Criminal Discovery in Indiana: Its Past and Future

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In recent years, criminal discovery has emerged from relative obscurity to become recognized as an important area of Indiana criminal procedure. Unlike civil discovery, which is defined and regulated by the Indiana Rules of Trial Procedure,[1] criminal discovery has developed almost exclusively by judicial decision. This mode of development has resulted in a less orderly and consistent structure of criminal discovery law than would have been expected had criminal discovery been provided for by statute or court rule.

It is the position of this author that the present disorganized state of criminal discovery law impedes the effective service of the ends for which discovery is provided and that a comprehensive scheme of criminal discovery should be enacted by rule of the Supreme Court of Indiana. This Article will review the development of criminal discovery in this state, will compare its present status to that of civil discovery and to the alternative systems of criminal discovery, and will examine the alternatives available for developing a coherent system of criminal discovery law.

I. The Development of Indiana Criminal Discovery

As late as 1967, Professor Lester Orfield spoke deploringly of the limited discovery available in Indiana criminal proceedings while advocating the enactment of statutory provisions for expanding discovery.[2] The minimal statutory provisions in existence then remain in force today. Depositions can be taken by the defendant, and once the defendant has done so, depositions can be taken by the state.[3] The notice of alibi statute[4] requires a defendant intending to present an alibi defense to give formal notice to the prosecutor, specifying the "exact place at which the defendant claims to have been."[5] By this notice, the defendant can require the prosecutor to file "a specific statement in regard to the exact date which the prosecution proposes to present at the trial as the date when, and the exact place that the prosecution proposes to present at the trial as

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[1] Ind. R. Tr. P. 26-37.

[2] Orfield, *Criminal Discovery in Indiana*, 1 Ind. Legal F. 117 (1967).

[3] Ind. Code § 35-1-31-8 (1976) (originally enacted as ch. 169, § 242, 1905 Ind. Acts 584, 637).

[4] *Id.* §§ 35-5-1-1 to -3 (originally enacted as ch. 228, §§ 1-3, 1935 Ind. Acts 1198).

[5] *Id.* § 35-5-1-1.

the place where, the defendant was alleged to have committed or to have participated in the offense."[6] The statutes regulating the form of indictments[7] and charging affidavits[8] in effect at that time required that the names of all material state's witnesses be endorsed in those pleadings. The remedy for the state's failure to list a witness, however, was only to deny the state a continuance in the event an unlisted witness failed to appear.[9]

Although early cases contained some suggestion that production of tangible evidence by the state[10] and discovery of witnesses' prior statements[11] by the defendant at trial might in some cases be proper, until 1967, no judicial decisions had actually required any discovery to the defendant. The year 1967 marked the beginning of a revolution in criminal discovery law through judicial decision. In that year in *Bernard v. State*,[12] the Indiana Supreme Court recognized the inherent power of courts to provide for criminal discovery by upholding the right of a defendant to obtain a list of the state's witnesses before trial. Subsequently, in *Antrobus v. State*,[13] the same court permitted in-trial discovery of a state witness' prior statements, including his grand jury testimony, after the witness had testified on direct examination.

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[6]*Id.* § 35-5-1-2. In spite of the words "exact date," the state is required to specify the date and time of day, as well as the place. Pearman v. State, 233 Ind. 111, 117 N.E.2d 362 (1954). *But see* Hampton v. State, 359 N.E.2d 276 (Ind. Ct. App. 1977). As to the specificity with which the place of the offense must be designated, *see* Mitchell v. State, 360 N.E.2d 221, 223 (Ind. Ct. App. 1977).

Professor Orfield also viewed the statute requiring special pleading of the defense of insanity, IND. CODE § 35-5-2-1 (1976), as a form of discovery for the state. Orfield, *supra* note 2, at 130.

[7]Ch. 169, § 112, 1905 Ind. Acts 584 (superseded by Pub. L. No. 325, sec. 3, § 2 (6)(c), 1973 Ind. Acts 1750, 1776, codified in IND. CODE § 35-3.1-1-2 (1976)).

[8]Ch. 169, § 119, 1905 Ind. Acts 584 (superseded by Pub. L. No. 325, sec. 3, § 2 (6)(c), 1973 Ind. Acts 1750, 1776, codified in IND. CODE § 35-3.1-1-2 (1976)).

[9]Denton v. State, 246 Ind. 155, 203 N.E.2d 539 (1965). The present statute enacted in 1973 retains this provision. IND. CODE § 35-3.1-1-2(c)(1976).

[10]Anderson v. State, 239 Ind. 372, 376, 156 N.E.2d 384, 386 (1959). *See* Orfield, *supra* note 2, at 127.

[11]McDonel v. State, 90 Ind. 320, 321-22 (1883). *But see* Lander v. State, 238 Ind. 680, 686, 154 N.E.2d 507, 510 (1958). *See generally* Orfield, *supra* note 2, at 122-23.

[12]248 Ind. 688, 230 N.E.2d 536 (1967). The court explained that discovery to the accused, while not constitutionally required, was within the inherent authority of the courts to regulate criminal procedure. *Id.* at 691, 230 N.E.2d at 539.

[13]253 Ind. 420, 254 N.E.2d 873 (1970). The court effectively overruled Anderson v. State, 239 Ind. 372, 156 N.E.2d 384 (1959), where the court had noted that discovery of a witness' pre-trial statements should be ordered where a "direct conflict" with trial testimony could be shown, or where the statements would "prove the innocence of the accused." *Id.* at 376, 156 N.E.2d at 386. The court in *Antrobus* stated that "the better rule does not require a defendant to prove an inconsistency . . . before he even knows what the witness said in the statement." 253 Ind. at 428, 254 N.E.2d at 877.

In both *Bernard* and *Antrobus*, the supreme court required the defendant to establish a foundation for the discovery of the items sought,[14] and upon laying the proper foundation, allowed the trial court only "limited discretion" to overrule the motion. The court could deny discovery only where the state showed a "paramount interest in nondisclosure."[15] Even before *Antrobus*, the "paramount interest" principle was applied to the statutory procedure for the taking of depositions.[16] The broad right seemingly conferred by the statute upon the defendant to depose witnesses was held to be subject to the court's power to prevent depositions if the state could establish a paramount interest in preventing deposition of its witnesses.

Bernard created the framework for the establishment of a comprehensive scheme of criminal discovery. In 1969, Judge Hunter wrote that *Bernard* held that "after a defendant has shown that *discovery* is necessary to preparation of his case, it should be granted absent a more compelling showing by the state."[17] In *Dillard v. State*,[18] Justice DeBruler, who also authored *Antrobus*, expanded the principles of *Bernard* and *Antrobus* to discovery in general. In *Dillard*, the defendant had sought disclosure of all relevant police reports and memoranda. The foundation for discovery established by the court required a sufficient designation of the items to be discovered and a showing of their materiality to the defense. Furthermore, where the state could show a paramount interest in non-

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[14]In Bernard v. State, 248 Ind. 688, 230 N.E.2d 536 (1967), the court recognized that a list of the state's witnesses would be clearly beneficial to the defense, therefore, in the absence of a showing of a paramount state interest in non-disclosure, the showing required of the defendant was minimal. As a later case explained, the materiality of such a list is self-evident. Dillard v. State, 257 Ind. 282, 292, 274 N.E.2d 387, 392 (1971).

In Antrobus v. State, 253 Ind. 420, 254 N.E.2d 873 (1970), the defendant was required to show:

> (1) The witness whose statement is sought has testified on direct examination; (2) a substantially verbatim transcription of the statements made by the witness prior to trial is shown to probably be within the control of the prosecution; and, (3) the statements relate to matters covered in the witness' testimony in the present case.

Id. at 427, 254 N.E.2d at 876-77.

[15]Bernard v. State, 248 Ind. at 692, 230 N.E.2d at 540; Antrobus v. State, 253 Ind. at 427, 254 N.E.2d at 877.

[16]Howard v. State, 251 Ind. 584, 244 N.E.2d 127 (1969); Amaro v. State, 251 Ind. 88, 239 N.E.2d 394 (1968); Nuckles v. State, 250 Ind. 399, 236 N.E.2d 818 (1968). *See also* Johnson v. State, 255 Ind. 589, 266 N.E.2d 57 (1971); Reynolds v. State, 155 Ind. App. 266, 292 N.E.2d 290 (1973).

[17]Howard v. State, 251 Ind. 584, 585, 244 N.E.2d 127, 128 (1969) (citing Bernard v. State, 248 Ind. 688, 230 N.E.2d 536 (1967)) (emphasis added).

[18]257 Ind. 282, 274 N.E.2d 387 (1971).

disclosure, discovery would not be permitted.[19] The defendant's request for production of the reports in *Dillard* failed for want of a sufficiently particular designation.

In 1972, Justice DeBruler wrote the opinion in *Sexton v. State*,[20] which allowed a defendant, who had no memory of the facts alleged due to electric shock therapy, to discover both his own statement to the police and a police diagram of the crime scene. The defendant was held to have satisfied *Dillard* by designating the items sought with reasonable particularity and by showing that, due to his inability to recall the facts of the offense, the materials were necessary to the preparation of his defense. As there was no showing of a paramount interest by the state in nondisclosure, the trial court was held to have had no discretion to deny the motion.

Thus, by 1972, a general criminal discovery framework seemed to have been constructed. As a preliminary matter, the defendant was required to specify the material sought with some particularity: For example, "all inter-office memos, notes and reports, of all law enforcement agencies, concerning this robbery" is insufficiently specific.[21] A showing of some need for the discovery was also necessary. In this regard, *Dillard* distinguished items of "self-evident" materiality—witness lists, for example—from other items whose materiality the defendant was required to show affirmatively.[22] The degree of need required to be shown was apparently more than simply the convenience of being able to review the state's file and preview its evidence.[23] Absent the state's showing of a paramount interest in nondisclosure, the court was required to order production.[24]

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[19]*Id.* at 291, 274 N.E.2d at 392.

