

Vanderbilt Law Review

Volume 14
Issue 3 *Issue 3 - June 1961*

Article 13

6-1961

Hickman v. Jencks

Edward W. Cleary

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Jurisprudence Commons](#)

Recommended Citation

Edward W. Cleary, *Hickman v. Jencks*, 14 *Vanderbilt Law Review* 865 (1961)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol14/iss3/13>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

HICKMAN V. JENCKS

Jurisprudence of the Adversary System

EDWARD W. CLEARY*

In recent years the Supreme Court of the United States has decided two cases with fundamental impact upon the status of the legal profession in the litigatory process. Although the two cases are intimately related, the opinion in the second did not mention the first, and the two decisions have never really been laid side by side.¹ It is proposed here to explore their mutual implications.

I. HICKMAN V. TAYLOR

1. *Factual Situation.*—The first of these cases is *Hickman v. Taylor*.² The facts have already been repeated frequently, but one further recitation will do no harm and may serve to refresh. Mr. Justice Murphy, for the Court, stated the problem to be one of “the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party’s counsel in the course of preparation for possible litigation after a claim has arisen.”³ In actuality, the case concerned only statements of witnesses, the discoverability of “other information” was neither involved nor specifically considered. Following an accident to a tug in which several crew members were drowned, the tug owners and underwriters engaged counsel to represent them in potential litigation. Counsel obtained written statements from some witnesses; others were interviewed, and in some instances counsel made memoranda of what was said. The district judge ordered the owners and counsel to produce the written statements, to state any facts learned through oral statements by witnesses to counsel and to produce counsel’s memoranda containing statements by witnesses.⁴ The court of appeals reversed,⁵ and this ruling was affirmed by the Supreme Court. The discovery was denied.

2. *The Supreme Court Decision.*—The Court pointed out that the witnesses whose statements were sought were known and available; that the factual circumstances of the accident were disclosed in

* Professor of Law, University of Illinois; editor, *Cases on Pleading* (2d ed. 1958).

1. Passing mention appears in Note, *The Jencks Legislation: Problems in Prospect*, 67 *YALE L.J.* 674, 687 n.47, 689 n.53 (1958).

2. 329 U.S. 495 (1947).

3. *Id.* at 497.

4. 4 F.R.D. 479 (E.D. Pa. 1945).

5. 153 F.2d 212 (3d Cir. 1945).

sworn answers to interrogatories, presumably including information gleaned from these witnesses; and that their testimony publicly given before the steamboat inspectors was available. In short, nonproduction would cause no hardship or injustice.⁶

The Court took care to deny that any privilege was involved.⁷ The reason for this is not immediately apparent, since a privilege is designed to shut out disclosure with a view to protecting an interest or relationship which is regarded as of sufficient importance to justify suppression of evidence,⁸ and this is exactly the broad base which the Court built under its decision. True, if the term "privilege" be thought of as referring to absolute prohibitions against requiring disclosure, applying at all times and under all circumstances, then admittedly the Court was correct; here it dealt only with suppression at the discovery stage and posited a wide exception for cases of "hardship or injustice." Yet there seems to be nothing inconsistent in the concept of a privilege so limited. And if the common law process possesses the vitality in matters of evidence claimed for it in *Funk v. United States*,⁹ the provisions of rules 26(b) and 34 excluding privileged matters from discovery¹⁰ could readily have been applied.

The fact seems to be, however, that the Court was once more trapped by an apparently felt necessity of saving face by refusing to admit that a contingency had arisen which the rules had not foreseen or had dealt with improvidently.¹¹ A court driven to critical scrutiny of its own rules occupies an ambiguous and embarrassing position, with no escape offered by the usual preference for judicial over legislative wisdom.¹²

The Court quite properly denied the applicability of the privilege for communications between attorney and client, since no such communication was involved.¹³ Yet the broad base for the decision was that preserving effective participation by the lawyer in the processes of litigation is in the public interest, and that effective participation demands a large measure of privacy.¹⁴ Except for substituting privacy of the attorney in place of freedom of disclosure by the client as a

6. 329 U.S. at 508-09.

7. *Id.* at 509-10.

8. McCORMICK, EVIDENCE 152 (1954).

9. 290 U.S. 371 (1933).

