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Edward S. G. Dennis Jr.

THE DISCOVERY PROCESS IN CRIMINAL PROSECUTIONS: TOWARD FAIR TRIALS AND JUST VERDICTS

EDWARD S.G. DENNIS, JR.*

Justice William J. Brennan's speech, *The Criminal Prosecution: Sporting Event or Quest For Truth? A Progress Report*,[1] featured with this symposium addresses the changes which have occurred in criminal discovery over the past twenty-six years and advocates broader discovery for criminal defendants for the future. Impressive as Justice Brennan's commitment to justice and work product are, his arguments do not establish that broader discovery will result in fairer trials or more just verdicts.

Although Justice Brennan does not offer many specific proposals, he appears to favor modifications of the *Jencks* and *Brady* rules[2] to allow discovery of the names, addresses, prior statements, and criminal records of the government's witnesses. To make his points, Justice Brennan compares federal criminal discovery, which for the most part is governed by the Federal Rules of Criminal Procedure, with (1) the majority opinion by Chief Justice Vanderbilt of the New Jersey Supreme Court in *State v. Tune*,[3] from which Justice Brennan, then an associate justice on

* Assistant Attorney General, United States Department of Justice, Criminal Division.

1. 68 WASH. U.L.Q. 1 (1990).

2. In Jencks v. United States, 353 U.S. 657 (1957) (Brennan, J.), the Supreme Court held that a criminal defendant was entitled to federal agents' written reports relating to the events about which the agents testified at trial. The so-called Jencks Act, 18 U.S.C. § 3500, clarifies and limits the *Jencks* decision. It provides that such reports or statements must be provided to the defense only after the witness has testified on direct examination. The Jencks Act is echoed in FED. R. CRIM. P. 26.2, which provides for the production of both government and defense witness statements in essentially the same manner.

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that the government must, on request, turn over to the defense any evidence which is favorable and material either to guilt or to punishment. Subsequent cases have established varying tests for materiality, depending upon the situation. *See, e.g.*, United States v. Agurs, 427 U.S. 97 (1976).

Both the *Jencks* and the *Brady* rules have generated a great deal of litigation, resulting in refinements of practice which vary slightly among federal circuits.

3. In State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953), Chief Justice Vanderbilt of the New Jersey Supreme Court reviewed the basic arguments against increasing discovery rights for criminal defendants. The arguments are still, in our view, quite compelling. According to Justice Brennan, they may be summarized in four points:

that court, dissented,[4] (2) discovery in federal civil cases,[5] (3) discovery in state criminal cases,[6] and (4) discovery in criminal cases in England.[7]

Justice Brennan's arguments are, in our judgment, based on flawed assumptions. First, the assumption that reform is needed is incorrect. Federal criminal trials are fair now, a fact not disputed directly by advocates of broader discovery. Second, the assumption that prosecutors are unlikely to search for possible exculpatory arguments based on evidence in the government's file is incorrect.[8] Such arguments are often the great weakness in the government's case, and the prosecutor searches long and hard for them. Third, the assumption that a more perfect justice is more likely to prevail if the two sides, defense and prosecution, are put in equal positions is baseless.[9] Even if we could somehow equalize the disparate privileges, advantages and resources which the two enjoy—and for many reasons we cannot[10]—there is no real reason to suppose that either the result or the process would be fairer.

Indeed, not only is broader discovery not needed, in our view its effect might be to diminish fairness in criminal trials. As Chief Justice Vanderbilt argued, unscrupulous defendants faced with the loss of liberty would use the information obtained to tailor their defenses and intimidate or eliminate witnesses, thus increasing the chances that the jury would return an unmerited not guilty verdict.[11] The government must contend with the heavy burden of proving guilt beyond a reasonable doubt. In that context, fairness surely does not require giving defendants time at their leisure to shape their tactics and defenses to fit every configuration of the government's case.

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(1) Greater discovery would lead not to more accurate factfinding but to an increase in perjured testimony by defendants or their witnesses.

(2) Greater discovery would lead to witness intimidation and reluctance on the part of witnesses to testify.

(3) Greater discovery would place the defendant in too favorable a position.

(4) Discovery practices in other criminal justice systems are not a useful guide in determining what American federal practice should be.

See Brennan, *supra* note 1, at 5-7.

4. Brennan, *supra* note 1, at 5-7.

5. *Id.* at 8-10.

6. *Id.* at 10.

7. *Id.* at 15.

8. *Cf. id.* at 8.

9. *Cf. id.* at 4.

10. The disparate positions dictated by the fifth amendment alone are formidable and include the defendant's right to remain silent with his corollary rights to call no witnesses and make no statements either before or during the trial.