[20]257 Ind. 556, 276 N.E.2d 836 (1972).

[21]Dillard v. State, 257 Ind. at 292, 274 N.E.2d at 392.

[22]*Id.* at 291, 274 N.E.2d at 392. *See* note 14 *supra.*

[23]In *Dillard*, appellant's attempt to discover all reports prepared by any law enforcement agency relating to the crime charged was characterized as "nothing more than a fishing expedition or an attempted rummaging about in the police files hoping to turn up something to use at the trial." 257 Ind. at 292, 274 N.E.2d at 392-93. Compare this with the degree of need for the requested items shown in *Sexton*, discussed at note 20 *supra* and accompanying text. In Kleinrichert v. State, 260 Ind. 537, 297 N.E.2d 822 (1973), a request for records relating to a prostitute's customers was held properly refused for want of a showing of materiality.

[24]Apart from the general "limited discretion" standard, there was already a fully discretionary discovery procedure operating at the time. *Dillard* held that the trial court had discretionary authority to order production of witness' statements before trial when *Antrobus* did not apply, because the witness had not yet testified. 257 Ind. at 294, 274 N.E.2d at 393.

In Cherry v. State, 258 Ind. 298, 280 N.E.2d 818 (1972), the court upheld a trial court's failure to order production of witness statements before trial. Justice Prentice wrote: "Under proper circumstances, the trial court might entertain a motion of this

In 1974, the Indiana Supreme Court both widened the scope and restructured the framework of criminal discovery in *State ex rel. Keller v. Criminal Court.*[25] In *Keller*, the local discovery rules of a trial court were challenged by both the defendant and the prosecutor. Justice Arterburn, who had shown reserved enthusiasm for discovery in the earlier cases,[26] wrote the court's opinion upholding the rules. Relying on language from earlier cases that the power to provide for discovery is inherent in the trial court,[27] *Keller* affirmed the authority of the trial court to issue an order requiring the state to produce a list of the state's witnesses before trial; statements by the accused, co-defendants, and witnesses; grand jury testimony; reports and results of scientific and medical tests; tangible and documentary evidence; and criminal histories of witnesses.[28] The court also upheld the part of the order requiring the defendant to list his witnesses and defenses.[29] Finally, the court stated:

> We hold, as a matter of state law, that a trial court has the inherent power to balance discovery privileges between parties. Thus, if any statute should deny or fail to provide for full discovery within constitutional safeguards, the trial

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type at this stage of the proceedings. However, an 'Antrobus-type' foundation would have to be laid, and the material sought would have to fit the foundation." *Id.* at 300, 280 N.E.2d at 820.

Since the *Antrobus* foundation requires that the witness have testified at trial, the court could not have intended to require the showing of all of the *Antrobus* elements and may have actually had the *Dillard* foundation in mind.

The burden of showing the paramount interest was apparently borne by the state. In *Sexton*, the court refused to hypothesize state interests in nondisclosure, or to require the defendant to negate possible interests, but assumed from the failure of the state to advance any interests in nondisclosure that none existed.

[25]262 Ind. 420, 317 N.E.2d 433 (1974). *See* Kerr, *Criminal Law and Procedure, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 178-79 (1975); Note, Keller, *Prosecutorial Discovery and the Privilege Against Self-Incrimination*, 9 IND. L. REV. 623 (1976).

[26]Justice Arterburn dissented in *Bernard*, 248 Ind. at 696, 230 N.E.2d at 542, and in Johns v. State, 251 Ind. 172, 240 N.E.2d 60 (1968) (conviction reversed for failure to provide complete witness list). He concurred separately in *Antrobus*, 253 Ind. at 436, 254 N.E.2d at 881, and concurred in the result in *Dillard*. In *Sexton*, he dissented in part, opposing the disclosure of the state's work product and questioning whether the court would allow reciprocal prosecutorial discovery of defense preparations. 257 Ind. at 562, 276 N.E.2d at 840.

[27]State *ex rel.* Keller v. Criminal Court, 262 Ind. at 423, 317 N.E.2d at 435 (citing Bernard v. State, 248 Ind. 688, 230 N.E.2d 536 (1967)); Johns v. State, 251 Ind. 172, 240 N.E.2d 60 (1968); Antrobus v. State, 253 Ind. 420, 254 N.E.2d 873 (1970).

[28]262 Ind. at 421-22, 317 N.E.2d at 434.

[29]*Id.* at 424-25, 317 N.E.2d at 436. This part of the opinion has been criticized. Note, Keller, *Prosecutorial Discovery and the Privilege Against Self-Incrimination*, 9 IND. L. REV. 623 (1976). The part of the order requiring the defendant to submit to physical examination and testing was not challenged.

> court may balance the discovery procedure regardless of any omission or prohibition in the statute.[80]

Justice DeBruler dissented in part,[81] arguing that the order required the accused to incriminate himself and that the *Keller* scheme of discovery was too broad:

> This order as I understand it requires the State to open its file to the accused upon a simple unspecific request to do so. In [*Antrobus*] and [*Dillard*] we set forth specific procedures that the accused must follow in order to successfully move for discovery. The interests of the accused and the State were carefully considered at each step. On the other hand, this order which the majority sanctions, subjects the State, without a showing of particularized need and a showing that the information being sought is not otherwise available to the accused, to a vague and overbroad command the perimeters of which are not discernible, resulting in needless waste, frustration, and expense.[82]

Since *Keller*, the paramount factor in criminal discovery has been the discretion of the trial court to order disclosures on such terms as it deems fit. *Keller* itself offers few guidelines for the exercise of that discretion. This situation produces a number of unfortunate results. Discovery is not uniform throughout the state,[83] and

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[80]262 Ind. at 429, 317 N.E.2d at 438.

[81]Since the court had denied both parties' applications for extraordinary relief, Justice DeBruler was technically concurring in the result. However, the majority had "affirmed" the trial court's discovery order, and he dissented from this holding. *Id.* at 430, 317 N.E.2d at 438.

[82]*Id.* at 432, 317 N.E.2d at 440 (citations omitted).

In Reid v. State, No. 107 S 345 (Ind. Feb. 6, 1978), the Indiana Supreme Court recognized limits on the *scope* of discovery after *Keller*, holding that an uncontested order requiring disclosure by the prosecution of "all evidence . . . relevant to the . . . charge" was overly broad:

> We believe that the State could not properly be involuntarily subjected to a general order to disclose *all information relevant to the subject matter or which may in any manner aid the accused in the ascertainment of the truth*, because such an order would place too great a burden upon it—a burden to assess and reassess its information, and to anticipate and speculate constantly as to the relevance of bits of information and the possible use the defendant might make of them. In effect, it would all but put the responsibility for the defense upon the state.

Id., slip op. at 7. The court also noted the difficulty in ascertaining whether such an order has been violated, which is simply to say that the vagueness of the order unduly burdens the courts as well as the prosecution.

[83]The court in *Keller* had recognized that the "better approach" to discovery development was by rule-making and suggested that such rules were forthcoming. 262 Ind. at 429, 317 N.E.2d at 438. However, in view of the supreme court's holding that

the rights of litigants to discovery may diminish or expand with a change of venue. Parties have no guidance as to what showing will be required of them as a prerequisite to obtaining disclosures. The abuse-of-discretion standard of appellate review allows the courts, both trial and appellate, to dispose of discovery issues without articulating those factors that the courts consider in exercising their discretion. Discovery issues may be dismissed with no more discussion than stating that discovery is discretionary with the trial court.[34] Finally, trial courts may themselves be confused as to their duties with respect to discovery. One case decided since *Keller* has suggested that defendants retain the qualified right to in-trial production upon the laying of an *Antrobus* foundation at least with regard to witness' pre-trial statements.[35]

II. Attempts at Codification of Discovery Law and Procedure

The *Keller* court recognized that codification of discovery rules might well be preferable to "piecemeal" development by judicial decision.[36] The most obvious ways in which such codification could occur is through statute or court rules. An attempt at statutory codification occurred in 1972 when the Indiana Criminal Law Study Commission drafted its proposed Indiana Code of Criminal Pro-

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trial courts might disregard limitations on discovery set out in rules and statutes, *see* note 30 *supra* and accompanying text, such rules might not provide much uniformity.

[34]*See* Hudson v. State, 354 N.E.2d 164 (Ind. 1976); Owens v. State, 263 Ind. 487, 333 N.E.2d 745 (1975).

In Murphy v. State, 352 N.E.2d 479 (Ind. 1976), the court reversed a conviction on the grounds that the trial court had abused its discretion in refusing to order the taking of depositions by the indigent defendant at public expense. The court, which before *Keller* had held that only the showing of a paramount interest by the state sufficed to prevent the defendant from deposing the state's witnesses, Amaro v. State, 251 Ind. 88, 239 N.E.2d 394 (1968), held that the trial court's decision was "speculative and arbitrary" because no findings of fact were made nor evidence presented to show why the request was unwarranted. 352 N.E.2d at 482. The court held that *Keller* had superseded the deposition statute, Ind. Code § 35-1-31-8 (1976), and implicitly had modified the *Amaro* line of cases. *See* note 16 *supra*. This case and Brewer v. State, 362 N.E.2d 1175 (Ind. Ct. App. 1977), which involved a situation similar to *Murphy*, are the only cases subsequent to *Keller* in which it has been found that the trial court abused its discretion in denying discovery of sanctions.

