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COMMENT

The New Criminal Deposition Statute in Ohio—Help or Hindrance to Justice?

*Marian F. Ratnoff**

FOR 39 DAYS, the 78-year-old victim of an assault lay in a Cleveland hospital in critical condition. On the 40th day, she died.¹ Two months after the assault, two men were arrested and indicted by the grand jury on two counts of first-degree murder in the perpetration of a robbery.² The accused men alleged that they had never been confronted by the victim, that they had never been placed in a lineup or identified, and indeed, that grave doubt existed as to whether the assault had caused the elderly woman's death.³

Learning that the State was holding several material witnesses alleged to be accomplices of the men, court-appointed counsel sought to depose them and several other persons, concededly for the sole purpose of pretrial discovery of relevant facts.⁴ Counsel acted under the authority of a newly amended statute, section 2945.50 of the *Ohio Revised Code*,⁵ which grants both prosecution and defendant the right to take the deposition of *any witness* in a criminal case if commissioned by the court. In the name of Jackman, a police officer and one of the proposed deponents, the prosecuting attorney

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¹ Brief for Appellant at 2, State *ex rel.* Jackman v. Court of Common Pleas, 9 Ohio St. 2d 159, 224 N.E.2d 906 (1967).

² *Id.* at 3.

³ *Id.*

⁴ *Id.*

⁵ OHIO REV. CODE ANN. § 2945.50 (Page Supp. 1966), which became effective October 13, 1965, proclaims:

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

Cf. the Vermont criminal deposition statute in note 19 *infra*.

sought a writ from the court of appeals prohibiting the trial judge from allowing the deposition to proceed.⁶

The court of appeals not only granted the prohibitive writ, but also held that the involved statute was unconstitutional.⁷ The appellate court traced the history of the statute, pointing out that deposition legislation was intended originally to permit depositions to be taken by defendants to perpetuate testimony and that subsequent revisions of the law were intended only to extend this same right to the State.⁸ In viewing the development of pretrial discovery, the court discussed the 1912 constitutional amendment concerning depositions, which was the ancestor of section 2945.50.⁹ After interpreting the minutes of the 1912 constitutional convention regarding the deposition enactment, the court explained that "there was no thought [by the 1912 legislators] of broadening the right of either party in a criminal case to take depositions for the purpose of pre-trial discovery."¹⁰ The court then observed that the constitutional power to enact pretrial discovery legislation "is clearly limited to taking testimony that cannot otherwise be preserved for presentation upon the trial of the case on the merits where a witness will not in all reasonable probability be then available . . ."¹¹ Therefore, since the legislature cannot exceed its constitutional grant of power, section 2945.50 "is unconstitutional insofar as it provides for taking depositions of witnesses who can be called to testify upon the trial of a criminal case on the merits."¹² The appellate court further concluded that section 2945.50 is so permissive that the trial court is given an "absolute, uncontrolled discretion" to determine when a deposition can be taken, which results in a wrongful delegation of legislative powers to the courts.¹³

The Ohio Supreme Court disagreed sharply with its appellate brethren.¹⁴ Accepting the challenge that the statute was unconsti-

⁶ *State ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St. 2d 159, 224 N.E.2d 906 (1967). After a hearing, defense counsel's application for a commission to take depositions was granted by the trial judge of the Cuyahoga County Court of Common Pleas. *Id.*

⁷ *State ex rel. Jackman v. Court of Common Pleas*, 6 Ohio App. 2d 182, 186-87, 217 N.E.2d 251, 254-55 (1966), *rev'd*, 9 Ohio St. 2d 159, 224 N.E.2d 906 (1967).

⁸ 6 Ohio App. 2d at 185, 217 N.E.2d at 253.

⁹ Ohio Gen. Code § 13.444-11 (1912).

¹⁰ 6 Ohio App. 2d at 185, 217 N.E.2d at 253-54.

¹¹ *Id.* at 186, 217 N.E.2d at 254.

