vested interest in maintaining consistency in his testimony.[128]

An accelerated disclosure renders both the fabricated defense and the guilty defendant more vulnerable. But what values of the privilege are threatened here? The prosecution has already established its case-in-chief by independent evidence and, with the danger of speculative prosecution significantly diminished, the defendant's liberty weighs less heavily in the balance. The defendant without a genuine defense clearly faces stronger rebuttal, but is that unfair? Absent the exigencies of the court calendar and the practical constraints of the jury trial process, the prosecutor can obtain, through intensive investigation during a lengthy continuance, much of the same information from defense witnesses after direct testimony for the purposes of rebuttal. Rules of exclusion designed to further collateral objectives may prevent meaningful attack on a defense,[129] but unless a particular constitutional value is threatened, it cannot reasonably be argued that a defendant has any inherent right to present testimony that is subject to a weak and ineffective form of investigation.

It might be argued that it is unfair to allow the prosecution a continuance to investigate a surprise witness on the ground that it gives the prosecution, with its superior resources, too great an advantage.[130] Even if

127. In California, this technique is unavailable to the defense when questioning prosecution witnesses. *See* CAL. PENAL CODE § 633 (1967).

128. *See Prosecutorial Discovery, supra* note 75, at 1110.

129. *See* People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); People v. Underwood, 61 Cal. 2d 113, 389 P.2d 937, 37 Cal. Rptr. 313 (1964). *But see* Harris v. New York, 401 U.S. 222 (1971).

130. The *Allen* court seemed to imply that the assumption in *Williams* "that there would be no constitutional bar to the prosecutors being granted a continuance following the unanticipated presentation of alibi evidence" was somehow "not wholly consistent with our interpretation of the privilege against self-incrimination." Allen v. Superior Court, 18 Cal. 3d 520, 523-25, 557 P.2d 65, 66-68, 134 Cal. Rptr. 774, 775-77 (1976). The court gave no basis for this implication, nor did it refer to any particulars of the *Prudhomme* standard that it considered inconsistent with such an assumption.

the state used all the resources at its disposal, however, it could not possibly investigate all defenses or discover and interview all potential witnesses, particularly with regard to alibi or physical incapacity defenses. Since the state may in no way be faulted for its lack of preparation in making rebuttal, it seems fair to allow a prosecutor a continuance to investigate a surprise witness, unless, of course, the defense is denied a similar opportunity. In light of the broad scope of pre-trial discovery available to the defense in California,[131] a well-prepared defense attorney is only rarely faced with a surprise prosecution witness, and in those cases, a continuance should certainly be available.

Another argument might be that the prosecution, with its greater authority and resources, would be likely to harass and intimidate defense witnesses, encouraging them not to testify or to alter their testimony.[132] But that danger is present in the investigation of any case by any litigant; it has not been shown that the prosecution's investigators present any special danger in this regard. Although the prosecution's resources and methods of investigation are often superior, the danger of alteration or suppression of evidence by prosecution investigators is probably less than that presented by informal defense investigators who, in practice, may be friends or relatives of the defendant or even the defendant himself.[133] In any event, the threat

How could it reasonably be argued that the prosecution should not be allowed such an opportunity? Consider the following experience of a diligent prosecutor: "In a case I recently tried, the time alibi was based on two defense witnesses allegedly seeing the time on a wall clock in a jewelry store. It occurred to me that many retail establishments want their customers to pay attention to the merchandise rather than the time and therefore keep clocks out of view. I had my investigator go down to the jewelry store with a camera and a notebook. There was no wall clock and there never had been one. The alibi turned out to be a wonderful piece of prosecution evidence." R. Altman, Deputy District Attorney of Los Angeles County (1976) (unpublished prosecutor's trial tactics manual). While the alibi evidence turned out to be highly incriminating, it was certainly not compelled incrimination and the state, with no previous opportunity to investigate the alibi witnesses, was certainly not given any undue advantage by mid-trial investigation. Such investigations are, in any event, often performed by District Attorney investigators during the course of a trial without any continuance.

131. See notes 77-85 and accompanying text *supra*.

132. State Bar Committee on Criminal Law and Procedure, *Criminal Law and Procedure, Disclosing Names of Alibi Witnesses Prior to Trial*, 36 CAL. ST. B.J. 480, 487 (1961). The state bar of California was, for many years, a firm opponent of the requirement of defense disclosure; its traditional opposition to legislative proposals for enactment of notice-of-alibi requirements illustrates the point. *Notice of Alibi Rule*, *supra* note 100, at 415-16. In 1971, however, drafted a comprehensive notice-of-alibi proposal. As noted in *Reynolds*, the California legislature has continued to reject notice-of-alibi proposals. Most rejections have been at the hands of the Assembly Criminal Justice Committee. That committee defeated a notice-of-alibi proposal again last year. (A.B. 3120) (1976 session); conversely, the state bar, in contrast to its traditional opposition, took no position on the merits.