[35]Morris v. State, 263 Ind. 370, 332 N.E.2d 90 (1975). "[A] defendant has a right, upon the laying of a proper foundation, to statements made by a witness to law enforcement officers and to the grand jury only *after* the witness has testified on direct examination." *Id.* at 376 (quoting Antrobus v. State, 253 Ind. at 420, 254 N.E.2d at 873).

The court also upheld the defendant's right to a witness list under *Bernard*. 263 Ind. at 376, 332 N.E.2d at 93. *See also* Marlett v. State, 348 N.E.2d 86 (Ind. Ct. App. 1976); Lockridge v. State, 263 Ind. 678, 338 N.E.2d 275 (1975).

[36]262 Ind. at 429, 327 N.E.2d at 438.

cedure,[37] which included a chapter regulating discovery.[38] The proposed code adopted the position of the Amercian Bar Association's Project on Standards for Criminal Justice: "[D]iscovery should be as full and free as possible."[39]

The proposed code listed items subject to discovery by the prosecution and the defense, which were similar to those enumerated in the local rule in *Keller*.[40] It retained the *Bernard* standard for determining the necessity for the production of a requested item: The trial court was permitted to deny the motion only upon the showing of a paramount interest in nondisclosure.[41] A "work product" privilege and informant's identity privilege were included, subject to an exception where the material exculpates the defendant.[42] Disclosure not required under the first section could be granted in the court's discretion upon a showing of materiality to the defense.[43] The court was also given discretion to regulate the manner of discovery,[44] and to impose sanctions for noncompliance with discovery orders.[45]

The proposed code may have been unduly rigorous in requiring the state to bear the burden of showing why discovery should not be ordered upon the state. It also missed an opportunity to define "paramount interest in nondisclosure" by not specifying what interests the nondisclosure standard protected. Specifically, the proposed code left unsettled whether factors such as expense, inconvenience, and harassment with excessive requests for production

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[37]*See* INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT (1972) [hereinafter cited as CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT].

[38]*Id.* §§ 35-5.1-4-1 to -8.

[39]*Compare* ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 1.2 (Approved Draft, 1970) [hereinafter cited as ABA STANDARDS] *with* CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-1(b).

This is also the position adopted in *Keller*. *See* 262 Ind. at 429, 317 N.E.2d at 438.

[40]CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-1(b). Both this section and Judge Wilson's local rules in *Keller* bear a resemblance to the list in the ABA STANDARDS, *supra* note 39, § 2.1.

[41]CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-1(c). The section specifies that the state must prove the interest in nondisclosure by a "clear preponderance" of the evidence, and sets out the danger of harm to or harassment of a witness and the facilitation of perjury as examples of paramount interest. The examples are apparently taken from Johns v. State, 251 Ind. 172, 240 N.E.2d 60 (1968).

[42]CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-1(d).

[43]*Id.* § 35-5.1-4-2.

[44]*Id.* § 35-5.1-4-6(a).

[45]*Id.* § 35-5.1-4-6(d).

were to be considered.[46] Nonetheless, the proposed code discovery provisions were the product of considerable thought and research,[47] and had the virtue of introducing order and rationality into the discovery process. The discovery chapter was not included, however, in the version of the Code of Criminal Procedure enacted into law in 1973.[48]

An alternative to statutory discovery procedure is regulation by court rules; the supreme court early recognized its inherent power to provide for discovery.[49] In civil cases, a comprehensive scheme of discovery is contained in the Trial Rules.[50] An obvious and convenient mode of providing such a scheme for criminal discovery might be the adoption of the civil rules in criminal prosecutions.[51] However, this approach has not been adopted.

Even before the adoption of the Indiana Trial Rules, the supreme court had declined to hold that a civil discovery statute[52] or equitable discovery rules[53] applied in criminal cases. *Bernard* marked no departure from this rule; the court explicitly disclaimed the applicability of "the rules of civil practice"[54] to criminal discovery.[55] The supreme court decided *Antrobus* hardly a month after its adop-

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[46]*Dillard* suggested that such factors could be taken into account. 257 Ind. at 292, 274 N.E.2d at 392. *Keller* mentioned cost and efficiency as factors for the trial court to consider, but of course *Keller* was concerned with a different standard. 262 Ind. at 423, 317 N.E.2d at 435.

[47]The comments to the Proposed Code of Criminal Procedure and its companion, the Proposed Penal Code, INDIANA CRIMINAL STUDY LAW COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT (1974), are valuable research aids in the field of Indiana criminal law.

[48]Pub. L. No. 325, ch. 2(6)(c), 1973 Ind. Acts 1757.

[49]Bernard v. State, 248 Ind. 688, 691, 230 N.E.2d 536, 539 (1970).

[50]IND. R. TR. P. 26-37.

[51]This is particularly true in view of the Criminal Rule providing that the Trial Rules apply to criminal cases "so far as they are not in conflict with any specific rule adopted by this court for the conduct of criminal proceedings." IND. R. CRIM. P. 21.

[52]Ch. 38, § 354, 1881 Ind. Acts 240 (Spec. Sess.) (repealed 1969) (formerly codified at IND. STAT. ANN. § 2-1645 (Burns 1946)). A statute, ch. 169, § 344, 1905 Ind. Acts 584 (superseded by IND. CODE 35-4.1-2-2 (1976)), rendered civil procedure rules applicable to criminal prosecutions.

In Weer v. State, 219 Ind. 217, 36 N.E.2d 787 (1941), the court assumed that the statute applied in order to hold that the appellant was not entitled to discovery.

[53]Lander v. State, 238 Ind. 680, 154 N.E.2d 507 (1958).

[54]Prior to the adoption of the trial rules, statutory provisions existed for the taking of depositions, ch. 38, §§ 287-318, 1881 Ind. Acts 292-98 (repealed 1969); for interrogatories, ch. 38, § 318, 1881 Ind. Acts 305 (amended by ch. 53, § 1, 1965 Ind. Acts 85) (repealed 1969); for admission of execution of documents, ch. 38, § 352, 1881 Ind. Acts 305-06 (repealed 1969); and for court ordered production of documentary evidence, ch. 38, §§ 353-354, 1881 Ind. Acts 306 (amended by ch. 140, § 1, 1965 Ind.Acts 219) (repealed 1969). All of these statutes were repealed by ch. 191, § 3, 1969 Ind. Acts 715-17.

[55]248 Ind. at 691, 230 N.E.2d at 539.

tion of the Trial Rules,[56] but gave no indication that those rules would apply in criminal prosecutions:

> The rules of discovery applicable in civil proceedings in Indiana courts are not applicable as such in criminal proceedings. However, the *techniques* of discovery embodied in those rules will often be applicable in criminal proceedings and the trial court has the inherent power to implement such discovery techniques as are necessary to provide the defendant a full and fair hearing.[57]

In *Dillard*, the court resorted to Trial Rule 34, which provides for the production and inspection of tangible and documentary evidence for assisting in defining the "sufficient designation" element of the *Antrobus* foundation.[58] The court borrowed language from Trial Rule 34 to hold that an item must be described with "reasonable particularity."[59] Both Trial Rule 34[60] and *Dillard* deal with production of materials. However, while Trial Rule 34 requires no foundation to be established as a prerequisite,[61] *Dillard* adopts what amounts to the requirement of a showing of good cause.

In 1972, the supreme court substantially applied the Trial Rule 26[62] definition of the scope of discovery to criminal proceedings.[63] In upholding the denial of an order to produce the results of a polygraph examination, the court noted that such results were "not only . . . inadmissible . . . but . . . would neither lead to any additional evidence nor aid the appellant in the preparation of his defense."[64]

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[56]The rules became effective Jan. 1, 1970.

[57]253 Ind. at 423, 254 N.E.2d at 874.

[58]*See* notes 14 & 15 *supra* and accompanying text. *Dillard* reaffirmed the three-pronged *Antrobus* foundation requirement, and references in later cases to *Dillard* foundations are in fact referring to *Antrobus*.

[59]257 Ind. at 292, 274 N.E.2d at 392.

[60]IND. R. TR. P. 34 is entitled: "Production of Documents and Things and Entry upon Land for Inspection and Other Purposes."

[61]Trial Rule 34 does not require a showing of good cause for production. 3 W. HARVEY, INDIANA PRACTICE 5 (1970).

[62]Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

IND. R. TR. P. 26(B)(1).

In Reid v. State, No. 107 S 345 (Ind. Feb. 6, 1978), the supreme court relied on IND. R. TR. P. 26(E) to hold that discovery orders in criminal prosecutions impose a continuing duty to disclose.

[63]Zupp v. State, 258 Ind. 625, 283 N.E.2d 540 (1972).

[64]*Id.* at 630-31, 283 N.E.2d at 543. The court cited *Antrobus* rather than Trial Rule 26. The quoted language might be considered a definition of the materiality of the *Dillard* foundation. *See* text accompanying notes 18-19 *supra*.

An area of increasing concern to the courts has been discovery sanctions. Trial Rule 37 sets out a comprehensive scheme of procedures to be employed in regulating civil discovery as well as the remedies to which the court may resort. The supreme court early held that the appropriate sanction for the state's failure to make ordered disclosures was a continuance.[65] Defendants have argued that evidence not disclosed should be excluded;[66] that witnesses not named should not be permitted to testify;[67] or as an ultimate sanc-

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[65]Johns v. State, 251 Ind. 172, 240 N.E.2d 60 (1968). In *Johns*, the state failed to completely comply with an order to produce a witness list yet made no showing that it could not or should not be required to respond. Although the court recognized that a continuance was generally an appropriate remedy in cases of this kind, it held it was reversible error for the trial court to permit the undisclosed witness to testify in the particular circumstances of this case.