¹² *Id.* at 187, 217 N.E.2d at 255.

¹³ *Id.* at 186, 217 N.E.2d at 254.

¹⁴ *State ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St. 2d 159, 224 N.E.

tutional, the arguments of the lower court were carefully refuted. In contrast to the appellate court's reading of the 1912 constitutional convention minutes, the supreme court concluded that the "delegates desired to give the state an equal privilege, and yet they were deeply concerned with the accused's long-recognized right of confrontation which they wished to preserve in its pristine force."¹⁵ Further, "[i]t is clear that the range of inquiry [at the convention] was the use of depositions *by the state* at trial. They did not consider the question of discovery depositions."¹⁶ Hence, since the supreme court could find no clear prohibition against pretrial discovery in the Ohio constitution and since the legislative provisions of section 2945.50 and the constitution were not incompatible, the fact was inescapable that the court of appeals had erred.¹⁷

Thus, in 1967, with the holding of constitutionality in *State ex rel. Jackman v. Court of Common Pleas*,¹⁸ Ohio becomes one of two States in the nation to allow criminal depositions for other than the most circumscribed reasons.¹⁹ How far the State of Ohio has travelled in allowing this privilege to be so expanded becomes manifest when the new statute is contrasted with *State v. Rhoads*,²⁰ a 1910 Ohio case, which has for many years been a leading expression of the law's unwillingness to allow defendant and prosecutor to know the substance of one another's case before trial.²¹ That the *Jackman* case has freed the Ohio criminal process of its hunter-hunted

2d 906 (1967), wherein the court stated, "There is no dispute that [the statute] purports to authorize a trial court to commission the taking of pretrial discovery depositions."

¹⁵ *Id.* at 165, 224 N.E.2d at 911.

¹⁶ *Id.* at 166, 224 N.E.2d at 911.

¹⁷ *Id.* at 168, 224 N.E.2d at 913.

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

¹⁹ Vermont is the other State having a similar criminal deposition statute. It became effective in 1961 and states:

A respondent in a criminal cause at any time after the filing of an indictment, information or complaint, may take the deposition of a witness, upon motion and notice to the state and other respondents, and on showing that the witness's testimony may be material or relevant on the trial or of assistance in the preparation of his defense, and upon such showing the court, a superior judge, county court judge or district judge shall order that the testimony of the witness be taken by deposition. 5 VT. STAT. ANN. tit. 13, § 6721 (Supp. 1967).

See also *id.* §§ 6722-27. Apparently, under the Vermont statute a defendant need only show cause why he should be allowed to take depositions and an order must issue. In Ohio, however, there is seemingly a great deal of discretion in the judge to determine whether to allow the taking of depositions. Also, it is important to note that section 2945.50 applies to both prosecution and defendants, while the Vermont statute applies only to defendants. See note 5 *supra*. See also notes 75-78 *infra* & accompanying text.

²⁰ 81 Ohio St. 397, 91 N.E. 186 (1910).

²¹ See, e.g., *State v. Sharp*, 162 Ohio St. 173, 122 N.E.2d 684 (1954); C. McCORMICK, EVIDENCE 210 & n.22 (1954).

quality cannot be doubted. Nevertheless, this newly given right foreshadows many problems, not the least of which will be the exploration by defense and prosecution of the outer reaches of the criminal deposition.

Unfortunately, the State of Ohio rarely incorporates within its statutes nor makes available any expression of the legislative intent which produced a particular statute. In an informal interview,²² Michael A. Sweeney of Cleveland, sponsor of the bill that was to become the new statute, stated that it was the intent of the authors of the bill to provide a new law which would be less rigid than the old one.²³ Like similar statutes in other States, the old law allowed criminal depositions to be taken only where a witness might be ill or dying, absent from the jurisdiction, or an out-of-State resident.²⁴ The emphatic concern of the bill's sponsors was that all of the Ohio case law applicable to pretrial discovery be most carefully preserved. Thus, the sponsors believed that on-the-scene statements secured by police in the investigation of a crime, a defendant's confession or statement, and any of the other fragments of the prosecutor's or the defense attorney's *work product* should be most carefully protected.²⁵ Similarly, the legislators were definitely opposed to abrogation of any of the traditionally secret preserves of privilege, *i.e.*, husband-wife, attorney-client, or doctor-patient.²⁶ All of the old standards were to be maintained. In the final analysis, Mr. Sweeney remarked that permission to depose the witness will rest upon the sound discretion of the trial judge whose decision to grant or deny the deposition will depend upon the strength of the reasons put forward by either party.²⁷