133. The threat of witness intimidation is one of the gravest problems faced by prosecutors and by the criminal justice system itself. One prosecutor has remarked that "wide-open pre-

could be diminished by means less intrusive on the opportunity to investigate and prepare, tools highly critical to the truth-determining process.[134] The defense witnesses could consent to speak with the state investigator, but only in the presence of the defense attorney or the defense investigator. The court could, upon defense request, order that the interview with the defense witnesses be so conducted or, in extreme cases, order that such examination take place in the form of a deposition—with attorneys and court reporters

trial defense discovery has contributed to, if not created, an almost out-of-hand witness intimidation problem. We read in the newspapers with alarming frequency of instances of witnesses being threatened, harassed, beaten and, occasionally, killed. Prosecutors inform me this is one of the major problems they face. Witnesses are fearful. They often 'don't want to get involved.' They contrive convenient memory lapses or recant their identifications. Those who are willing and cooperative often have to be protected for long periods of time at public expense." Tochterman, *Better Balance in Trial Discovery*, in PROSECUTOR'S BRIEF 1, 11 (May 1977).

134. Nevertheless, Chief Justice Wright speaking for the majority in a much later case seemed to suggest that allowing the prosecution access to defense witnesses generally, even those already known to the prosecution, might somehow implicate the privilege. In People v. Hannon, 19 Cal. 3d 588, 564 P.2d 1203, 138 Cal. Rptr. 885 (1977), based upon evidence that a lawyer had instructed defendant's alibi witness not to talk to anyone until he testified in court, the prosecution sought and obtained an instruction authorizing the jury to infer consciousness of guilt from the attempt by the defense to suppress evidence. In holding the instruction unwarranted by the evidence in light of the failure to show defendant's personal involvement in any such attempt, the court went on to state that even if the record had contained proof that defendant's attorney had instructed the alibi witness to remain silent prior to trial, "such conduct [did] not necessarily constitute the suppression or the attempted suppression of evidence." Id. at 600, 564 P.2d at 1209, 138 Cal. Rptr. at 891. In holding that the prosecution's sole remedy when faced with a defense witness who refuses to speak with its investigator is impeachment on the basis of bias, Chief Justice Wright made the following observation: "It is apparent that the issue of suppression of evidence arose out of the prosecutor's concern that Brown might present alibi evidence which could not be impeached effectively on short notice. In actuality the claimed suppression of evidence was not of evidence which Brown might have supplied to the People but rather of clues from which the People might have been able to impeach any alibi testimony which Brown might present at the trial. Thus we see notice-of-alibi issues lurking behind the suppression of evidence/consciousness of guilt issues we have considered in this case." *Id.* at 602 n.5, 564 P.2d at 1211 n.5, 138 Cal. Rptr. at 893 n.5 (citing Reynolds v. Superior Court, 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974) and Allen v. Superior Court, 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976)).

At the least, Chief Justice Wright suggests that a direct order requiring a known defense alibi witness to speak with the prosecution prior to trial threatens the privilege and that a defense attorney's request to a defense witness that the witness not speak with the prosecution prior to trial is a proper means of protecting the privilege. At most, Chief Justice Wright's statement appears to cast doubt upon the propriety of even the prosecution contacting unwilling defense witnesses prior to trial.

Yet, how can it be reasonably argued that the Fifth Amendment privilege is implicated by thorough prosecutorial investigation of defense witnesses either prior to or during trial with the aid of a continuance? Certainly no personal compulsion is directed against the defendant: he or she is not required to do or say anything. To stretch the privilege to the point of preventing the prosecution from investigating witnesses and other evidence already known to it would remove a vital tool in the truth-determining process and severely diminish its integrity.

present—or in court with judicial supervision.[135] Through these devices, the danger of witness intimidation might be brought within reasonable limits while the prosecutor would remain free to prepare an effective rebuttal.

Fairness, then, is not threatened by a defense disclosure that may assist the state in making its rebuttal; nor is the final and most important value protected by the privilege—that the government should not resort to the cruel process of forcing a defendant to contribute to his own defeat. In view of the diminished importance of the privilege at this point, any compromise of this value can only be slight. The defendant has been forced to incriminate himself in only the most attenuated manner by accelerated disclosure. The value of humaneness deserves consideration in this context but that value is similarly not entitled to be considered absolute, refusing limitation regardless of the significance of competing interests.

Careful analysis suggests that while impeachment or rebuttal evidence directed at the presentation of a previously disclosed defense is often highly incriminatory, it should not pose a substantial threat to the values protected by the privilege against self-incrimination. When a defendant presents testimony, he must expect that it will be tested by thorough investigation as well as by cross-examination at trial. Accelerated disclosure, which *only* serves to provide an opportunity for preparation of a proper rebuttal, need not pose a significant threat to the privilege.

4. Use in Narrowing the Issues

Another way in which advance disclosure may threaten the privilege arises from the nature of the defense itself. The mere specification of a particular defense, without enumeration of details or of supporting witnesses, focuses the prosecution's attention on that defense, allowing it to concentrate its investigation and to tailor its case-in-chief. The defendant's tactical advantage in holding all the defense cards under the general plea of "not guilty" is certainly reduced. But what values are threatened by merely narrowing the issues? Reducing the defendant's decided advantage in this respect would not make the encounter unfair but only more evenly balanced.[136] As noted previously, however, a request that would force a defendant to choose defenses at the outset and thereafter prevent him from abandoning or adding to them may be unfair when applied to certain types of

135. Authorization for such a procedure in terms of a "conditional examination" of both prosecution and defense witnesses is being considered by the California legislature this year. S.B. 642 (1977 Session) (March 23, 1977).