Johns is much cited by defendants who hope to fit the facts of their cases into its mold, but the courts have not been eager to apply so serious a sanction. The Second District Court of Appeals fashioned a practical remedy in Marlett v. State, 348 N.E.2d 86 (Ind. Ct. App. 1976). The court remanded the case for an evidentiary hearing at which the testimony in question was to be produced, holding that the trial court had erroneously refused to order production of a transcript of grand jury testimony after the defendant established the necessary *Antrobus* foundation. If this testimony was found to contain sufficient discrepancy from the witness' trial testimony to warrant its use for impeachment, the court was to order a new trial.

The supreme court has also suggested that the "offending counsel" should be punished for contempt of the court's discovery order. Chatman v. State, 263 Ind. 531, 334 N.E.2d 673 (1975).

[66]Hudson v. State, 354 N.E.2d 164 (Ind. 1976); Chatman v. State, 263 Ind. 531, 334 N.E.2d 673 (1975).

[67]Lund v. State, 345 N.E.2d 826 (Ind. 1976); Luckett v. State, 259 Ind. 174, 284 N.E.2d 738 (1972).

In Henson v. State, 352 N.E.2d 746 (Ind. 1976), the court suggested that a showing of prosecutorial obstruction of the discovery process or the inadequacy of a continuance as a remedy would call for exclusion of evidence as a discovery sanction. *Id.* at 749.

In Reid v. State, No. 107 S 345 (Ind. Feb. 6, 1978), the court undertook an extensive analysis of the adequacy of a continuance to remedy a violation of a discovery order by the prosecution upon the facts of that particular case to support its conclusion that a continuance would have been adequate. Underlying Justice Prentice's discussion seems to be the unstated assumption that the purpose of discovery sanctions is not to punish the offending party but to assure that the noncompliance does not harm the case of the party seeking discovery. Since a continuance would serve to restore the accused to as good a position as he would have held had there been no violation, a continuance was a sufficient remedy. This seems to be a sensible position.

One post-*Keller* case, Owens v. State, 263 Ind. 487, 333 N.E.2d 745 (1975), went so far as to order a continuance to remedy the state's noncompliance with the notice of alibi statute, IND. CODE §§ 35-5-1-1 to -3 (1976), in lieu of the preclusion of proof remedy provided by statute. *Id.* § 35-5-1-3. *See* notes 4-6 *supra.*

The court's treatment of the issue is terse, and it is not clear whether the holding represents a conscious supersedure of the alibi statute or a misapplication of Reed v. State, 243 Ind. 544, 188 N.E.2d 533 (1963).

tion, the defendant should not be prosecuted.[68] The courts have consistently rejected these arguments.

In recent decisions, the courts have cited Trial Rule 37 for the proposition that discovery sanctions are discretionary with the trial court.[69] In *Keel v. State*,[70] the court of appeals, while noting an absence of cases applying Trial Rule 37 to criminal prosecutions, recognized an inherent discretionary power in the trial court to exclude testimony or evidence because of noncompliance with the court's discovery order. This embraces a narrow part of Trial Rule 37's broad options.[71]

The one area of criminal discovery to which the Trial Rules have been applied in their entirety is that of depositions. In *Carroll v. State*,[72] the supreme court applied Trial Rule 32(A) to the use of a deposition in a criminal trial. Although the statutory provision that allows the defendant to take depositions "to be read on the trial"[73] could be read to permit such depositions to be used at trial as substantive evidence without restriction, no case had ever construed it in this manner. In *Murphy v. State*,[74] the court held that the statute had been superseded by *Keller* and by the Trial Rules,[75] and that Trial Rules 30 and 31, governing the taking of depositions, applied to criminal prosecutions through Criminal Rule 21.[76] This is the only instance to date of the application of an entire civil discovery rule to criminal procedure.

Aside from the area of depositions, there has been no wholesale borrowing from the Trial Rules in the formulation of the rules of criminal discovery. The adoption of the "techniques" of civil

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[68]Lund v. State, 345 N.E.2d 826 (Ind. 1976).

[69]French v. State, 362 N.E.2d 834 (Ind. 1977); Lund v. State, 345 N.E.2d 826 (Ind. 1976); Block v. State, 356 N.E.2d 683 (Ind. 1970); Keel v. State, 333 N.E.2d 328 (Ind. Ct. App. 1975).

[70]333 N.E.2d 328 (Ind. Ct. App. 1975); *See also* State v. Buza, 324 N.E.2d 824 (Ind. Ct. App. 1975).

[71]IND. R. TR. P. 37(B)(3) authorizes the trial court to exclude evidence or to order evidence to be taken as established in enforcing discovery orders.

In *Keel*, the court of appeals referred to this sanction as a "protective order"; the protective order is a device provided by Trial Rule 26(C) to prevent the oppressive use of discovery.

[72]263 Ind. 696, 338 N.E.2d 264 (1975).

[73]IND. CODE § 35-1-31-8 (1976).

[74]352 N.E.2d 479 (Ind. 1976). *See also* Brewer v. State, 362 N.E.2d 1175 (Ind. Ct. App. 1977).

[75]352 N.E.2d at 482.

[76]*Id.* IND. R. CRIM. P. 21 provides: "The Indiana Rules of trial and appellate procedure shall apply to all criminal appeals so far as they are not in conflict with any specific rule adopted by this court for the conduct of criminal proceedings."

discovery, predicted in *Antrobus*, has not visibly materialized.[77] This is not necessarily an undesirable result. The Trial Rules were adopted to implement policies and to deal with problems inherent in civil trials; the policies and problems of criminal procedure are sufficiently different from those of civil procedure to warrant separate discovery rules. As the supreme court has recognized its authority to do so,[78] it should adopt specific rules for criminal discovery.

III. Alternatives for Rules of Criminal Discovery Procedure

In considering what is desirable in criminal discovery, it would be well to begin by isolating and examining the purposes of such discovery, the interests to be served, and the dangers to be avoided. *Keller* stated: "[C]riminal discovery is designed to improve the efficiency of the criminal justice system. The idea of a trial as a sport or game is not only a reflection on the judicial process, but it is wasteful of human intelligence and technique."[79] The American Bar Association's Project on Standards for Criminal Justice has made a more extensive listing of discovery purposes:

> (a) Procedures prior to trial should serve the following needs:
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> (i) to promote an expeditious as well as fair determination of the charges, whether by plea or trial;
>
> (ii) to provide the accused sufficient information to make an informed plea;
>
> (iii) to permit thorough preparation for trial and minimize surprise at trial;
>
> (iv) to avoid unnecessary and repetitious trials by exposing any latent procedural or constitutional issues and affording remedies therefor prior to trial;
>
> (v) to reduce interruptions and complications of trials by identifying issues collateral to guilt or innocence, and determining them prior to trial; . . ., and
>
> (vi) to effect economies in time, money, and judicial and

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[77]In Gutowski v. State, 354 N.E.2d 293 (Ind. Ct. App. 1976), the court of appeals recapitulated the relationship between the trial rules and criminal discovery as follows: "The trial court has the inherent power to apply the techniques of discovery embodied in the civil rules and is not bound by the limiting language contained in those civil rules." *Id.* at 296. While this statement is undoubtedly correct in light of the language from *Keller* quoted above, *see* text accompanying note 30 *supra*, it is an unfortunate rule that fails to guide the trial court in the exercise of its discretion.

[78]Neeley v. State, 261 Ind. 434, 305 N.E.2d 434 (1974); State v. Bridenhager, 257 Ind. 699, 279 N.E.2d 794 (1972).

[79]262 Ind. at 423, 317 N.E.2d at 435.

> professional talents by minimizing paperwork, repetitious assertions of issues, and the number of separate hearings.[80]

The interests contained in these standards include not only efficiency of the criminal justice system, but also the fairness of that process to the accused. However, the interest of fairness to the defendant is already protected by the constitutional doctrine of due process, which prohibits the state from using evidence known to be false or perjured[81] and from suppressing exculpatory evidence.[82]

The purposes of criminal discovery differ from those of civil discovery in one very important respect. A principal function of civil discovery is the narrowing of the issues,[83] which are only vaguely framed by the pleadings under the Trial Rules. This purpose is not applicable to criminal procedure. While the pleadings in civil cases are intended only to serve notice of the transaction upon which the action is based to the opposing party,[84] the criminal indictment or in-

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[80]ABA STANDARDS, *supra* note 39, § 1.1. The standards enumerate needs to be served not only by discovery but by pre-trial procedures generally.

[81]Napue v. Illinois, 360 U.S. 264 (1959).

[82]Brady v. Maryland, 373 U.S. 83 (1963). While *Brady* contemplated that the defense would request the material alleged to be exculpatory, the United States Supreme Court has since emphasized that the prosecutor must disclose evidence without specific request if the evidence is sufficiently substantial to create "reasonable doubt that did not otherwise exist." United States v. Agurs, 427 U.S. 97, 112 (1976).

Indiana law anticipated *Agurs*. In Birkla v. State, 263 Ind. 37, 323 N.E.2d 645 (1975), the Indiana Supreme Court held that destruction of potentially material evidence prior to a request for production by the defense places a "heavy burden" on the prosecution to show that the destruction of the evidence did not prejudice the defendant. *Id.* at 43, 323 N.E.2d at 649. *See also* Newman v. State, 263 Ind. 569, 334 N.E.2d 684 (1975).