About 6 weeks after the Ohio Supreme Court handed down its *Jackman* decision, a judge of the Cuyahoga County Court of Common Pleas indicated the factors which would influence *his* decision in regard to applications for depositions. In a journal entry, he

²² Interview with Michael A. Sweeney, former member of the Ohio General Assembly, House of Representatives, member at large, in Cleveland, Ohio, May 5, 1967 [hereinafter cited as Sweeney Interview].

²³ OHIO REV. CODE ANN. § 2945.50 (Page 1954), *as amended*, OHIO REV. CODE ANN. § 2945.50 (Page Supp. 1966).

²⁴ *Id.* The older section stated:

When an issue of fact is joined upon an indictment and a material witness for the state or the defendant is sick or infirm, or about to leave the state, or is confined in prison, or resides out of this state, the prosecuting attorney or the defendant may apply . . . to take the depositions of such witness.

²⁵ Sweeney Interview.

²⁶ *Id.*

²⁷ *Id.*

enunciated the rules to be followed in common pleas court by either party seeking a deposition under section 2945.50: the parties are to state the general nature of the information sought and the purpose of the deposition; the deposition may not be sought for the purpose of harassing individuals or delaying trial; the names and addresses of each witness must be given; if the proposed deponent is a police officer, he must be designated by rank and badge number.²⁸

Apparently, however, guidelines have not been altogether helpful. For instance, in a Cuyahoga County criminal case an 8-year-old girl, a victim of a felonious assault, was deposed and thereby forced to recount a terrifying experience. The 53-year-old defendant, charged with two counts of felonious assault on her, sat across the table as she was questioned.²⁹ While the efficacy of allowing the deposition can be questioned, the prosecutor did not blame the judge who was unsure as to the requirements of the law and the limits of his discretion. The prosecutor stated, "Although the law leaves the granting of depositions to the judge's discretion, no useful guidelines have been set down I certainly can not blame [the judge] But I must aim a million dollars of criticism at the law."³⁰

Although the Ohio Supreme Court has suggested that civil guidelines are available to the presiding judge in trials of criminal causes,³¹ these court rules offer minimal guidance, at best, to interested parties. Taking a deposition — either civil or criminal — is not without complex problems. Perhaps because of the complexities of the procedure, many States appear unalterably opposed to Ohio's stand for what appear to be sound reasons.

In contrast to Ohio, New Jersey recently reaffirmed that its rules of court would not permit pretrial depositions.³² In denying a defendant compulsory process to obtain the examination of certain witnesses, the court set forth its belief that the majority of the States were correct in not allowing depositions in criminal cases.³³ The

²⁸ Cuyahoga County Court of Common Pleas Judge Perry B. Jackson set down the guidelines for use in the Cuyahoga County criminal courts. *Cleveland Plain Dealer*, May 6, 1967, at 7, col. 6.

²⁹ *Cleveland Press*, Nov. 7, 1967, at 12, col. 1.

³⁰ *Id.*

³¹ 9 Ohio St. 2d at 167, 224 N.E.2d at 912.

³² *State v. Tate*, 47 N.J. 352, 221 A.2d 12 (1966). For a discussion of criminal discovery in Indiana and other States, see Orfield, *Criminal Discovery in Indiana*, 1 *IND. LEGAL F.* 117 (1967).