136. Dean, *Advanced Specifications of Defense in Criminal Cases*, 20 A.B.A.J. 435, 435-36 (1934).

defenses, in light of the defendant's limited knowledge of the state's case as well as his own.[137]

With respect to the purpose of avoiding self-condemnation, an advance plea alone will generally not lead to witnesses or specific evidence that could incriminate. While it may assist the state somewhat by lessening the defendant's tactical advantage, every procedural alteration that affects defendant's tactical position does not significantly threaten the values protected by the privilege.

It is evident then that compelled pre-trial disclosure presents many degrees of danger to the privilege, some constituting a direct intrusion on the privilege, some imposing only slight threats to the values it protects, and others falling clearly outside its parameters. The extent of intrusion often depends on the way in which the incriminating evidence is used. A compelled disclosure that only tangentially implicates a defendant as a participant in a crime may severely intrude upon the privilege when it is used by the prosecution to overcome a challenge to the sufficiency of its case-in-chief, and when, without it, the defendant would never have been put to his proof or faced the prospect of conviction. On the other hand, a compelled disclosure that leads to devastating rebuttal evidence may trespass only slightly on the values protected by the privilege where the prosecution would most likely have discovered the evidence by independent investigation of the disclosure after its presentation by the defense.[138] Finally, a compelled disclosure that merely narrows the issues threatens the privilege even less.

D. State Interests Served by Accommodation

Various legitimate governmental interests would be served by an advance disclosure requirement. The variation here most often depends on the nature of the defense rather than on the way in which the evidence may be used to incriminate. A number of general state interests would, of course, be served by disclosure of every defense. Interests of judicial economy and prosecutorial efficiency would be furthered by any defense disclosure. A narrowing of the issues subject to contest at trial would most likely reduce the need for broad pre-trial investigation, shorten the trial, and assist in

137. One commentator has expressed the view that the prosecutor should be required to develop all facets of the case rather than concentrate on those elements that will be contested, thereby permitting him "to aim his efforts at getting a conviction rather than at exposing all available evidence to the truth-seeking process." Note, *Prosecution's Right to Discovery*, 59 CALIF. L. REV. 225, 230 (1971). Other than providing novices with an exercise in trial practice, however, there appears to be no rationale for requiring prosecutors to prove elements that are not contested or in fact affirmatively conceded.

138. See note 125 and accompanying text *supra*.

disposition of cases by way of a negotiated plea.[139] In addition, the search for truth would be furthered by the opportunity for thorough state investigation and the elimination of the defendant's advantage of surprise. Nevertheless, the state interests do not appear strong, much less compelling, when applied to all defenses, especially in light of the values protected by the privilege that would be sacrificed. First, as has been noted,[140] many cases call for a difficult choice between one or more available defenses and it would be unfair to force a defendant to choose between them without first viewing the state's case-in-chief. The disclosure of the nature of certain defenses, and certainly the names of witnesses supporting them, would also endanger the privilege by possibly supplying evidence to support an otherwise insufficient state case-in-chief. Any defense involving an admission of presence at the scene of the crime, such as mistake or accident, duress, or self-defense, might lead the prosecutor to investigate eye-witnesses to the crime and may preclude the defendant from contesting weak identification testimony or other evidence establishing his presence.

With respect to certain specific defenses, however, the state interests appear stronger. These defenses generally are easy to fabricate, difficult to rebut or disprove, and available to the defense as a last minute surprise weapon, often shifting the focus of the trial to a single, narrow issue. Because of these characteristics, it is often contended, although impossible to prove, that such defenses are used as a vehicle for perjury and as an avenue of escape for the guilty.[141] For example, the alibi defense embodies most of these characteristics.[142] Because supporting witnesses may be friends or relatives of the defendant, the defense is easily fabricated. Not being present at the scene of the crime, alibi witnesses cannot be discovered through normal investigation techniques and their whereabouts are not otherwise known to the police. There may be no independent witnesses to the alibi. Since the evidence relating to the defense is almost entirely within the knowledge or possession of the accused, the alibi is difficult to disprove at trial. Finally, the alibi defense can easily surprise a prosecutor who thought his eyewitnesses were stronger than they proved to be and who expected to encounter another claim such as self-defense.[143]

139. *See generally* Note, *No Judicially Created Notice-of-Alibi Procedure*, 64 CALIF. L. REV. 509, 514-16 (1976).

140. See text accompanying notes 86-89 *supra*.

141. *See* Millar, *The Modernization of Criminal Procedure,* 11 J. CRIM. L.C. & P.S. 344, 350 (1920); Note, *Prosecutorial Discovery Under Proposed Rule 16*, 85 HARV. L. REV. 994, 1010 (1972).

142. *See Notice of Alibi Rule, supra* note 100, at 415.