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

Fairness in criminal cases is due not only the defendant but also the general public, whose interest is represented by the government. Defendants should not be protected against tripping themselves up when they testify falsely or fabricate defenses. The "surprise" that results when the government puts on a witness who thwarts such efforts to distort justice is of the very essence of fairness in our system and promotes the reaching of just verdicts. As long as human nature drives defendants to take desperate measures to escape criminal liability, broader discovery will only promote and facilitate defendants' attempts to subvert justice. This is what the majority in *Tune* so clearly understood in 1953, and human nature has not changed drastically in thirty-six years.

Nevertheless, there have been some changes in criminal discovery since *Tune*—and some proposed changes have been rejected. In 1975, Congress rejected a proposal, submitted by the Supreme Court pursuant to the Rules Enabling Act, to amend Rule 16 of the Federal Rules of Criminal Procedure. The proposed amendment would have required the prosecution, upon the defendant's pretrial motion, to provide the defense with the names and addresses of all witnesses the United States Attorney planned to call.[12] The proposal gave a corresponding right to the government. The House Judiciary Committee modified the proposal by setting the government's disclosure obligation at three days before trial.[13] In testimony before the House and Senate Judiciary Committees, Department of Justice representatives submitted the results of a survey of United States Attorneys detailing over 700 instances of witness intimidation, assault or assassination.[14] Has anything happened since this presentation precipitated rejection of reform in 1974 to make the fear for witness security less pressing?

Protective orders are no answer. A request for a protective order puts the burden on the government to come forward with evidence in support of the request, and, even in hand, a protective order is of doubtful effectiveness in many cases. Proving a violation of a protective order can be difficult, and a defendant always can decide that violating the order is worth the risk. If protective orders were genuinely effective, the Department of Justice would not have had to institute its witness protection

12. *See* 122 CONG. REC. 25,841 (1975).

13. *See* H.R. REP. NO. 94-247, 94th Cong., 1st Sess., at 13 (1975).

14. *See Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Judiciary Comm.*, 94th Cong., 1st Sess. 92 (1975) (statement of John C. Keney, Acting Assistant Attorney General, Criminal Division, Department of Justice).

program,[15] which, as Justice Brennan acknowledges, is "a very costly and disruptive method of protecting a witness who may be in danger."[16]

As at the time of *Tune*, perjured defense testimony continues to threaten the integrity of the federal criminal process. This is immediately and intuitively obvious to anyone with a criminal trial practice.[17] Justice Brennan suggests that the Department of Justice has not proved that perjury is suppressed by restrictive discovery.[18] Preliminarily, it is usually the proponents of change who bear the burden of showing that the change would not be harmful. Yet more important, how might such a thing ever be proved?—by asking convicted defendants after their trial if they would have committed or suborned perjury had they known what the government's witnesses were going to say? Clearly, neither the basic proposition nor its converse is readily susceptible to proof.

Furthermore, there is a distinction between discovery requests that elicit material the defendant will know only if the government tells him—for example, the results of scientific tests or whether the defendant was identified in a photographic array—and requests that elicit only whether the government has a certain piece of evidence in its arsenal—for example, the defendant's admission to his sister or the testimony of a codefendant. Rule 16[19] now compels discovery of most items fairly within the first category; only items in the second category are really still at issue, and it is this sort of discovery that defendants are most likely to misuse. Because this second category of information is already within the defendant's knowledge, its disclosure by the government certainly is not needed to promote the truthfinding process. Rather, the only interest served by the disclosure of this type of information is the promoting of gamesmanship.

Justice Brennan essentially concedes Chief Justice Vanderbilt's third point in *Tune*—that it is unfair to require the government to disclose crucial aspects of its case while permitting the defendant to hide his own. We are so accustomed to, and take so for granted, the differing obligations of the defense and the prosecution that it is easy to overlook the

15. In the witness protection program, the witness is given a new identity and relocated with his immediate family.

16. Brennan, *supra* note 1, at 13.

17. However, not many perjury cases are prosecuted. The difficulty of proving the charge, a desire to avoid the appearance of vindictiveness, and the urgent need to allocate prosecutorial resources to other crimes all contribute to the government's reluctance to pursue perjury cases.

18. Brennan, *supra* note 1, at 12-13.

19. FED. R. CRIM. P. 16.

significance of this point. For, while we all wish to minimize the danger of an innocent defendant's conviction, a one-sided extension of discovery rules may place the defendant at such an advantage that it greatly reduces the chance of a guilty defendant's conviction, even *without* his resorting to perjury or witness tampering.[20] Also, the acquittal of a guilty defendant often means that many past crimes go unpunished and many new crimes are made possible. Studies on recidivism indicate that career robbers may commit forty or fifty robberies per year, while career burglars often commit well over one hundred offenses per year.[21]

Finally, Chief Justice Vanderbilt's fourth argument—that the example of other countries is no guide because of the different character of the people and the processes[22]—has not so much been disproved by Justice Brennan as held up to ridicule. But plainly, it is unfair to compare this one aspect of our federal criminal justice system with that of other countries. Different criminal justice systems have strikingly dissimilar ways of arriving at the truth, and it is impossible to engraft a feature from one system onto another without upsetting the system's balance.