10. FED. R. CIV. P. 26(b): "Unless otherwise ordered . . . the deponent may be examined regarding any matter, not privileged . . ." FED. R. CIV. P. 34: "Upon motion . . . the court in which an action is pending may (1) order any party to produce . . . documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged . . ."

11. See *Palmer v. Hoffman*, 318 U.S. 109 (1943).

12. The Court had refused to adopt a rules amendment dealing with this problem. ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE REPORT OF PROPOSED AMENDMENTS 44-47 (1946).

13. 329 U.S. at 508.

14. *Id.* at 510-11. See also Mr. Justice Jackson concurring, 329 U.S. at 515.

means of insuring effective functioning of the lawyer, the base is exactly the one found for the attorney-client privilege.¹⁵ On this solid base a highly contrived structure was erected out of materials salvaged from the existing rules. Rule 34, dealing with production of documents, requires a showing of good cause as a condition precedent thereto; Rule 30(b) authorizes the court, for good cause shown, to restrict discovery. The present circumstances, on the one hand, preclude the requisite good cause, and, on the other hand, furnish it. Now these might seem to add up to the same thing. Unfortunately, however, the Court went on to suggest differences between the written and the oral statements by emphasizing the evils to the profession which might be caused by requiring the attorney to make disclosure of what had been told him orally. Thus the intimation is found that disclosure of written statements might be allowed with less reluctance. This aspect, plus the fact that the statements at issue were taken by the attorney himself, left the whole matter in a considerable fog which the Court has not seen fit to dissipate.

3. *Logical Scope of the Ruling.*—(a) *Must the statement be made to an attorney?*—In its very narrowest sense, *Hickman* holds only that, absent “hardship,” discovery may not be had of statements by witnesses, oral or written, taken by the attorney employed to prosecute or defend the case. And it is strictly within these confines that Professor Moore, the chief and able exponent of federal procedure, would restrict the operation of the decision,¹⁶ regarding it as an unfortunate restriction upon free discovery and as such to be given the smallest possible effect. He would, therefore, deny protection against disclosure to any statement obtained by a claim agent or investigator, since this is not the “work product” of an attorney. Here Professor Moore seems to lose track entirely of the justification for the protection. Reverting to the analogy of the attorney-client privilege, the justification is found in promoting the welfare of the client, not that of the attorney. In like manner, the basis for the protection against discovery is not to be looked for in the welfare of the legal profession per se but in the contribution which an effective legal profession makes to the welfare of those needing legal services. The argument of Professor Moore would deny the litigant handling his own case any protection against discovery of the *Hickman* variety, although it would seem to be no less essential to effective preparation than would be so if a lawyer were employed. It is unrealistic in the extreme to assume that litigation can be conducted effectively if investigation, which in most cases consists largely of interviewing witnesses and

15. McCORMICK, EVIDENCE 181 (1954).

16. 4 MOORE, FEDERAL PRACTICE ¶ 26.23[8], at 1131-49 (2d ed. 1950).

taking statements, must be conducted by the attorney himself in order to avoid or minimize disclosure. The fact is that investigation of this kind is normally conducted by investigators in the employ either of the attorney or the client.¹⁷ The attorney himself is but an agent of the client. Under the attorney-client privilege it is recognized that the communication may be made by or through an agent of the client and to an agent of the attorney in order to make the relationship an effective one.¹⁸ Similar considerations should govern in connection with protection against discovery. Those who would limit *Hickman* emphasize protection of "the mental impressions of an attorney" and say that disclosure of statements of witnesses obtained by others than the attorney in the case does not invade the mental impressions of an attorney.¹⁹ This position ignores the broader aspects of the functioning of the lawyer as recognized in *Hickman*: "Proper preparation of a client's case demands that he *assemble information*, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."²⁰

Also the Court said: "We are thus dealing with an attempt to secure the production of *written statements* and mental impressions *contained in the files* and the mind of the attorney."²¹ It seems apparent that the important thing as regards the written statements is that they are in the files of the attorney in the sense of being a part of the overall preparation of the case, rather than that the attorney himself may have obtained them.

In short, the assembling of information is an essential aspect of litigation; it cannot be accomplished efficiently without the employment of agents, whether of the attorney or of the client; therefore, statements, whether oral or written, obtained by agents other than himself are within the protection contemplated by *Hickman*.