143. *See* State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931). In considering the danger of a false or fraudulent alibi claim "presented by the accused so near the close of the trial as to make it quite impossible for the state to ascertain any facts as to the credibility of the witnesses called

Other defenses that share most of these characteristics are those involving claims of physical or mental incapacity, such as impotency, insanity, and diminished capacity.[144] Defenses involving confession and avoidance, such as a former acquittal, conviction or pardon, commission under a promise of immunity, and entrapment, however, are not easy to fabricate or difficult to disprove. A defense involving excuse or justification, such as self-defense, duress, mistake, or accident, is also usually apparent from the facts and is rarely difficult to contest. Often, the defendant is arrested at the scene and circumstantial evidence or independent eyewitness testimony is available to verify or rebut the defense. Those defenses that rest upon a lack of personal ability—"I couldn't have done it because I wasn't there" or "I wasn't able"—present the strongest governmental interests in favor of pre-trial disclosure. Such defenses, when compelled to be disclosed pre-trial, pose a somewhat lesser threat to the privilege. Investigation and interrogation of witnesses as to the defendant's inability to commit the crime normally will not be useful to the prosecutor in establishing his principal case against a defendant. While the names of self-defense or duress witnesses may assist in establishing the prosecutor's case-in-chief, an interview with an alibi witness, while providing a basis for impeachment, would ordinarily not be used in the prosecution's case-in-chief. Even the *Prudhomme* court did not disturb *Jones'* conclusion that discovery relating to the defense of impotence could not possibly incriminate the defendant.[145]

As recognized earlier,[146] however, even disclosure relating to these defenses could, in some cases, provide evidence that if used, could violate the privilege by compelling the defendant to provide testimonial evidence that would be used to incriminate him and that would not otherwise have been available to the prosecution through investigation or normal trial disclosures.[147]

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by the accused," the court upheld one of the first alibi statutes enacted in the United States. *Id.* at 4, 176 N.E. at 657.

144. The fact that a separate trial phase on the insanity issue is required in California demonstrates that the issue of extreme mental disability (compare the diminished capacity defense) can entirely shift the focus of the trial. The defense of alibi, it may be said, is an example of extreme physical disability.

145. Prudhomme v. Superior Court, 2 Cal. 3d 320, 325-26, 466 P.2d 673, 676-77, 85 Cal. Rptr. 129, 132-33 (1970).

146. See text accompanying note 117 *supra*.

147. Consider the following case: The prosecutor's eyewitnesses think a defendant "looks like" the robber, but are unable to make a positive identification, and only weak circumstantial evidence connects the defendant to the crime. The case against the defendant, while adequate to call for a trial, is insufficient to overcome a motion for judgment of acquittal and send the case to the jury. The defendant plans to present an alibi and through pre-trial discovery has been forced to disclose the names of his alibi witnesses. The state's investigator interviews the witnesses and one states that the defendant had threatened him into providing a false alibi. This

E. Possible Avenues of Accommodation

In balancing the values protected by the privilege against self-incrimination with the state's interests that would be served by an advance disclosure requirement, at least three avenues of accommodation merit consideration. First, the scope of discovery could be limited to the nature of the defense only; second, the time of disclosure could be advanced only slightly by allowing prosecutorial discovery after the prosecution has established its case-in-chief rather than after the defendant has presented his witnesses or other evidence; and third, a broader form of discovery could be authorized but with protective devices established to diminish the possibility that compelled disclosures would be used in a manner that would intrude upon the interests served by the privilege.[148]

1. Limiting the Scope of Discovery

The first accommodation would entail limiting disclosure to the defendant's plea; the plea would be required if he wished to assert specific defenses that claimed personal inability, similar to the California requirement that an insanity defense be specifically pleaded.[149] The possibility that such limited disclosure would incriminate the defendant, while always present, would usually be remote. The prosecutor would not ordinarily be able to discover the evidence the defendant intends to introduce from the

witness is subpoenaed by the prosecutor and testifies to these facts in the prosecution's case-in-chief. The case may now be sufficient to go to the jury and to be sustained on appeal. *See* Williams v. Superior Court, 71 Cal. 2d 1144, 458 P.2d 987, 80 Cal. Rptr. 747 (1969); Rideout v. Superior Court, 67 Cal. 2d 471, 432 P.2d 197, 62 Cal. Rptr. 581 (1967).

In some ways it may be argued that an alibi witness is particularly capable of incriminating a defendant. It is common knowledge that defendants in criminal courts ordinarily do not come from the middle or upper classes of our society and that the facts themselves often present the "seamier" side of life. Since an alibi witness is often previously acquainted with an accused, he might be in a particularly appropriate position to provide the prosecutor with information concerning defendant's habits, lifestyle, or activities that incriminates the defendant either in the crime charged or in other offenses. In presenting an alibi witness to testify, however, the defense always makes a calculated judgment that the benefits to be derived from the witness' testimony at trial will outweigh any possibility that the witness will provide information damaging to the defendant. Because the prosecutor could obtain the incriminating information if the witness testified for the defendant, it would seem that acceleration of disclosure would do slight, if any, damage to the values protected by the privilege.

148. Another approach, which might be called "required waiver," has been suggested by a number of commentators. This form of compromise would entail denying discovery to the defense unless the defendant waives his special status as an accused and possibly his privilege as a witness, Goldstein, *supra* note 67, at 1198; Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56, 101 (1961); *Barrier to Discovery, supra* note 105, at 144-45. In view of the demonstrated need for broad defense discovery, see text accompanying notes 73-76 *supra*, however, such discovery should not be conditioned on a waiver of such magnitude. *See* Brooks v. Tennessee, 406 U.S. 605 (1971); People v. Coleman, 13 Cal. 3d 867, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975). See note 41 *supra*.