³³ 47 N.J. at 354, 221 A.2d at 13. In *State v. Tate*, the court was not convinced that the right to discovery by use of depositions in criminal cases was helpful to the administration of criminal justice. Indeed, depositions might tend to encumber the criminal process. *Id.* at 356, 221 A.2d at 14-15. However, the court did not preclude

court buttressed its stand by noting that even California, which traditionally has had liberal discovery procedures in criminal cases, does not allow the taking of depositions.³⁴

In general, States allow criminal depositions because of non-residence, expected absence from the jurisdiction, inability to find the witness in the jurisdiction despite the exercise of due diligence, illness or physical disability, or impending death.³⁵ Wherever depositions have been sought for purposes other than those enunciated above, various opposing arguments have been advanced. In New Jersey's *State v. Tune*,³⁶ the court observed that "long experience has taught the courts that often discovery will lead not to honest fact finding, but on the contrary to perjury and suppression of evidence."³⁷ In addition, the threat of possible intimidation or bribery of prospective witnesses looms menacingly in pretrial discovery.³⁸ In *State v. Rboads*,³⁹ a now rejected Ohio decision, the court added a further objection that pretrial discovery is a one-way street running in the defendant's favor.⁴⁰ The Ohio court asked, with some petulance, "[W]hy should the accused be allowed to rummage through the private papers of the prosecuting attorney? Neither the sublime teachings of the Golden Rule . . . nor the supposed

future legislative or judicial action in regard to the problem: "As we have said, we have no experience of our own to draw upon. Perhaps the experience in the State of Vermont [and now presumably Ohio] which alone permits discovery, can shed light on how we would fare." *Id.* at 356-57, 221 A.2d at 15.

³⁴ *Id.* at 354, 221 A.2d at 13. California Supreme Court Justice Traynor seems to feel, however, that criminal discovery should be increased. He has said: "In criminal litigation . . . there is continuing resistance to pretrial discovery, the more formidable because it has not only the force of law and habit, but also the force of adrenal reaction against seemingly plausible menaces. The most cogent arguments for change encounter that resistance." Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964).

³⁵ Annot., 44 A.L.R.2d 768 (1955).

³⁶ 13 N.J. 203, 98 A.2d 881 (1953). The reasoning of *State v. Tune* was partially rejected in *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958).

³⁷ 13 N.J. at 210, 98 A.2d at 884.

³⁸ *Id.*

³⁹ 81 Ohio St. 397, 91 N.E. 186 (1910). OHIO REV. CODE ANN. § 2945.50 (Page Supp. 1966) would seem to render the *Rboads* decision nugatory. See also text accompanying note 20 *supra*.

⁴⁰ 81 Ohio St. at 397, 91 N.E. at 192. Any fears which the court had in 1910 about the "one-way street" were obliterated by the constitutional amendment passed in 1912 and embodied in OHIO CONST. art. I, § 10, which was designed to give the State and the defendant an equal right to take depositions for use at criminal trials, for certain circumscribed reasons. The constitutional convention did not consider the use of *discovery* depositions, as embodied in section 2945.50. 9 Ohio St. 2d at 165-66, 224 N.E.2d at 911.

sense of fair play can be so perverted as to sanction the demands allowed in this case."⁴¹

The classic observation of Judge Learned Hand sums up another objection to criminal discovery in general, *i.e.*, the undue advantage given the defendant.

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, [the defendant] need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve Our dangers do not lie in too little tenderness to the accused What we need to fear is the archaic formalism and watery sentiment that obstructs, delays, and defeats the prosecution of crime.⁴²

Various judges and legal writers have, however, refuted the traditional arguments. When Mr. Justice Brennan sat as a judge of the New Jersey Supreme Court, he castigated fellow judges for their opinion in *State v. Tune*;

That old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of truth, is again disinterred from the grave where I had thought it was forever buried under the overwhelming weight of the complete rebuttal supplied by our experience in civil causes where liberal discovery has been allowed.⁴³