It must, of course, be recognized that *Hickman* does not immunize the information gained from statements but only the statements themselves.²² Thus the controversy actually centers upon the dis-

17. The "multi-purpose" accident report by an employee is beyond the scope of this discussion. See 21 U. CHI. L. REV. 752 (1954). We are dealing only with statements obtained solely for use in pending or prospective litigation.

18. 8 WIGMORE, EVIDENCE § 2317 (3d ed. 1940).

19. 4 MOORE, FEDERAL PRACTICE ¶ 26.23[8], at 1136 (2d ed. 1950); Note, 62 HARV. L. REV. 269 (1948). Professor Moore is driven to extensive reliance throughout upon quotations from District Judge Kirkpatrick, whose views were rejected in *Hickman* and whose holding on this precise point was reversed in *Alltmont v. United States*, 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950).

20. 329 U.S. at 511. (Emphasis added.)

21. *Id.* at 509. (Emphasis added.)

22. Unwillingness or inability to recognize the distinction seems to account

closure of the statement itself, and, if honest disclosure has been made as to the information, the only remaining use to which the statement could be put would be impeachment of the witness or, in rare instances, corroboration,²³ which the Court recognized and refused to consider as adequate grounds for requiring the disclosure.²⁴

(b) "*Sharp practices.*"—Mention has been made of the impairment of effectiveness of the profession which would attend upon any general requirement of disclosure of statements obtained from witnesses. In *Hickman*, the Court in addition to "inefficiency" also spoke of "unfairness and sharp practices" which would develop in the legal profession if the "work product" were required to be disclosed.²⁵ While the inefficiency aspect is clear enough, it is far from clear what the Court had in mind in the way of unfairness and sharp practices. Perhaps it feared that red herrings in the form of false statements or misleading briefs or memoranda might be inserted in the file for the purpose of misleading the opposition. Or, looking at the discovering counsel, perhaps capitalizing on another's industry was felt to be unfair. In any event, the Court seemed satisfied, and probably not without justification, that the ingenuity of the profession would prove equal to the situation, with accompanying damage to professional standards.

With regard to disclosure of statements given orally, the Court spoke more specifically of adverse effects upon the profession over and above the inefficiency engendered:

Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence;²⁶ and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness.²⁷

Mr. Justice Jackson, concurring, spelled out the consequences in more detail:²⁸ Exact correspondence between the statement of the witness

for at least some of the divergence in views following *Hickman*. See 4 MOORE, FEDERAL PRACTICE ¶ 26.23[8], at 1139-40 (2d ed. 1950).

23. Occasionally the statement may be admissible as substantive evidence under an exception to the rule against hearsay. *Haskell v. Siegmund*, 28 Ill. App. 2d 1, 170 N.E.2d 393 (1960) (statement of decedent admitted as declaration against interest). *Hickman* recognizes this situation as appropriate for disclosure. 329 U.S. at 511.

24. 329 U.S. at 513.

25. *Id.* at 511.

26. No reason is apparent why an oral statement could not qualify as an exception to the hearsay rule. Cf. note 23 *supra*.

27. 329 U.S. at 512-13.

28. *Id.* at 516-18.

as written by the lawyer and the testimony of the witness would be impossible. When discrepancy appeared, the adversary would produce the statement for impeachment, directing attention to the untruthfulness of either witness or counsel. Counsel would then either be branded a deceiver or be forced to take the stand to defend his own credibility against that of his witness. The role of the lawyer does not encompass being a witness. Moreover, the statement of an adverse witness, though not believed, would have to be produced; if the witness were not called, the groundwork would be laid for a charge of suppressing evidence.²⁹

(c) *Disclosure at time of trial.*—One further aspect of *Hickman* must be considered: Does it create a privilege only against discovery, or does its protection extend to disclosure at the trial? The cases are few, probably due to the substantial lack of recognition at common law of any right to documents in the possession of the opponent³⁰ and to conservatism in construing statutes as they appeared.³¹ Generally they have held that there was no right to the production of statements at the trial for use in cross-examination to lay a foundation for possible impeachment.³² This view seems to be consistent with the basis for *Hickman*. The time element as between disclosure prior to trial and at the trial is without significance: the important thing is the prospect of disclosure at any stage. True, the "property" aspect of preparation may recede somewhat if disclosure is sought at the trial, since it seems inconceivable that counsel would deliberately omit preparation with a view to taking advantage of that of his adversary at that late time, but the property aspect of preparation merits little weight in any event.