149. A plea of alibi would not, of course, require a bifurcated trial. *See* CAL. PENAL CODE § 1026 (West 1970).

plea alone. Of course, it is possible that a prosecutor will interview friends and relatives of the defendant and thereby stumble upon a prospective alibi witness, but this may easily occur in the absence of an alibi plea. The greater likelihood that an alibi plea would motivate a prosecutor to undertake such an investigation when he would not otherwise do so is vastly different from giving the prosecutor the details of the alibi or the names of alibi witnesses.[150]

While such a narrow notice requirement may present only a slight threat of incrimination, more substantial problems arise in attempting to make the requirement effective.[151] It might be easily disregarded unless the defendant were subject to some sanction for withdrawing the plea and relying on another defense. For example, a defendant would have nothing to lose by routinely entering the plea to keep his options open while maintaining the same freedom he now enjoys under a general plea of "not guilty." The imposition of a sanction for such withdrawal would arguably be unfair in certain cases. It is not unusual for a defendant to claim initially, even to his attorney, that he knows nothing about the crime, and only later, after observing the evidence against him at the preliminary examination or during the state's case-in-chief, to admit some involvement. Moreover, the facts presented in the state's case may give rise to a meritorious defense: the assault may have been committed in self-defense, the shooting accidental, the battery committed on police officer acting outside the scope of his duties, the sale of narcotics in response to police persuasion amounting to entrapment. Any effective sanction would penalize a defendant by hindering his assertion of a new defense. While the United States Supreme Court would not apparently be bothered by the imposition of a penalty in these circumstances,[152] the prospect of depriving a defendant of a potentially valid defense because he failed to assert it at the outset appears to be not only fundamentally unfair but also to constitute a punishment greatly disproportionate to the wrong committed.

The safest approach would probably be to ignore the withdrawn alibi notice and leave the problem of fraudulent notices to the ethical standards

150. Even the details of the defense alone, for example, the location where defendant claims to have been, would often lead directly to the names of alibi witnesses and hence to their location.

Even state courts that are protective of the privilege based on their own constitutions appear to view the plea requirement as only a highly speculative threat. For example, *Reynolds* relied heavily upon an Alaska Supreme Court decision striking down a notice of alibi order on state privilege grounds, but that court upheld a requirement that an accused give notice of an alibi defense, regarding such notice as similar to a plea of "not guilty" and finding "nothing incriminating about this inquiry." Scott v. State, 519 P.2d 774, 787 (Alas. 1974).

151. As noted in text accompanying note 152 *infra*, the United States Supreme Court has not addressed itself to the question of an appropriate sanction.

152. *See* Williams v. Florida, 399 U.S. 78, 84 n.15 (1970).

enforced by the legal profession. This approach has been adopted by the Federal Rules of Criminal Procedure, which go far beyond a mere plea requirement: 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.[153] It has the additional attribute of not discouraging the initial entry of alibi pleas. A more moderate position would allow comment on the claim, similar to false or evasive extrajudicial assertions. This would prevent blanket alibi claims while presenting only a minimal threat to the privilege. Of course, the formulation of a fair sanction for a defendant's attempt to present an alibi defense without prior notice might prove difficult, although not impossible.[154] Despite previous notice of an alibi or other defense, however, a defendant should always be allowed to rest without presenting any evidence, and to rely upon the failure of the state to prove its case without the threat of adverse comment. Otherwise, the notice requirement could directly penalize the defendant for asserting the privilege in face of a clearly insufficient case against him.[155]

While the requirement of a special plea with respect to specific defenses may not impair the central values protected by the privilege, this approach is of limited utility from the state's point of view. It will rarely assist the prosecution in gathering specific rebuttal evidence; rather, it will merely help to focus the issues in the investigation and the trial. Nevertheless, by rendering some assistance in making the criminal process more effective as a truth-seeking device, it does present "an appealing solution"[156] to the problem.

2. *Minimizing the Acceleration*

Another avenue for accommodation would minimize the acceleration of disclosure required by any discovery rule. Only after the prosecution has

153. FED. R. CRIM. P. 12.1(f).

154. As a sanction for failure to disclose the Federal Rules of Criminal Procedure mandates the exclusion of the testimony of any undisclosed witness other than that of the defendant himself. FED. R. CRIM. P. 12.1(d). The sanction, however, is permissive only, and for good cause the court may grant an exception to it. FED. R. CRIM. P. 12.1(e). In California, a defendant waives the defense of insanity by failing to enter the plea of not guilty by reason of insanity. *See* CAL. PENAL CODE § 1026 (West 1970). In exceptional cases, however, fairness requires that the defense be available upon a plea entered even after commencement of trial. People v. Boyd, 16 Cal. App. 3d 901, 908, 94 Cal. Rptr. 575, 579 (1971).