A leading legal writer commenting upon depositions in civil causes, emphasized as Mr. Justice Brennan had, that civil depositions, far from encouraging perjury, were a great preventive.⁴⁴ Further, a student writer commenting on the threat of intimidation in civil depositions advances the belief that bullying tactics and improper questioning can be eliminated by protective orders issued by the court.⁴⁵ The Ohio Supreme Court made a similar observation in the *Jackman* case.⁴⁶

⁴¹ 81 Ohio St. at 425, 91 N.E. at 196; see Note, *Pretrial Criminal Discovery: The Need for Expansion*, 35 U. CIN. L. REV. 195 (1966).

⁴² *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

⁴³ *State v. Tune*, 13 N.J. 203, 227, 98 A.2d 881, 894 (1953) (dissenting opinion).

⁴⁴ Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863 (1933). The author maintained that in civil causes "[t]he party is examined early, while his memory is fresh, before he has had time to work up a protective scheme of fictitious circumstances, and while it is still comparatively easy to check up on his testimony to ascertain how far it may vary from the truth." *Id.* at 872.

⁴⁵ Note, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 YALE L.J. 117 (1949).

⁴⁶ 9 Ohio St. 2d at 167, 224 N.E.2d at 912.

Finally, in answer to the one-way street argument and "undue advantage" protagonists, one writer attacks the position that the State and the accused are equal adversaries; "The average defendant can rarely, if ever, approach the power and resources of the prosecution."⁴⁷

Although the philosophical arguments run pro and con with equal ferocity, unquestionably, the ability to take a criminal deposition raises *practical problems* which are not easily refuted. To begin, there is the problem of freezing the testimony of a witness. It is certainly true in civil depositions, which are our only source of experience at present, that an attorney very often takes a deposition not only to find out what a witness will say but also to pin down his story.⁴⁸ Although the sponsors of section 2945.50 were clearly opposed to the use of the statute for fishing purposes,⁴⁹ there is no guarantee that it will not be so employed. Here the discretion of the trial judge will be crucial. Ohio civil case law seems to oppose any attempts to obtain extremely remote information⁵⁰ and thus, the trial judge must carefully distinguish such attempts from sincere desires to depose witnesses in order to prepare a solid case. Although the argument could be made that to grant a judge such wide discretion to determine the occasion for granting a right given by statute is judicial legislation, it has been observed that where the right is intimately associated with the judicial procedure, the judge cannot be accused of attempting to be a legislator.⁵¹

Fortunately, since the Ohio statute grants the deposition privilege to both State and defendant, it avoids one problem inherent in frozen testimony. For instance, if only the defense is allowed to depose witnesses, much of the prosecution's case will be frozen, thereby affording the defense an opportunity to arrange its case so as to directly refute the prosecution's frozen testimony at trial. But, because of the equal right to take the witnesses' testimony before

⁴⁷ Garber, *Criminal Discovery*, 15 W. RES. L. REV. 495, 497-98 (1964).

⁴⁸ Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 311 (1960).

⁴⁹ Sweeney Interview, *supra* note 22.

⁵⁰ 9 Ohio St. 2d at 167, 224 N.E.2d at 912; see *Ornstein v. Chesapeake & O.R.R.*, 36 N.E.2d 521 (Ohio Ct. App. 1937), *appeal dismissed*, 133 Ohio St. 385, 13 N.E.2d 909 (1938). In the federal system, "fishing" or attempting to secure remote information, is not a valid argument to discredit discovery procedures, because discovery is of equal value to both sides. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947); *Pike & Willis, Federal Discovery in Operation*, 7 U. CHI. L. REV. 297, 303 (1940).

⁵¹ Brief for Appellant at 20-21, *State ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St. 2d 159, 224 N.E.2d 906 (1967).

trial under section 2945.50, neither side can profitably arrange its story in an effort to refute a particular segment of testimony without suffering a similar rearrangement of facts by the opposition. Although frozen testimony may be clarified, explained, or softened by the introduction of mitigating facts, the opportunity to withhold information is not as great as it might be where either side hears testimony for the first time in open court. This is not to say, however, that witnesses who after being given notice⁵² that a deposition is to be taken cannot be coached.