The English approach to discovery which Justice Brennan so admires is part of a complex and delicately balanced system, some aspects of which are not nearly so favorable to the defendant. In England, as in the United States, the search for the truth is of paramount concern, and in that spirit broad discovery is available. But England has almost no exclusionary rule for tangible evidence because the English find such a rule to be an intolerable impediment to the conduct of a fair trial resulting in a just verdict.[23] Does Justice Brennan wish to import to the United States all of English criminal procedure designed to result in a just verdict, or only the portion dealing with discovery for the defense?

Comparisons of the federal criminal justice system with those of the various states also are not very meaningful. First, only a small minority of states have discovery broader in any respect that Justice Brennan

20. Most defenses—for instance, claim of right, duress or coercion, entrapment, mistaken identification, and self-defense—must be disproved by the government beyond a reasonable doubt. If the defense knows exactly who the government's witnesses are and what they will say, but is privileged to withhold from the government, even through the presentation of the government's case-in-chief, the defense theory of the case and the identity of the defense witnesses, the government is obviously placed at a great disadvantage.

21. *See* S. REP. NO. 585, 97th Cong., 2d Sess. 20-21 (1982).

22. *Tune*, 13 N.J. at 219, 98 A.2d at 889.

23. Note, *Exclusion of Illegally Obtained Evidence: A Comparison of English and American Law*, 57 UMKC L. REV. 315 (1989).

deems significant.[24] Thus, a majority of states have a discovery policy which, like the federal policy, is more restrictive. Second, the jurisdiction of the federal criminal justice system is narrower than that of the states and tends to have a higher proportion of cases in which witness tampering is part of the criminal culture, such as narcotics trafficking, political corruption and large-scale organized crime. Many of these defendants have the means to find government witnesses and silence them.

Similarly, civil discovery rules and practices provide scant guidance. Justice Brennan argues that criminal discovery should be as extensive as civil discovery because the defendant's freedom, rather than civil liability, is at stake.[25] This argument has an equally persuasive flip side: One might just as well argue that criminal discovery should be narrower because the safety and integrity of the society, rather than mere money, is at stake. Instead of trying to draw comparisons based upon what values are at stake, we need to look at the reality of criminal trials and the likely effect of increased criminal discovery. The potential loss of liberty puts pressure on criminal defendants not present in even the biggest or most hotly contested civil suit.

Further, the argument for imposing civil discovery procedures in criminal cases fails to account for the inherent differences between the two types of proceedings. In civil cases, the burden of proof is borne almost equally by the opposing parties because a preponderance of evidence standard normally applies. Additionally, the broad discovery of civil cases benefits both sides equally; civil defendants are not privileged to withhold their theories, witness lists or deposition testimony. While Justice Brennan praises the application of civil pretrial discovery techniques to criminal proceedings,[26] he makes clear that only the defendant should be the recipient of this kind of discovery.[27] It is no answer that the government's superior resources for crime investigation justify a one-sided expansion of discovery rules. Civil suits are often conducted between litigants who are not equal in terms of resources, but no one seriously proposes that the better financed side should be barred from deposing opponents or discovering their theory of the case.

It is entirely appropriate that criminal procedures, including discovery rules, be reevaluated periodically. It would be presumptuous to assume

24. *See* Brennan, *supra* note 1, at 10.
25. *Id.* at 12.
26. *Id.* at 7.
27. *Id.* at 7, 10-12.

that the current system necessarily embodies the perfect balance of rights and responsibilities. However, we should undertake such reevaluations with the singular goal of promoting the truth-finding process. Those reviewing criminal procedures should weigh evolving indicators concerning the proper functioning of the criminal justice system and decide whether these indicators suggest the need for greater defense discovery rights or, conversely, the need to reduce nonconstitutionally based defense discovery. The Department of Justice has not resisted many of the procedures adopted during the past twenty-six years to broaden defense discovery rights. Similarly, we hope that those who have pressed for broader defense discovery will evaluate objectively the specifics of future discovery proposals in the context of the truth-finding objectives of procedural rules. These objectives are disserved by reflexive support for rule changes simply because the changes comport with some preset philosophy. While a defendant's right to a fair trial certainly must be protected, society is the loser when changes in criminal procedural rules result in unjust acquittals.