155. Providing an opportunity for prosecutorial comment on a previously pleaded alibi when defendant rests without presenting evidence not only makes the assertion of the privilege more costly, *see* Griffin v. California, 380 U.S. 609, 614 (1965), but also increases the likelihood that a prosecutor with an insufficient case will charge a defendant in the hope that an alibi defense will be pleaded and later withdrawn, enabling the prosecutor to use the adverse inference to support his weak case.

156. *Notice of Alibi Rule, supra* note 100, at 417.

presented a sufficient case-in-chief would the defendant be called upon to state the general nature of his defense and to provide a list of witnesses he will be calling in support of it.[157] Although this requirement, which approximates a limited opening statement for the defense (although not to the jury), would be contrary to current California law,[158] it would entail no substantial threat to the privilege. Freedom from speculative prosecution is certainly not affected, and with a full opportunity to evaluate the prosecution's case, required disclosure at this point does not appear unfair. When a defendant has been able to view the prosecution's case in full and has decided to present a defense, a requirement that would entail giving the prosecution a preview of his case should not be viewed as a violation of the *Prudhomme* standard.[159] The danger of witness intimidation is minimal, and the possibility is slight that the compulsion itself would incriminate a defendant. At this stage, it is also unlikely that the disclosed witnesses would lead to incriminating evidence, and, in any event, these witnesses would probably be called to testify. In fact, it is conceivable that Justice Peters would have approved of such a rule. His principal objection was to any requirement of disclosure "until a prima facie case [had] been established"[160] or, until "the prosecution has first made out a case that the accused can or should deny."[161]

As with the limited scope of discovery, however, this accommodation does not substantially further the state interests involved. When the entire

157. A defendant should not, however, be required to state whether he himself will testify. This is a tactical decision that defendant should be required to make only in consultation with counsel, uninhibited by any rules requiring him to have given prior notice of such intent. *Cf.* Brooks v. Tennessee, 406 U.S. 605, 610-11 (1971).

158. In enforcing the *Prudhomme* standard, the California Supreme Court has stated that a defendant cannot be compelled to disclose possibly incriminating evidence "at any time prior to its actual use at trial." Bradshaw v. Superior Court, 2 Cal. 3d 332, 333 n. 3, 466 P.2d 680, 681 n.3, 85 Cal. Rptr. 136, 137 n.3 (1970).

159. In People v. Manson, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976), the trial court, in a multiple-defendant case, faced the prospect of a defendant testifying over the objection and without the cooperation of their defense counsel. Fearful that a defendant's testimony in such form might include evidence inadmissible and prejudicial to the co-defendants, *see* Bruton v. United States, 391 U.S. 123 (1968); People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965), the court proposed that each defendant initially testify outside the presence of the jury. Noting that the order was not implemented for the purpose of discovery, the court concluded as follows: "While an in camera proceeding would give the prosecution a preview of the defendant's case, that procedure certainly does not violate any constitutional right. Since appellants had declared their intention to testify, the proposed proceeding was not tantamount to compelling a waiver of the privilege against self-incrimination." People v. Manson, 61 Cal. App. 3d 102, 161-62, 132 Cal. Rptr. 265, 299 (1976) (citing Prudhomme v. Superior Court, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970)).

160. Jones v. Superior Court, 58 Cal. 2d 56, 65, 372 P.2d 919, 923, 22 Cal. Rptr. 879, 883 (1962) (Peters, J., concurring and dissenting).

161. *Id.* at 63, 372 P.2d at 923, 22 Cal. Rptr. at 883.

defense may be presented in less than a day, as is the usual case, the prosecutor will have little opportunity for investigation after learning of the witnesses at the opening of defendant's case. Only in rare cases that involve multiple defendants, and in which months may elapse after the close of the prosecution's case but before the last defendant presents his case, would the prosecutor have ample time to investigate and prepare.[162]

3. *Establishing Protective Devices*

The last and most ambitious proposal for accommodation is designed to serve the state interests more effectively by a broader form of pre-trial disclosure. This approach would require specification of the details of the defense and the naming of defense witnesses, while undertaking the difficult, dangerous, and burdensome task of formulating and applying strict protective devices to reduce the possibility that the required disclosures will incriminate the defendant such that the values protected by the privilege would be threatened. The difficulty lies in fashioning a judicial order of immunity to compel acceleration of disclosure similar to that used to compel grand jury or trial testimony.[163] Such a judicial order would permit investigation of the compelled pre-trial disclosure while prohibiting the use of any evidence derived therefrom until after the prosecution had succeeded in independently establishing its case-in-chief. To more completely protect the privilege, the prohibition should continue unless and until the defendant actually presents disclosed matters in his defense at trial. The California Supreme Court in two cases has expressed a willingness to implement judicially created immunity rules in other contexts in which some accommodation is called for between the privilege and legitimate state interests.[164] Although the procedures in both cases were not specifically directed toward

162. It is in multiple-defendant cases, however, that fairness may require each defendant to wait until he is called upon to present his defense before making any required disclosure. A defendant may be fully aware of the substance of the prosecution's case, but co-defendants in California are not entitled to discovery from one other. A great deal of uncertainty therefore remains as to the nature of defenses that will be presented by individual defendants. While most co-defendants cooperate in a somewhat common defense, such that their cases are mutually supportive, on occasion a conflict of interest may arise and each defendant may end up acting as his co-defendant's prosecutor. When this occurs, a defendant may not be aware of the full case against him until all his co-defendants have presented their cases. Thus, where multiple defendants are involved, this form of accommodation should require disclosure from each defendant only when that defendant is called upon to present his case. As such, it provides only a limited benefit to the prosecutor, chiefly in those cases involving individual defenses lasting over a period of weeks or months.