The *Brady* doctrine should not be confused with court-ordered discovery, as some practitioners do. Court-ordered discovery is usually held not to be constitutionally required. United States v. Augenblick, 393 U.S. 348 (1969); Johnson v. State, 255 Ind. 589, 266 N.E.2d 57 (1971); Gubitz v. State, 360 N.E.2d 259 (Ind. Ct. App. 1977). Due process is concerned with *suppression* of evidence—the total withholding of evidence from the trier of fact by the prosecution—and ordinarily is not concerned with pre-trial disclosure of information to the accused for the preparation of his defense. But there is no reason for the courts not to find that the assistance of counsel clause of the sixth amendment guarantees at least minimal pre-trial discovery in order to insure meaningful investigation and preparation. One federal court has held that due process requires the prosecution to permit the defense access to ballistics evidence for expert examination. Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975). *See also* White v. Maggio, 556 F.2d 1352 (5th Cir. 1977).

[83]C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2001, at 15 (1970).

[84]IND. R. TR. P. 8(a) requires a "short and plain statement of the claim" and a demand for relief. The Civil Code Study Commission Comments to Trial Rule 8, *quoted in* 1 W. HARVEY, INDIANA PRACTICE 476 (1969), state:

> This subdivision establishes the concept of notice pleading and eliminates the constraining doctrines of the code concept of the "cause of action." Historically, pleadings have had four functions: (1) giving notice of the nature of the

formation is required to state "the nature and elements of the crimes charged in plain and concise language."[85] Under a prior statute, the supreme court has held that Indiana criminal law does not recognize the bill of particulars because any charging instrument so vague as to justify a bill is subject to a motion to quash.[86]

The prime danger in criminal discovery was traditionally assumed to be that of perjury.[87] The defendant, once apprised of the specifics of the case against him, would fabricate evidence to meet the charges. This view has been somewhat discredited in recent years.[88] As Justice William Brennan has written:

> I must say that I cannot be persuaded that the old hobgoblin perjury . . . supports the case against criminal discovery. I should think rather that its complete fallacy has been starkly exposed through the extensive and analogous experience in civil causes where liberal discovery has been allowed and perjury has not been fostered. Indeed, this experience has

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claim or defense; (2) stating facts each party believes to exist; (3) narrowing the issues; and (4) providing a means for speedy disposition of sham claims and unsubstantiated defenses. Rule 8(a) places the emphasis on the first of these functions (the giving of notice) and when read in conjunction with the rules as a whole, shifts the other functions to discovery, pre-trial conference, and summary judgment.

[85]IND. CODE § 35-3.1-1-2(a)(4) (1976). This section also requires the charging instrument to state the name of the offense, *id.* § 35-3.1-1-2(a)(2), and to cite the statute violated, *id.* § 35-3.1-1-2(a)(3). The time and place must be stated with sufficient specificity to show that the crime was committed within the period of the statute of limitations and to show proper venue, unless the time or place are elements of the offense in which case they must be stated "as definitely as can be done." *Id.* § 35-3.1-1-2(a)(5).

Various case law pleading requirements apply to individual offenses. For example, an indictment or information for involuntary manslaughter must allege the specific acts of the defendant that constitute reckless disregard for the safety of others. State v. Beckman, 219 Ind. 176, 37 N.E.2d 531 (1941). An information charging the commission of a felony while armed must set out the elements of the included or underlying felony. Goldstine v. State, 230 Ind. 343, 103 N.E.2d 438 (1952). A burglary charge must specify the felony that the accused intended to commit within the entered structure. Bays v. State, 240 Ind. 37, 159 N.E.2d 393 (1959). An information for conspiracy must allege the elements of the felony that was the object of the conspiracy. Landis v. State, 196 Ind. 699, 149 N.E. 438 (1925).

[86]Sherrick v. State, 167 Ind. 345, 79 N.E. 193 (1906). The "motion to make more specific" has also been held not to be recognized by Indiana criminal law. Hinshaw v. State, 188 Ind. 447, 124 N.E. 458 (1919).

The proposed Indiana Code of Criminal Procedure included a provision for a bill of particulars, CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-3.1-1-3, but this feature was omitted from the Code as enacted.

[87]ABA STANDARDS, *supra* note 39, § 1.2, comments at 36-40.

[88]*Id.*

> suggested that liberal discovery, far from abetting, actually deters perjury and fabrication.[89]

In *Dillard*, the court recognized that intimidation, harassment, or harming of witnesses or informants might be another danger of criminal discovery.[90] The Proposed Code of Criminal Procedure tried to counter these dangers by listing facilitation of perjury and danger to "any person" as adequate grounds for denial of a request for discovery.[91]

Another possible danger to be avoided is the abuse of discovery procedures to prolong criminal prosecutions and to harass the prosecution with exorbitant demands for production. There is dicta indicating recognition of this possibility in *Dillard*.[92] Trial Rule 26 provides trial courts with the means to prevent discovery abuses that subject parties or other persons to "annoyance, embarrassment, oppression, or undue burden or expense" in civil matters.[93] The potential for such abuse in criminal cases, where the amount of and time for preparation by each party is ordinarily much less than in civil actions, is correspondingly greater.[94] A defendant should not be allowed to employ the threat of exhaustive discovery as a trump in plea negotiations or as a wrench with which to jam the workings of the criminal justice system.

Any scheme of discovery worthy of consideration, of course, should advance the interests sought to be served by criminal discovery while minimizing the potential for abuses. With this in mind, this discussion will turn to the alternatives to be faced in constructing any such scheme.

A. Scope of Discovery

The scope of criminal discovery in Indiana before *Keller* was quite restrictive. For example, the "materiality" showing required by *Dillard* was capable of harsh construction. As applied in *Sexton*

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[89]Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 291 (footnote omitted).

[90]257 Ind. 282, 274 N.E.2d 387 (1971).

[91]CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-1(c).

[92]257 Ind. at 292, 274 N.E.2d at 392.

[93]IND. R. TR. P. 26(C).

[94]This may seem paradoxical in view of the often cited preponderance of resources which the prosecution, marshalling society's power, enjoys over the individual defendant. However, the prosecution must allocate finite resources among a great number of criminal investigations and prosecutions. Moreover, the prosecution consists of several mutally autonomous agencies, with differing outlooks and priorities, whose cooperation is often less than optimal.

v. State,[95] the materiality requirment seemed to demand that the material sought be beneficial to the preparation of the defandant's case and that the defendant be unable to obtain the materials or information for himself without hardship. The American Bar Association Standards' approach—arguably adopted in *Keller*[96]—that discovery be as "full and free as possible, consistent with the protection of persons, effective law enforcement, the adversary system, and national security"[97] probably represents the opposite extreme.

A scope of discovery as restrictive as that outlined in *Sexton* threatens to impair discovery's functions of expediting the administration of justice and guaranteeing the accused adequate information with which to prepare his defense. A scope as liberal as that of the ABA Standards lends itself to misuse too readily. The scope of discovery best suited to the realization of discovery's ends seems to be one in which the defendant may discover items which would probably be of benefit to the preparation of his defense and which are substantially more accessible to the prosecutor than to the defense.

In specific terms, the scope of permissible discovery should include the following: A list of witnesses;[98] statements made by the accused, a codefendant, or a witness, including statements contained in grand jury testimony; records of criminal convictions of any such persons available to the prosecutor; inspection of tangible and documentary evidence; and the reports of experts and results of scientific or medical tests. All of the foregoing are encompassed within the ABA Standards and the Proposed Code of Criminal Procedure's discovery chapter.[99] Additionally, the defendant should be allowed to discover a copy of the police report dealing with the crime with which he is charged. Such reports were probably not discoverable in ordinary circumstances before *Keller*,[100] since they did not represent the statement of a witness but were part of the state's work product.[101] However, disclosure of such reports helps to

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[95]257 Ind. 556, 276 N.E.2d 836 (1972). *See* text accompanying notes 20-23 *supra*.

[96]*See* Note, Keller, *Prosecutorial Discovery and the Privilege Against Self-Incrimination*, 9 IND. L. REV. 623 (1976).

[97]ABA STANDARDS, *supra* note 39, § 1.2.

[98]In Reid v. State, No. 107 S 345 (Ind. Feb. 6, 1978), the supreme court refused to limit "witness" to exclude witnesses expected to be called for rebuttal purposes, and held that a party is entitled to disclosure of rebuttal evidence when the existance and relevance thereof becomes known to the party possessing it.

[99]*See* note 39 *supra*.

[100]In Adams v. State, 254 Ind. 509, 260 N.E.2d 878 (1970), a police officer's notes of an interview with a witness were held not to be subject to disclosure unless the officer testified.

[101]It is not clear whether a "work product privilege" exists in criminal cases under present law. Justice Arterburn dissented in *Sexton* on the grounds that the diagram

maximize the efficiency of the defendant's trial preparation by providing the defense with a background and starting point for its preparations, while constituting a minimal interference with the functioning of the police and prosecutor.

Since it is more conducive to judicial efficiency that certain issues collateral to the defendant's guilt or innocence be raised and resolved before trial, the defendant should be allowed access to sufficient information to determine whether such issues exist.[102] To enable the defense to make a pre-trial suppression motion, the state should be required to disclose whether tangible evidence has been seized, whether any form of identification has been conducted, and whether the defendant or any codefendants have made any statements to law enforcement officials.[103]

The question of discovery privileges is encompassed in the issue of scope. The Proposed Code of Criminal Procedure provided for an "informant" and a "work product" privilege.[104] Present Indiana law recognizes the right of the state to withhold an informant's identity when the state shows a paramount interest in doing so and when the informant's identity is not relevant to any material issue in the case.[105] This rule recognizes the necessity of employing informants in some areas of law enforcement and the danger in mandatory disclosure of informants' names to the defense.[106] A comparable in-

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ordered produced was the state's work product. 257 Ind. at 562, 276 N.E.2d at 840.