II. JENCKS v. UNITED STATES

1. *Background.*—The second case for consideration in this discussion

29. That these fears may have some foundation in fact is illustrated by *Eizerman v. Behn*, 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956). Counsel was cross-examining a witness as to prior contradictory statements, apparently oral. Opposing counsel demanded that he take the stand to testify concerning his notes which were being used in the cross-examination. Denial of the request was upheld, citing *Hickman*.

30. 7 WIGMORE, EVIDENCE § 1858 (3d ed. 1940); 8 *id.* § 2219.

31. 7 *Id.* § 1859c.

32. *Douglas v. Washington Terminal Co.*, 298 Fed. 199 (D.C. Cir. 1924); *Barrington v. Pacific Elec. Ry.*, 83 Cal. App. 100, 256 Pac. 567 (1927); *Chicago v. Harrison-Halsted Bldg. Corp.*, 11 Ill. 2d 431, 143 N.E.2d 40 (1957); *Walker v. Struthers*, 273 Ill. 387, 112 N.E. 961 (1916); *Powell v. Northern Pac. R.R.*, 46 Minn. 249, 48 N.W. 907 (1891); *Star Mfg. Co. v. Atlantic Coast Line R.R.*, 222 N.C. 330, 23 S.E.2d 32 (1942); *Lehan v. Chicago & N.W. Ry.*, 169 Wis. 327, 172 N.W. 787 (1919). *Contra*, *McKinley v. Southern Pac. Co.*, 80 Cal. App. 301, 181 P.2d 899 (1947); *Kemeny v. Skorch*, 22 Ill. App. 2d 160, 159 N.E.2d 489 (1959); *Haskell v. Siegmund*, 28 Ill. App. 2d 1, 170 N.E.2d 393 (1960). And see *Freel v. Market St. Cable Ry.*, 97 Cal. 40, 31 Pac. 730 (1892); *Banks v. Connecticut Ry. & Lighting Co.*, 79 Conn. 116, 64 Atl. 14 (1906).

is *Jencks v. United States*,³³ a criminal case. The decision was not without background. The Court previously had ruled in *Goldman v. United States*³⁴ against the existence of any absolute right of the accused to inspect notes or memoranda made by witnesses—who were government agents—which were used by them to refresh their recollection prior to testifying. However, the existence of a right to production and use of statements was recognized thereafter in *Gordon v. United States*,³⁵ a case in which a key government witness, who had pleaded guilty and was awaiting sentence, admitted on cross-examination that, between the time of his apprehension and the making of his final statements implicating the defendants, he had made three or four statements not implicating them. Even though the witness orally admitted the inconsistencies on the stand, defendants were entitled to the greater weight and accuracy of the writings.

2. *Factual Situation.*—*Jencks*,³⁶ a prosecution for falsely swearing to a non-communist union officer affidavit, was charged with overtones of political liberties and threats to national security; it was not a case likely to produce dispassionate consideration by all members of the Court. The two principal witnesses for the government were party members, Ford and Matusow, paid to report on party activities. Reports by Ford covered a period of two years, those by Matusow a much briefer but critical period. Following the trial and while the case was pending on appeal, Matusow recanted his testimony as deliberately false. During the trial, after each witness testified to the making of reports, the accused moved for the production of the reports for inspection by the trial judge; if he determined that they had impeachment value, they were to be made available to the defense. The motions were denied.

3. *Supreme Court Decision.*—The Supreme Court reversed these rulings. No preliminary foundation of inconsistency was required, said the Court,³⁷ speaking through Mr. Justice Brennan. To construe *Gordon*³⁸ as so requiring was to misinterpret that case. The “crucial nature” of testimony of the two witnesses was “conspicuously apparent.”³⁹ Impeachment was “singularly important.”⁴⁰ The contemporaneous nature of the reports, the admissions of both witnesses that

33. 353 U.S. 657 (1957).