163. *See* Kastigar v. United States, 406 U.S. 441 (1972); Organized Crime Control Act of 1970, Pub. L. No. 91-452, 91st Cong., 2d Sess. (codified in scattered sections of 18 U.S.C.).

164. *See* People v. Coleman, 13 Cal. 3d 867, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975); Byers v. Justice Court, 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969), *vacated sub nom.* California v. Byers, 402 U.S. 424 (1971).

the state interests served by pre-trial discovery, the state was allowed to proceed with a course of action that would have endangered the privilege against self-incrimination absent some protective immunity.

State interests would be more effectively served by the greater breadth of required disclosure and, theoretically at least, the defendant would be afforded a form of protection that would prevent intrusions upon the privilege in any way. Defendant would be assured that the compulsion would not force him to assist in establishing an otherwise insufficient case-in-chief for the state. Since incriminating evidence resulting from the disclosure could be used only if and when the disclosed information was presented by the defendant, he would be guaranteed that the compulsion would not lead to significantly greater incrimination than would result from thorough investigation of defendant's evidence after its presentation at trial. Although, in reality, prompt interview and witness investigation is generally more effective than mid-trial inquiry, any interest that the defendant may have in avoiding effective scrutiny of a defense would be rendered insignificant once he had presented it, and incrimination would be limited to rebuttal of that defense.[165]

This attempt at accommodation would be dangerous because the practical problems of enforcing the immunity may render its protection inadequate. Strict rules applicable to the prosecution of a witness after he has been forced to testify under a grant of immunity require that the state show by clear and convincing evidence that the information upon which the witness is to be prosecuted was derived from a wholly independent source.[166] As a practical matter, however, it is often difficult, if not impossible, to test the truth of a prosecutor's affidavit for this purpose.[167] Similar problems are inherent in the enforcement of a rule that requires the prosecutor to show that its case-in-chief was based upon independent evidence after he has obtained a pre-trial defense disclosure. The most effective method would seem to be that, as a condition of discovery, the prosecutor must first make a record by *in camera* proof, sealed documentation, or otherwise, of the evidence in his possession. The court can then be assured that the evidence presented in the prosecution's case-in-chief was derived from an independent source. As further protection in unusual cases, the court may be authorized to deny the discovery request upon an *in camera* defense show-

165. See text accompanying notes 125-35 *supra*.

166. *See* Kastigar v. United States, 406 U.S. 441 (1972); United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976); United States v. Catalano, 491 F.2d 268 (2d Cir. 1974); United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973).

167. *See, e.g.*, United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976). It has been said that because of this difficulty, any such immunity would be "too hollow a safeguard." *Prosecutorial Discovery, supra* note 75, at 1005.

ing that the information subject to disclosure would lead to severe danger of incrimination and that intrusion upon the privilege could not be avoided by the strictest protective order.

The search for an effective means of enforcement points out another problem with this method of accommodation—its burdensome nature. Proper enforcement of all protective devices may impose a greater burden on the judicial system than would a substantial continuance. While pre-trial disclosure may result in more effective rebuttal of a fabricated defense, harm to judicial efficiency and possibly to prosecutorial freedom[168] may be too great a price to pay for the incremental benefits received from a more reliable process for ascertaining the truth.

Conclusion

In light of the demonstrated difficulty of formulating a fair yet effective accomodation of the values protected by the privilege against self-incrimination, it is reasonable to conclude not only that Chief Justice Wright meant what he said when he indicated in *Allen* that the privilege leaves no room for balancing, but that he was correct. Any disclosure requirement, even when not fashioned as a rule of discovery, raises the specter of incrimination and poses an ominous danger to our adversary system of justice of "stealthly encroachments"[169] under the two-way street rationale. In every attempt at prosecutorial discovery, one hears Chief Justice Wright repeating the admonition of Justice Peters in his dissent in *Jones*: "It will not do to say that the impairment of constitutional rights is only minor in the instant case, and for that reason no one should get excited about it."[170]

Yet, Chief Justice Wright would certainly agree that the principles of the privilege are not rigid and inflexible, intolerant of any adjustment regardless of the importance of their underlying values when contrasted with competing interests in a given context. Not every adjustment constitutes an impairment of a constitutional right. Every accommodation is not, at best, an unworthy compromise or, at worst, a capitulation to values regarded as

168. The employment of immunity as a protective device may in some cases inhibit effective prosecution. Faced with the prospect of defendant's argument that the new evidence was discovered by exploiting the pre-trial disclosures rather than by following up leads from the defense witnesses' testimony at trial or by independent investigation prior to presentation of the defense, the prosecutor might hesitate to file formal charges for crimes committed by defendant but discovered in a pending suit. Similar arguments have been raised in regard to judicially-imposed immunity rules in other contexts. *See, e.g.*, Cassou, *The Morrissey Maelstrom: Recent Developments in California Parole and Probation Revocations*, 9 U.S.F. L. REV. 43, 72-73 (1974).