Coaching is the ghost which hovers over every lawsuit, civil or criminal. Like the skeleton in the closet it is not discussed and is generally unseen but its rattling is frequently heard. Nevertheless, author Edson Sunderland, who recognized the possibility in civil cases, believes that coaching a witness in preparation for a deposition is less common than coaching before a trial and thus, testimony taken at deposition is apt to be less rehearsed than testimony given at trial.⁵³ Only experience with the new Ohio statute will indicate whether coaching will destroy the obvious intent of the statute to make the truth less difficult to capture.⁵⁴

One interesting consequence of the use of criminal depositions will be its potential virtue or vice in impeaching a witness. Section 2945.54 of the *Ohio Revised Code*,⁵⁵ directs that where criminal discovery is sought, the same requirements which exist in civil discovery shall govern. In civil depositions, nothing limits their use for purposes of impeachment of any witness at the trial of any action.⁵⁶ In a perceptive essay on the consequences of the *Miranda v. Arizona*⁵⁷ decision, author Stanley Kent⁵⁸ observes that despite the prohibitions against the use of an illegal confession to convict an accused, nothing in the Court's opinion abrogates nor weakens the impeachment rules forged in *Walder v. United States*⁵⁹ and its prog-

⁵² OHIO REV. CODE ANN. § 2945.54 (Page 1954), provides that examination of witnesses shall be taken in the same manner as that for taking depositions under *id.* §§ 2319.05-31. *Id.* § 2319.15 provides for written notice of intent to take a deposition except where it is to be taken under special commission. Although the criminal statute requires application to the criminal court for a commission to take a deposition, it does not appear to be a special commission.

⁵³ Sunderland, *supra* note 44, at 872.

⁵⁴ Sweeney Interview, *supra* note 22.

⁵⁵ OHIO REV. CODE ANN. § 2945.54 (Page 1954).

⁵⁶ *Id.* § 2319.45 (Page Supp. 1966).

⁵⁷ 384 U.S. 436 (1966).

⁵⁸ Kent, *Miranda v. Arizona — The Use of Inadmissible Evidence for Impeachment Purposes*, 18 W. RES. L. REV. 1177 (1967).

⁵⁹ 347 U.S. 62 (1954).

eny.⁶⁰ Thus, Kent argues that an otherwise inadmissible confession can be used for impeachment purposes provided it touches upon collateral matters and does not go to the heart of the indictment.⁶¹ By analogy, is not the same conclusion available in regard to the use of criminal depositions where a showing of coercion and illegality of procedure would be harder to make than in a confession case? Nothing prevents an attorney for either side from showing a discrepancy between what a witness says in court and what he says on deposition. As Kent points out in regard to the use of the confession for impeachment purposes, even an exculpatory statement becomes a "powerful weapon" in the hands of the opposition in discrediting a witness.⁶²

Additional dangers in the use of the criminal deposition lie in the possibility that either side may use the process to indulge in malicious or overextended questioning. It is possible, as one writer has commented, for a clever attorney to set forth a series of questions which individually may not be so improper as to allow the deponent the right to refuse to answer, but which may have the cumulative effect of constituting bullying tactics.⁶³ Yet, the right to have one's lawyer present at the taking of a deposition offers a degree of protection against the possibility of unearthing collateral material.⁶⁴ Once again, only experience will demonstrate whether the statute is to be used or abused.

Not to be overlooked is the threat of delay which is omnipresent in the use of depositions. Where an individual or his attorney objects to answering an allegedly improper question, much time can be lost in securing a ruling from a judge. Exactly to the point is the experience in the courtroom of the very judge who promulgated the first deposition rules enunciated in Cuyahoga County.⁶⁵ A newspaper report of this first attempt to use the deposition statute after the *Jackman* decision relates: "After a morning game of 'I object' between the prosecutor and defense attorney, Common Pleas

⁶⁰ Kent, *supra* note 58, at 1179.