34. 316 U.S. 129 (1942). This accorded with the general run of the cases to the effect that a memorandum used to refresh prior to testifying, but not used on the stand, need not be produced for inspection. Annot., 125 A.L.R. 19-200 (1940).

35. 344 U.S. 414 (1953).

36. *Jencks v. United States*, 353 U.S. 657 (1957).

37. *Id.* at 666.

38. *Gordon v. United States*, 344 U.S. 414 (1953).

39. 353 U.S. at 667.

40. *Ibid.*

they could not recall what reports were oral and what were written, and Matusow's admission that he could not remember what he put in his reports, all "highlighted" the value of the reports for impeachment.⁴¹ The reports were "relevant and material," and to give the accused access to them only if the witness admits inconsistency would be "incompatible with our standards for the administration of criminal justice."⁴² The interest of the United States in a criminal prosecution is that justice be done.⁴³ The accused was entitled to inspect the reports, since only the defense is equipped to determine whether they are useful to it.⁴⁴ The making of this determination by the trial judge is disapproved.⁴⁵ If the Government elects, on the ground of privilege, not to produce, the prosecution must be dismissed.⁴⁶

Justices Burton and Harlan, concurring in result, would have gone no farther than to grant the relief sought by the accused and would have vested in the trial judge a large measure of discretion in weighing the conflicting interests involved.⁴⁷ Mr. Justice Clark dissented with vigor. The rule announced by the majority might do well enough in state courts, but too many federal prosecutions involve matters of national security to permit the practice to prevail in the federal courts.⁴⁸

4. *Aftermath of the Decision—(a) Congress.*—The alarums of national security were rung immediately upon the release of the *Jencks* opinion. Bills were introduced in Congress and a statute soon, too soon perhaps, emerged.⁴⁹ This statute⁵⁰ provided, in effect, that the Government should not be required to produce the statement of a witness until he had testified on direct. At that point, production would be required of statements relating to the subject matter of his testimony. Claims that the statement did not so relate would be determined by the court in camera, and unrelated matter would be excised by the court. If the Government elected not to produce a statement, the testimony should be stricken, unless the court determined that justice required a mistrial. Statements were narrowly defined as written statements signed or otherwise adopted or approved by the

41. *Ibid.*

42. *Id.* at 667-68.

43. *Id.* at 668.

44. *Id.* at 669.

45. *Ibid.*

46. *Id.* at 672.

47. *Ibid.*

48. *Id.* at 680.

49. The history of the legislation is reported graphically in Keefe, *Jinks and Jencks*, 7 CATHOLIC U.L. REV. 91 (1958), and with more detail in Note, *The Jencks Legislation: Problems in Prospect*, 67 YALE L.J. 674 (1958), and *The Aftermath of the Jencks Case*, 11 STAN. L. REV. 297 (1959). See also *Palermo v. United States*, 360 U.S. 343 (1959).

50. 18 U.S.C. § 3500 (1958).

witness or substantially verbatim transcriptions of oral statements recorded contemporaneously.

(b) *The Palermo Decision*.—The statute was construed in *Palermo v. United States*.⁵¹ The Court said that the statute was exclusive and that no production could be had of a statement except under its terms. The term "statement" was interpreted to refer only to those which properly could be said to be the witness' own words, in full and without distortion. Doubts as to whether a statement came within this statutory definition would be resolved by the court in camera, though the statute was silent on this point. No constitutional issue was involved. A statement of some 600 words, resulting from a conference of three and one-half hours, was held not to be within the statute and not producible.

Mr. Justice Brennan, who had written for the majority in *Jencks*, concurred in the result⁵² but felt that the majority had needlessly strayed far afield. The statute should not be construed as exclusive. To do so might mean that possible constitutional rights were being adjudged away in advance. Congress meant only to check extravagant interpretations of *Jencks*. Overly narrow interpretation would encourage agents of the government to take statements in ways calculated to avoid production under the statute. These views had the concurrence of the Chief Justice, Mr. Justice Black, and Mr. Justice Douglas.

SOME COMPARISONS AND OBSERVATIONS

1. *Hickman and Jencks are diametrically opposed in result*.—Both reply to a narrow question: Shall disclosure be required of statements obtained from witnesses? *Hickman* gives a negative, *Jencks* an affirmative answer. Differences in detail between the two cases are without significance.