Since *Keller* the supreme court has apparently held, without discussion of the term "work product," that the trial court may order the production of police reports. Monserrate v. State, 352 N.E.2d 721 (Ind. 1976).

[102]It might appear that all of these facts would be within the knowledge of the accused; often, however, this is not the case. A search may be conducted while the defendant is already in custody or is absent from the searched premises. A defendant has no way of knowing whether his photograph has been shown to a witness, and many "show-ups" are conducted through one-way windows in holding cells. Aside from these factors, such disclosures are necessary to permit the defense counsel to effectively represent the mistrustful defendant who fails to fully apprise his attorney of the facts known to him, and the confused, intoxicated, or slow-witted defendant who is unable to do so. *See* ABA STANDARDS, *supra* note 39, § 1.2, comment at 41-42.

[103]However, the flexibility with which a suppression hearing can be conducted allows full exploration of the facts relating to the challenged search, confession, or identification at the hearing itself and obviates the need for protracted discovery preparatory to such a hearing.

[104]*See* text accompanying note 42 *supra*.

[105]Dorsey v. State, 254 Ind. 409, 260 N.E.2d 800 (1970); Collett v. State, 338 N.E.2d 286 (Ind. Ct. App. 1975).

[106]Hewitt v. State, 261 Ind. 71, 300 N.E.2d 94 (1973); McCulley v. State, 257 Ind. 135, 272 N.E.2d 613 (1971).

This issue is hedged by constitutional limits. In Roviaro v. United States, 353 U.S. 53 (1957), the United States Supreme Court required disclosure of an informer's identity when such information is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Id.* at 60-61. In McCray v. Illinois, 386

former's privilege should be included in any codification of Indiana discovery rules.

The proposed code envisioned a narrower privilege for the work product[107] of the prosecutor and the police than that of Trial Rule 26, which sets forth the standard for discovery of work product in a civil action.[108] While Trial Rule 26 exempts trial preparation in general from disclosure, the proposed code exempts only material containing "opinions, theories, or conclusions" of the prosecutor or police.[109] The concept of "work product" as developed in civil discovery[110] is not particularly useful in criminal procedure. The state has not merely an advantage but a near monopoly of many trial preparation techniques: Fingerprint identification, firearms identification, and many areas of chemical analysis. It is wasteful to require the defendant to duplicate the investigative efforts of the police in these areas, even assuming that the necessary resources are available to him.

The danger to be avoided in this area is that the defendant may abuse discovery procedures by causing unnecessary cost and inconvenience to the law enforcement agency. The state should be required to produce only that evidence which is already in existance; it should not be required to research, investigate, or summarize for the defendant's benefit.[111] These practices are anomalous in an adversary system as they debilitate the fact-resolution process of

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U.S. 300 (1967), the Court upheld an Illinois privilege statute applied to prevent disclosure of an informant's identity at a suppression hearing, where the issue was the validity of a warrant issued upon information obtained from that informant, despite a confrontation clause challenge.

[107]CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-1(d), reads in part: "Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of police officers, the prosecuting attorney or members of his legal staff unless the material exculpates the defendant."

[108]IND. R. TR. P. 26(B)(2) restricts discovery of materials prepared for trial, with the exception of statements by the discovering party, to those for which good cause can be shown for production. Trial Rule 26(B)(3) allows a party to obtain a list of expert witnesses who will appear at trial for his opponent and to discover their relevant opinions. Otherwise, the opinions and information possessed by expert witnesses may not be discovered without a showing of inability to obtain equivalent information without undue hardship.

[109]The privilege found in the Proposed Code of Criminal Procedure is slightly broader than that of the ABA STANDARDS, *supra* note 39, § 2.6(a), as the latter does not include the opinions of police officers.

[110]*See* Hickman v. Taylor, 329 U.S. 495 (1947).

[111]For example, many defense discovery motions request "the substance of any oral statment" made by a witness. If the state summarizes such a statement for the defendant, the defense may then seek to bind the state to its summary, preventing contradiction at trial. This runs counter to the trial's purpose of discovering the truth.

that system and place one party in the position of vouching for another's evidence.

B. Procedure

One of the recurring difficulties with present discovery practice is the confusion engendered by the diversity of local court rules and the lack of definite standards to which such rules must conform. In some reported cases, the defendant's misunderstanding of the trial court's action upon his discovery demand prevented appellate review of the merits of discovery claims.[112] In others, the defendant was held to have waived discovery issues by failing to seek the appropriate remedy in the trial court.[113] This difficulty illustrates the need for definitiveness in the trial court procedure.

There are two general models of discovery procedure, either of which may be utilized by trial courts under *Keller*. The usual procedure, and that envisioned by the pre-*Keller* cases, required the defendant to move the trial court to order the state to provide the discovery sought. In this procedure, the validity and propriety of each request is automatically submitted to the court for determination. In the alternative model, that employed by the Federal Rules of Criminal Procedure[114] and recommended in the standards of the American Bar Association,[115] the defendant requests discovery directly from the state, and only when the parties dispute whether a given disclosure should be made is the court called upon to take action.

Each model has virtues and flaws. The first model discussed above permits the defendant to know with certainty whether his discovery has been granted and injects clarity into the appellate consideration of discovery issues by focusing argument either on the propriety of the trial court's ruling or the sufficiency of the state's compliance. However, the burden placed upon the courts to routinely

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[112]In Dillard v. State, 257 Ind. 282, 274 N.E.2d 387 (1971), the defendant obtained an order requiring the state to list persons questioned during the investigation, but the state responded by producing a witness list. The defendant was held to have waived the issue of the state's incomplete compliance by failing to request sanctions in the trial court.

In Block v. State, 356 N.E.2d 683 (Ind. 1976), and Hendrix v. State, 262 Ind. 309, 315 N.E.2d 701 (1974), the defendants argued that the state had failed to comply with a discovery order when the court found that no order had been issued. A similar waiver occurred in Murphy v. State, 352 N.E.2d 479 (Ind. 1976).

[113]Siblisk v. State, 263 Ind. 651, 336 N.E.2d 650 (1975); Owens v. State, 263 Ind. 487, 333 N.E.2d 745 (1975); Luckett v. State, 259 Ind. 174, 284 N.E.2d 738 (1972); Buchanan v. State, 336 N.E.2d 654 (Ind. Ct. App. 1975) *See also* Ross v. State, 360 N.E.2d 1015 (Ind. Ct. App. 1977).

[114]FED. R. CRIM. P. 16(a).

[115]ABA STANDARDS, *supra* note 39, § 1.4.

rule upon every discovery request made will strain judicial resources unless the action taken upon the motions also becomes routine and automatic. Consideration of seriously contested discovery motions is thus unnecessarily impeded and complicated.

The second model discussed above remedies this fault but tends to prolong the discovery process through the addition of an extra stage in which the prosecutor decides whether to comply or contest. Such added time may be sufficient to constitute a delaying factor that limits the speediness of criminal trials.

Any scheme of discovery procedure must include sanctions for noncompliance. As already noted, present Indiana law relies heavily on the continuance as the principal discovery remedy.[116] Obviously, no number of continuances will compel an unwilling or dilatory opponent to provide ordered or authorized discovery. The continuance is an appropriate remedy when noncompliance is the result of oversight or inability to comply within the available time when it appears that additional time will enable discovery to be completed. An accused should not, however, be required to accept indefinite delay of his trial as the price of discovery. At some point, more powerful sanctions are necessary to prevent willful or bad faith failure to provide discovery. The point at which such sanctions become appropriate is contingent upon too many factors to be governed by rigid rules. The varying degrees of difficulty involved in producing different kinds of evidence, the wide variations in caseloads and manpower among the individual prosecutors' offices and law enforcement agencies throughout the state, and similar considerations suggest that the decision to impose punitive sanctions should be entrusted to the trial court's discretion.[117]

The Indiana Rules may enumerate the acceptable sanctions or may generally direct the trial court to take appropriate action. The Federal Rules, like the Indiana Civil Discovery Rules[118] and existing Indiana discovery case law,[119] permit the court to exclude undis-

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[116]*See* text accompanying notes 65-71 *supra*.

[117]This may be what the Indiana Supreme Court intended to provide in cases such as Lund v. State, 345 N.E.2d 826 (Ind. 1976), which held that discovery sanctions are discretionary with the trial court. Both the American Bar Association and the Indiana Criminal Code Study Commission propose considerable trial court discretion in providing sanctions. ABA STANDARDS, *supra* note 39, § 4.7; CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-5.1-4-6(d). The Federal Rules of Criminal Procedure also vest wide discretion in the trial court. FED. R. CRIM. P. 16(d).

[118]IND. R. TR. P. 37(B)(3).

[119]Keel v. State, 333 N.E.2d 328 (Ind. Ct. App. 1975); State v. Buza, 324 N.E.2d 824 (Ind. Ct. App. 1975). In Olson v. State, 262 Ind. 329, 315 N.E.2d 697 (1974), while the issue was not directly under consideration, the Indiana Supreme Court gave effect to a trial court's ruling striking the testimony of a witness, whose name was omitted from

closed evidence.[120] The American Bar Association's Advisory Committee on Pretrial Proceedings omitted this remedy from its Standards with the following comment:

> Without rejecting this device as a useful sanction in some situations, some members of the Committee thought there would be difficulties in applying it against accused persons, and unfairness if the sanction was applied only against the prosecution. The Committee's general view, moreover, was that the court should seek to apply sanctions which affect the evidence at trial as little as possible, since these standards are designed to implement, not to impede, fair and speedy determinations of cases.[121]

Although the constitutional problems once thought to inhere in exclusion of defense evidence may have dissipated since the United States Supreme Court's decisions in *Williams v. Florida*[122] and *Wardius v. Oregon*,[123] the comments to the ABA Standards pose a valid criticism of evidentiary exclusion as a discovery remedy: It punishes not only the offending party but society as a whole by reducing the validity of the trial as a fact-finding process.