169. Boyd v. United States, 116 U.S. 616, 635 (1886).

170. Jones v. Superior Court, 58 Cal. 2d 56, 67, 372 P.2d 919, 925, 22 Cal. Rptr. 879, 885 (1962).

superior by worshippers of expediency. Nor, as far as the balance of power between the defendant and the state is concerned, does the Constitution require that every tactical advantage enjoyed by a defendant be left unaltered.[171]

The operation of discovery rules in the context of the criminal trial process requires some mutuality in order to maintain the integrity of the adversary process as a realistic search for the truth.[172] Although *Jones* has not been overruled, the two-way street of criminal discovery in California today is a four-lane freeway for the defense and an overgrown and neglected footpath for the prosecution. Discovery from the defendant had been nearly eliminated, while discovery for the defendant had progressed far beyond its 1964 limits, when Chief Justice Traynor noted that few jurisdictions had moved as far as California in liberalizing defense discovery.[173]

Opponents of any prosecutorial discovery argue that the lack of mutuality in criminal discovery cures rather than creates the imbalance. The right of discovery must remain unilateral to counter the inherent imbalance in favor of the prosecution in a criminal case. This view was best expressed by Professor Goldstein in 1960.[174] Yet, when he spoke of the "very serious disadvantage"[175] of the defendant in a criminal case, he was viewing a criminal process vastly different from that conducted in California today. The revolution in criminal procedure during the Warren Court era provided defendants with the essential tools for defense in the adversary context and, through exclusionary rules designed to serve interests collateral to the truth-determining process, has given defendants procedural counter-balances that avoid the impact of incriminating evidence and that are useful both in negotiating a settlement and in presenting a case to the jury.[176] In terms of

171. The legislative enactment of prosecutorial discovery rules would be much easier from a political point of view if additional discovery benefits could be conferred on the defense. In federal court, FED. R. CRIM. P. 12.1 authorizes disclosure to the defense, after notice of alibi, of the names and addresses of rebuttal witnesses to which the defendant would not otherwise have been entitled. In California, a defendant is already entitled to the names and addresses of any witness placing defendant at the scene of the crime, as well as any witness the prosecution intends to call at the trial. Thus, as a practical compromise in California, it may be necessary to tie a notice-of-alibi rule to further defense discovery, such as a greater opportunity to depose prosecution witnesses.

172. Some degree of mutuality in cases in which the state interests are stronger might also mitigate further deterioration of public confidence in the legal profession caused by technical procedural rules that appear to frustrate the determination of the truth and render lawyers "a sort of people whose profession is to disguise matters." T. MORE, UTOPIA (trans. ed. 1935).

173. *See* Traynor, *supra* note 5.

174. Goldstein, *supra* note 67.

175. Goldstein, *supra* note 67, at 1199.

176. In California, this advantage in the context of the exclusionary rule of Miranda v. Arizona, 384 U.S. 436 (1966), includes the ability to testify without fear of impeachment. *See* People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

discovery, California criminal procedure gives defendants information unheard of in federal practice.[177] In terms of knowledge of the opponent's case, the advantage in California is with the defense. Certainly, broad defense discovery is required to counterbalance the numerous advantages the prosecution enjoys as a fact-gatherer, and a limitation upon such discovery should not be considered as an alternative to prosecutorial discovery. Nevertheless, fairness in the adversary contest does not require a one-way street for criminal discovery in California.

The task before the state's judiciary is to arrive at accommodations that will permit prosecutorial discovery while remaining solicitous of the values underlying the privilege. The safest approach would limit discovery to specific defenses, such as alibi and physical incapacity, and limit the scope of required disclosure to a plea only. If details of the defense or names and addresses of witnesses are to be included, disclosure should be required only after the prosecution has presented a sufficient case-in-chief. Any extensive pre-trial disclosure requirement would severely endanger the values of the privilege, even when limited to specific defenses such as alibi or physical incapacity, unless effective procedural devices were implemented to assure that incriminatory information gained from the disclosures would be used only after the disclosed information was presented by the defense at trial. Because it will be most difficult to make these protections effective while avoiding burdensome court procedures and leaving the prosecution free to pursue legitimate objectives with independent evidence, California would do well to adopt a "go slow—proceed with caution" approach to prosecutorial discovery. This is the admonition given to us by Chief Justice Wright in *Allen*.

177. In federal court, discovery has been expanded somewhat by recent amendments to the Federal Rules of Criminal Procedure. A defendant still has no right to discover unilaterally, however, the names and addresses of prosecution witnesses, much less their statements or expected testimony, until they have actually testified for the prosecution in its case-in-chief. *See* FED. R. CRIM. P. 16; Palermo v. United States, 360 U.S. 343 (1959).

The 1975 House of Representatives proposed amendments to the federal rules would have given each party the right to discover the names and addresses of the opposing party's witnesses three days prior to trial, but the conference committee adopted the Senate version omitting such a right. "A majority of the conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy." H.R. REP. NO. 414, 94th Cong., 1st Sess. 12, *reprinted in* [1975] 17 CRIM. L. REP. (BNA) 3218.