⁶¹ *Id.* at 1179-80.

⁶² *Id.* at 1180. The author points out that an exculpatory statement by an accused given before trial often contains collateral material that can be used by the prosecutor to attack the accused's credibility, thereby making his statement inculpatory. *Id.* at 1179-80.

⁶³ Note, *supra* note 45, at 136. Such a cumulative effect would result if information potentially harmful to the deponent if revealed to third parties was unearthed. *Id.*

⁶⁴ See OHIO REV. CODE ANN. § 2945.52 (Page 1954).

⁶⁵ Reference is to Cuyahoga County Common Pleas Judge Perry B. Jackson. See notes 28-30 *supra* & accompanying text.

Judge Perry B. Jackson halted proceedings and ordered both sides to file further briefs.⁶⁶ More than a dozen objections were raised in a short span of time. When witnesses were ordered to answer questions by the court-assigned commissioner and they refused to do so, all parties would proceed to the presiding judge's courtroom to obtain a ruling on the propriety of the question.⁶⁷ Obviously, since the new statute does not require that the deposition be taken in the presence of a judge,⁶⁸ this early experience emphasizes the possibilities for delay and procrastination while attorneys learn how to handle the new legal tool. Caustically, experience suggests that lawyers will continue to use delaying tactics when it is to their client's advantage even after the profession has become familiar with the technique.

Depositions are often costly proceedings. Yet, justice requires that the deposition right be afforded the indigent defendant; the question then arises as to who must bear the cost of the deposition. Since the *Gideon v. Wainwright*⁶⁹ decision, the cost of supplying counsel to indigents has seemingly become a major factor in our legal system.⁷⁰ Having to pay for depositions which an indigent defendant may desire could cast an unbearable financial burden upon the State.⁷¹ Thus, there remains a vital question concerning the deposition privilege: Will an indigent be denied the valuable right to depose witnesses because of his inability to pay?

Finally, whatever the defects of criminal depositions, the procedure has obvious value to both sides simply because it furnishes an opportunity to observe and appraise the demeanor of adversary

⁶⁶ Cleveland Press, May 12, 1967, at 8, col. 3.

⁶⁷ *Id.*

⁶⁸ OHIO REV. CODE ANN. § 2945.54 (Page 1954) directs that depositions be taken in accordance with *id.* § 2319.05 which allows a deposition to be heard before a judge or clerk of the supreme court, the appeals court, the common pleas court, or before a notary public or public stenographer. Judge Perry B. Jackson, the judge who issued the first deposition rules in Cuyahoga County, stated that he had commissioned a court reporter to take the deposition in the case. Interview with Perry B. Jackson, Judge of the Cuyahoga County Court of Common Pleas, in Cleveland, Ohio, May 15, 1967.

⁶⁹ 372 U.S. 335 (1963).

⁷⁰ The State auditor of Ohio, Roger Cloud, has recently said that because of the Supreme Court decisions allowing indigents the right of counsel and the right to obtain free transcripts of court records, the State's share in prosecuting indigent defendants has risen from less than \$100,000 in 1952 to nearly \$1 million in 1967. Cleveland Plain Dealer, Dec. 7, 1967, at 41, col. 1.

⁷¹ See OHIO REV. CODE ANN. §§ 2945.53-54 (Page 1954). It would seem that most indigent defendants would take advantage of section 2945.50, but in Cuyahoga County it has apparently only been used about 20 times. Interview with the Cuyahoga County Official Court Reporter, in Cleveland, Ohio, Dec. 9, 1967.

witnesses. Further, the virtue of eliminating the possibility of withheld or surprise testimony cannot be gainsaid. In *Brady v. Maryland*,⁷² Mr. Justice Douglas decried the prosecutor who withholds evidence which could be exculpatory for the accused. The injustice of allowing the prosecution to be the architect of a proceeding and to shape a trial by choosing to put forth or withhold evidence and, by analogy, testimony, does not comport with standards of justice.⁷³ In addition, the criminal deposition statute is of value to the State, which will no longer have to suffer the adverse effect of the withholding of evidence by the defendant.