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a witness list, by disregarding the testimony on appeal. *But see* Upshaw v. State, 352 N.E.2d 102 (Ind. Ct. App. 1976).

[120]In French v. State, 362 N.E.2d 834 (Ind. 1977), the trial court struck testimony concerning statements not disclosed to the accused pursuant to a discovery order. The Indiana Supreme Court did not discuss the propriety of this sanction, but proceeded to consider whether the trial court's admonition to the jury to disregard the testimony was sufficient to cure any error in its admission.

[121]ABA STANDARDS, *supra* note 39, comment to § 4.7, at 107-08.

[122]399 U.S. 78 (1970). In *Williams*, the United States Supreme Court upheld a Florida Rule of Criminal Procedure that required the defendant to give notice of his alibi defense and excluded all alibi testimony except that of the defendant himself as the penalty for noncompliance.

[123]412 U.S. 470 (1973). In *Wardius*, the United States Supreme Court overturned an Oregon statute with a similar sanction because the statute did not provide for similar discovery to the defense. The Indiana Supreme Court has also upheld exclusion of alibi testimony as a sanction for noncompliance with the Indiana alibi notice statute (IND. CODE §§ 35-5-1-1 to -3 (1976)). Bowen v. State, 263 Ind. 558, 334 N.E.2d 691 (1975); Lake v. State, 257 Ind. 264, 274 N.E.2d 249 (1971). Justice DeBruler concurred separately in *Bowen* and would hold that insofar as the statute prevents the accused from testifying himself as to his alibi, it contravenes article 1, § 13 of the Indiana Constitution. 263 Ind. at 568, 334 N.E.2d at 697.

Professor Robert Clinton in his article on the "right to defend," criticizes these decisions as infringing upon the accused's right to present a defense. Clinton, *The Right to Present a Defense: An Emerging Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713, 830-41 (1976). This position reflects the curious view that the defendant should be immune from the very procedural rules to which he can hold the state.

A contempt citation issued against the offending counsel is the chief alternative to the exclusion sanction.[124] However, since courts are reluctant to find contempt except in the most extreme cases, it is generally ineffective as a sanction. Furthermore, contempt is often inappropriate in cases where the attorney is not responsible for the noncompliance or is unable to avert it. This may occur when a defense lawyer has difficulty in obtaining cooperation from his client or it may occur as a result of the misunderstandings and frictions that accompany the interaction of prosecutors with prosecuting witnesses and law enforcement agencies. The court should not be limited, however, in using its contempt powers to prevent willful sabotage of discovery processes by parties, counsel, or witnesses.

Although attorney disciplinary procedures may be used as a discovery sanction, the use of such procedures as a sanction is subject to the same limitations that accompany the use of contempt.[125] Furthermore, the exclusion sanction, as opposed to the disciplinary or contempt sanction, penalizes persons other than the attorney, thereby maximizing the incentive of the persons involved in both the defense and prosecution process to cooperate in providing the required discovery.

A final aspect of discovery procedure concerns the protective order.[126] The court should be empowered to defer or restrict discovery, or condition it upon compliance with special rules, in cases where the application of the ordinary rules of discovery would endanger a witness or subject him to harassment, impede an ongoing investigation, endanger the confidentiality of legitimate government secrets, or subject either party to unreasonable expense or inconvenience. The Federal Rules of Criminal Procedure[127] and the Proposed Code of Criminal Procedure[128] contained such a provision, and the ABA Standards recommend one.[129]

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[124]Justice Prentice recommended this sanction in Chatman v. State, 263 Ind. 531, 334 N.E.2d 673 (1975).

[125]The use of attorney disciplinary procedures to enforce discovery rules is suggested by the American Bar Association. ABA STANDARDS, *supra* note 39, comment to § 4.7, at 108.

[126]IND. R. TR. P. 26(C).

[127]FED. R. CRIM. P. 16(d).

[128]CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, §§ 35-5.1-4-3 to -6(a).

[129]ABA STANDARDS, *supra* note 39, § 4.4. The ABA Standards also suggest in camera review of materials and excision of nondiscoverable materials. Both are worthwhile devices for dealing with unusual situations.

C. Specific Forms of Discovery

The forms of criminal discovery that have developed under existing case law have already been described.[130] *Antrobus* predicted the adoption of the "techniques" of civil discovery into criminal procedure;[131] and several techniques, the deposition and the motion to produce in particular, have been so adopted. The deposition in criminal cases has come to mirror the deposition in civil cases.[132] The motion to produce is a broader device in criminal procedure than in civil procedure; it has become the all-purpose discovery vehicle, which has been used to discover items as diverse as witness lists and expert's reports.[133] Also, the court's power to order the defendant to submit to physical tests, examinations, and measurements resembles the Trial Rule 35 order for physical or mental examination.[134]

The question must invariably arise whether the major remaining civil discovery device, the interrogatory, should be employed in criminal proceedings. This issue did not arise until 1976,[135] when the Indiana Court of Appeals decided *Gutowski v. State*.[136] Gutowski filed written interrogatories with the trial court to be answered by the

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[130]*See* text accompanying notes 12-35 & 54-57 *supra*.

[131]253 Ind. at 423, 254 N.E.2d at 874.

[132]*See* text accompanying notes 72-76 *supra*.

[133]State *ex rel.* Keller v. Criminal Court, 262 Ind. 420, 423, 317 N.E.2d 433, 435 (1974).

[134]IND. R. TR. P. 35(A). There is a rule based upon the statute rendering accomplices competent witnesses, IND. CODE § 35-1-31-3 (1976), and the general competency of witnesses statute, *id.* § 34-1-14-5, that permits defendants to require accomplice witnesses to submit to psychological examinations for the purpose of determining whether the witness is competent to testify under § 34-1-14-5, which requires that witnesses be sane at the time they testify. Antrobus v. State, 253 Ind. 420, 254 N.E.2d 873 (1970). A similar rule applies to the prosecutrix in a rape prosecution. Wedmore v. State, 237 Ind. 212, 143 N.E.2d 649 (1957). The trial court has discretion in determining whether a psychiatric examination is necessary. Chadwick v. State, 362 N.E.2d 483 (Ind. 1977).

[135]A 1973 Indiana Supreme Court decision, Fender v. Lash, 261 Ind. 373, 304 N.E.2d 209 (1973), appears to suggest that interrogatories may be employed in criminal prosecutions. In that case, the petitioner, an inmate of the state prison, filed a petition for a writ of habeas corpus, which the trial court treated as a post-conviction relief petition. Although the opinion does not so specify, the petioner sought to obtain leave of the trial court in the post-conviction preceeding to serve interrogatories on the state. Brief for Petitioner at 17-18. The trial court struck the motion; and the supreme court affirmed, holding that Indiana Trial Rule 33(A) allows service of interrogatories on the opposing party without leave of court. 261 Ind. at 376, 304 N.E.2d at 210. The rules governing post-conviction proceedings expressly provide that civil discovery rules apply. IND. R. POST-CONVICTION RELIEF 1, § 5. The court also remarked about the lack of a *Dillard* foundation; under the circumstances this comment seems unnecessary, since Trial Rule 33 does not require any such foundation.

[136]354 N.E.2d 293 (Ind. Ct. App. 1976).

complaining witness. The trial court sustained the state's objection that Trial Rule 33 allows interrogatories to be served only on parties.[137] Judge Staton, for the court, wrote:

> Nor do we intend to imply that the technique of discovery by interrogatories submitted to a complaining witness is improper in a criminal case. The trial court has the inherent power to apply the techniques of discovery embodied in the civil rules and is not bound by the limiting language contained in those civil rules. In the proper case, discovery by written interrogatories served on non-parties may well be appropriate as a less coumbersome [sic] and less expensive technique than discovery by depositions.[138]

The court held, however, that Gutowski had waived the issue by failing to argue the propriety of his particular interrogatories at a hearing in the trial court for that purpose. Gutowski's argument that the interrogatories were actually a deposition upon written questions under Trial Rule 31 was disposed of in the same manner.[139]

Judge Garrard concurred separately, stating that he would hold that interrogatories may not be served on a non-party.[140] He identified a reason for not allowing the use of interrogatories to non-parties that applies to their use with parties as well:

> While use of interrogatories may normally be the most inexpensive discovery technique, they are usually of questionable value in adducing the depths of shading necessary to the resolution of disputed factual issues. As stated by Dean Harvey, ". . . interrogatories . . . constitute a cumbersome device not suitable for complicated factual situations or where parties may prove evasive."[141]

This is probably due to the distinctive function of interrogatories, which were developed as a feature of the pleadings of suits in

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[137]IND. R. TR. P. 33(A) provides: "Any party may serve upon any other party written interrogatories to be answered by the party served . . . ."

[138]354 N.E.2d at 296.

[139]The court assumed that the criminal procedure deposition statute, IND. CODE § 35-1-31-8 (1976), allowed such depositions. However, the Indiana Supreme Court had already decided, in Murphy v. State, 352 N.E.2d 479 (Ind. 1976), that the statute had been superseded, *see* the text accompanying notes 74-76 *supra*, and that Trial Rules 30 & 31 applied to the taking of depositions. Written depositions are expressly permitted under Trial Rule 31 but differ in form from interrogatories.

[140]354 N.E.2d at 300 (Garrard, J., concurring). *See also* Hampton v. State, 359 N.E.2d 276, 279 (Ind. Ct. App. 1977) (Staton, P.J., concurring in result).

[141]354 N.E.2d at 300 (Garrard, J., concurring) (quoting 2 W. HARVEY, INDIANA PRACTICE 682 (1970)).

equity[142] to narrow the issues in the case for trial.[143] For this reason, interrogatories are appropriate to determine the opinions, conclusions, and contentions of parties.[144] This function is necessary under notice pleading but is fulfilled by the pleadings themselves in criminal procedure.[145] Although inexpensive and convenient when compared with depositions, interrogatories are seldom employed as a complete discovery device but rather as a preparation for those devices capable of more detailed fact resolution. Interrogatories are one reason why civil litigation involves the consumption of more time and money than criminal litigation. Moreover, while the accused's right against self-incrimination does not protect him from being required to disclose his defenses and witnesses,[146] it may well protect him from being required to answer interrogatories.[147] Interrogatories would thus be a discovery device available only to defendants.

There are no reported Indiana cases dealing with the applicability of the remaining civil discovery device, the Trial Rule 36 request for admissions, to criminal prosecutions. The purpose of this device has been described as being the elimination of the need of proving facts not seriously contested.[148] This is a worthwhile objective, consonant with the discovery purpose of procedural efficiency, but the device itself is poorly suited to the practicalities of criminal procedure. The rule deems the requested matter admitted unless the answering party denies it within thirty days.[149] Since defendants are seldom required by the nature of any defense to prove peripheral or uncontroverted facts, the device fails in its purpose with respect to the defense. However, it can be abused by the defendant who requests the state to admit the lack of a necessary element of the offense in hopes that the state will inadvertently fail to answer. The sanction for bad-faith denial is the assessment of costs under Trial Rule 37(B).[150] This sanction is unlikely to deter either the state or

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[142]E. MERWIN, EQUITY AND EQUITY PLEADING § 915, at 521 (1895).

[143]8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2163, at 487 (1970); 2 W. HARVEY, INDIANA PRACTICE 684 (1970).

[144]2 W. HARVEY, INDIANA PRACTICE 684 (1970).

[145]*See* notes 84 & 85 *supra* and accompanying text.

[146]State *ex rel.* Keller v. Criminal Court, 262 Ind. 420, 317 N.E.2d 433 (1974).

[147]In State *ex rel.* Land v. Knox Superior Court, 249 Ind. 471, 233 N.E.2d 233 (1968), the taking of depositions by the defendant was held not to constitute a waiver of the defendant's privilege against self-incrimination. The state could depose the defendant's witnesses but not the defendant himself.

[148]3 W. HARVEY, INDIANA PRACTICE 58-59 (1970).

[149]IND. R. TR. P. 36(A).

[150]3 W. HARVEY, INDIANA PRACTICE 61 (1970).

the defendant. Furthermore, its benefits may be realized by stipulations by the parties.[151]

A final discovery device worth consideration is the bill of particulars.[152] The bill of particulars is a vestige of the generally abandoned system of refining fact issues through pleadings; it is a statement by the prosecutor of specific details of the offense charged. In a reasonably liberal scheme of discovery such as Indiana's, a device for disclosure of factual details of the charge would unnecessarily duplicate other discovery devices. Production of police reports would provide equivalent information with less inconvenience to either party. In situations in which relevant facts would not appear in the official reports, such as entrapment cases, the bill is likely to suffer the same inadequacy as the interrogatory—insufficient factual sensitivity. Deposition of the state's witnesses would be more likely to reveal necessary information.

There are, however, two uses of the bill of particulars that have prospective merit. One is to replace the anachronistic statutory procedure for giving notice of alibi evidence.[153] The statute, enacted to allow the prosecution an opportunity to detect spurious alibis,[154] requires the accused to notify the prosecution of the place he intends to prove that he was at the time of the offense as a precondition to the admissibility of the alibi evidence.[155] There appears to be no justification for singling out alibi evidence and subjecting it to special disclosure standards when the state can discover defenses and defense witnesses in general. Moreover, the statute permits the defendant to require the state to specify the time and place of the offense *after* he has notified the state of his whereabouts.[156] The remedy for noncompliance is again exclusion of evidence, in this case

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[151]Existing statutory law provides for pre-trial conferences in criminal cases at which the court and parties are to consider "the simplification of the issues to be tried at trial and the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof." IND. CODE § 35-4.1-3-1(b) (1976). Following the conference, the trial court is to file a memorandum of the agreed matters. *Id.* § 35-4.1-3-1(c).

[152]*See* text accompanying note 86 *supra*. The bill of particulars envisioned by the Proposed Code of Criminal Procedure allowed the defense to request any "items of factual information . . . which relate to the charge and are not recited in the indictment or affidavit." CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT, *supra* note 37, § 35-3.1-1-3(a). The bill was to be granted when "the court is satisfied that any or all of the items of information requested in the motion . . . are necessary to enable the defendant adequately to prepare or conduct his defense." *Id.* § 35-3.1-1-3(b).

[153]IND. CODE §§ 35-5-1-1 to -3 (1976). *See* text accompanying notes 4-6 *supra*.

[154]Note, *Criminal Law: Statutory Regulation of Alibi Defense Through Notice Requirements*, 30 IND. L.J. 106, 107-08 (1954).

[155]IND. CODE § 35-5-1-3 (1976). The statute allows the trial court to excuse noncompliance for good cause.

[156]*Id.* § 35-5-1-2.

evidence that the accused was at the scene of the offense.[157] This provision is a trap for the careless prosecutor.

The bill of particulars could be used to enable the defendant to obtain a precise statement of the time and place of the offense in order to prepare his alibi defense. The state could discover this defense and the identity of the alibi witnesses through ordinary discovery techniques. Thus, the disclosure of alibi matters would be brought into uniformity with the remainder of discovery law, and the anomalies of the current statutory procedure ended.[158]

Also there are cases in which the accused cannot ascertain the exact offense with which he is charged because the statute defining the offense sets out elements in the alternative, and the charging instrument alleges all of the elements.[159] While an early case held that an indictment sufficiently vague to warrant a bill of particulars

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[157]*Id.* § 35-5-1-3. *But see* Owens v. State, 263 Ind. 487, 333 N.E.2d 745 (1975).

[158]Indiana appears to be the only jurisdiction employing a procedure in which the accused states his alleged whereabouts *and then* demands to know where and when the crime is alleged to have been committed. IND. CODE § 35-5-1-1 (1976). *See Statutory Regulation of Alibi Defense Through Notice Requirements, supra* note 154, at 109. The federal alibi notice rule calls for the government to demand notice from the defendant, specifying the time and place of the offense. FED. R. CRIM. P. 12.1.

[159]The problem can be illustrated both under the recently repealed criminal code and the newly enacted code. The former kidnapping statute, IND. CODE § 35-1-55-1 (1976) (repealed 1977), defined kidnapping as: (1) forcibly carrying away, (2) fraudulently carrying away or decoying, or (3) imprisoning with the intention to carry away. In Davis v. State, 355 N.E.2d 836 (Ind. 1977), the information alleged that the accused both forcibly *and* fraudulently carried away his victim.

Under the repealed code, the problem also arose in other offenses, *i.e.*, the robbery statute, IND. CODE § 35-13-4-6 (1976) (repealed 1977) (taking "by violence or by putting in fear"); first degree murder, *id.* § 35-13-4-1 (1976) (repealed 1977) (premeditated and felony murder).

Under the present law, in effect since Oct. 1, 1977, there remain numerous offenses possessing alternative elements or sets of elements. *See, e.g., id.* § 35-42-3-1 (Supp. 1977) (kidnapping); *id.* 35-42-4-1 (rape); *id.* § 35-42-4-2 (unlawful deviate conduct); *id.* § 35-42-1-1 (arson); *id.* § 35-43-1-2 (mischief); *id.* § 35-43-2-2 (trespass). In most cases, these formulations are more clearly expressed than were the element formulations of prior law; alternative elements are generally set out in separately numbered subsections. *Compare id.* § 35-1-124-2 (1976) (repealed 1977), *with id.* § 35-43-5-2 (Supp. 1977) (forgery).

Hopefully, this clarification of elements will lead prosecutors to charge offenses without duplication of elements and will ameliorate the conditions which the bill of particulars is meant to remedy. The linguistic conservatism of those who draft indictments and informations, however, is a force not be to underestimated, *see* Candler v. State, 363 N.E.2d 1233, 1236-38 (Ind. 1977), and established formulations and phrases may remain in use notwithstanding the simple clarity with which the Criminal Code defines offenses.

could be quashed,[160] it is unclear whether this holding survives more recent cases declining to void charges for surplusage.[161]

The bill of particulars could be useful in disclosing the state's theory, at least insofar as specifying the elements of the offense charged and the basis of liability.[162] Such use might conserve time and effort by preventing needless litigation over the sufficiency of the charging instruments.[163]

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[160]Sherrick v. State, 167 Ind. 345, 79 N.E. 193 (1906). *See* text accompanying note 86 *supra*.

[161]*See, e.g.*, Candler v. State, 363 N.E.2d 1233 (Ind. 1977).

[162]The accessory before the fact statute, IND. CODE § 35-1-29-1 (1976), allows the defendant to be charged as a principal but convicted as an accessory.

[163]The federal courts disagree as to whether FED. R. CRIM. P. 7(f), which provides for bills of particulars, permits courts to require the government to state legal theories. *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE—CRIMINAL § 129, at 287 n.49 (1969). Clearly such a requirement can lead the parties astray into premature and immaterial legal argument over unripened issues. This should be controlled by the trial court by restricting the use of the bill to those cases where necessary to provide adequate information to prepare a defense.