Perhaps the value of criminal deposition legislation is best illustrated by the Vermont experience. Similar to section 2945.50, the Vermont statute only provides for the defendant's right to take depositions and has been in effect since 1961.⁷⁴ Recently, a survey of the State's defense counsel, judges, and prosecutors was undertaken to determine if in fact the use of criminal depositions was beneficial.⁷⁵ The results indicated that most are pleased with the statute, its greatest value appearing to be the decrease in the likelihood of trial. Apparently, the decrease results from the defendant's ability to determine the rudiments of the case from firsthand knowledge rather than from mere conjecture as was often true before the statute was enacted.⁷⁶ In conjunction with the above, the bluffing element was also removed.⁷⁷ Thus, as a result of using depositions, defense counsel and the prosecution have been encouraged to work out a solution to the criminal charge and to place greater emphasis on rehabilitating the individual involved. Perhaps the greatest impetus for other States considering expanded criminal deposition legislation is the statement that, in Vermont, "after more than five years of practice under these statutes . . . [there has not been] a single dissent calling for the return of the old law, either by a prosecutor, a judge or a defense counsel"⁷⁸

⁷² 373 U.S. 83 (1963).

⁷³ *Id.* at 88.

⁷⁴ Note 19 *supra*.

⁷⁵ Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967).

⁷⁶ *Id.* at 733-34. The reasons given for the taking of deposition were: "(1) general discovery, (2) the tying of a witness to a particular story, (3) an attempt to present formalized facts to indicate to the prosecutor the weakness in his case, and (4) an attempt to present formalized facts to show a defendant the nature and strength of the state's case." *Id.* at 733.

⁷⁷ *Id.* at 733-34.

⁷⁸ *Id.* at 734. A reason for the success of the statute seems to be that Vermont has

There is no question that police prosecutors in Ohio are deeply disturbed by the new statute.⁷⁹ However, the sponsor of the bill believes that their fears are not justified and that time and experience will demonstrate the value of the statute.⁸⁰

To the doubters, however, the words of author Robert L. Fletcher are mollifying.⁸¹ He points out that the use of pretrial discovery in civil cases has not had disastrous consequences. Our judicial system has achieved substantial justice despite the specter of perjury. If the factual minutiae are available to opposing counsel, a more reliable picture of what truly occurred will evolve.⁸² A Pennsylvania judge once observed that the modern concept of a trial is an inquiry by rational means into the truth about disputed fact which requires that all rational legitimate means of finding out what happened be available.⁸³ If a client comes to an attorney with a \$100 damage claim because someone has crumpled his car's fender in a parking lot, depositions can be taken freely without having to ask for permission. Is justice not strained when a similar right is denied a man who may lose not \$100 but his life? Those who view a trial as the quest for truth will accept the deposition power, realizing its strengths and weaknesses, yet striving to learn how to use it. Those who view a trial as a combat between the State and the accused in which only the cunning can triumph will be inconsolable.

a small lawyer population, who have traditionally followed an "open file" policy. *Id.* at 732-33.

⁷⁹ Sweeney Interview, *supra* note 22. Concerning the deposing of the 8-year-old victim of a felonious assault, notes 29-30 *supra* & accompanying text, the prosecutor stated, "It was pathetic, the way she broke down. . . . The trial would be enough of an ordeal." Cleveland Press, Nov. 7, 1967, at 12, col. 1.

⁸⁰ Sweeney Interview, *supra* note 22.

⁸¹ Fletcher, *supra* note 48, at 310-11.

⁸² *Id.*

⁸³ Commonwealth v. Stepper, 54 Lack. Jur. 205, 211 (Lack. County Ct. 1952).