It is true that in *Hickman* the disclosure was sought by discovery proceedings in advance of trial, while in *Jencks* the disclosure was not sought until after the witness had testified on direct at the trial. However, this differential in time constitutes no substantial difference. The basic considerations which dictated the result in *Hickman* apply equally to efforts to obtain disclosure of statements at the trial. Admittedly the provisions of the Federal Rules of Civil Procedure hinging on "good cause" or absence thereof are not available to provide a basis for this result at the trial, but neither is the need for using them to contrive it.

It is also true that in *Hickman* the statements in question were

51. 360 U.S. 343 (1959).

52. *Id.* at 360.

obtained by the attorney engaged to try the case, while in *Jencks* the statements were obtained by the Federal Bureau of Investigation which does not try cases. However, this possible ground of difference disappears when the protection of *Hickman* is extended, as it should be, to include statements obtained by agents, whether of the party or of the attorney.

2. *Subsequent developments show that the fears expressed in Hickman were not unfounded.*—*Hickman* was predicated upon the premise that to require disclosure of statements would result in inefficiency, unfairness, and sharp practice. Inefficiency and perhaps sharp practice seem already to be discernible in the criminal field following the *Jencks* decision and statute. Unfairness seems to be too vague a concept to explore.

The law is almost wholly innocent of any realistically factual self-study or machinery for going about it; most of our rules and procedures are based on the kind of surmise and conjecture which we deplore in witnesses. Regarding appellate decisions as a basis for examining anything other than the behavior of appellate judges is open to question, yet they do afford some glimpses of life on the outside, sporadic and accidental as they may be. Hence it is with full realization of the perils involved that some essay will be made to see some pattern of effect from *Jencks* and the statute, beyond the test posited upon the reasonable man.

The masters⁵³ are all agreed upon the importance of obtaining a written statement from each witness, preferably in the form of a stenographic transcript which embodies his exact words, as an essential aspect of preparing a case. An early statement, taken while the facts are still fresh in mind, sets his memory and also affords an accurate and unbiased basis for refreshing recollection before taking the stand or even while testifying. It affords a basis for impeaching the turncoat. Without it, refreshment of recollection seems likely to be accomplished from memoranda made by an investigating agent, whose honesty may be unquestioned but whose interest in a favorable outcome cannot wholly be discounted, and the chances of effective impeachment seem to be greatly reduced. The *Jencks* decision and, to an even greater degree, the statute militate against this aspect of careful preparation.

Palermo arose over a pre-*Jencks* investigation.⁵⁴ A statement of the

53. For example, BUSCH, *LAW AND TACTICS IN JURY TRIALS* § 204 (1949); CULLINAN & CLARK, *PREPARATION FOR TRIAL OF CIVIL ACTIONS* 21 (3d ed. 1956). See also *Rosenberg v. United States*, 360 U.S. 367 (1959), in which the witness wrote the Assistant United States Attorney that she would need to reread her original statement in order to refresh her failing memory.

54. The witness in question was interviewed on July 16, 1956. 360 U.S. 343, 344 (1959).

key witness for the government is described as a "transcript of his testimony,"⁵⁵ no doubt meaning that the interview consisted of questions and answers recorded stenographically or electronically. The witness later verified and signed the transcript, and at that time also executed an affidavit clarifying and expanding his original answers. Both the affidavit and the transcript were made available to the accused at the trial. The controversy in the case turned upon a memorandum of the later meeting made by a government agent. Scrupulously careful preparation of the government's case is evident.

Written statements by witnesses and verbatim transcriptions of interviews are strikingly absent in many of the cases in which the investigation seems likely to have taken place after *Jencks* and the statute. The memorandum made at a later time and summarizing the interview has taken the place of the written statement of the witness and the verbatim interview.⁵⁶ The impact of *Jencks* and the statute—as construed by *Palermo*—seem fairly to be apparent.

As regards "sharp practice," the approach must be even more cautious. For what inference can be drawn from them, cases may be found in which summarizing reports are made from interview notes and the notes destroyed,⁵⁷ or in which these reports are not brought into the courtroom,⁵⁸ or in which it is unclear exactly what is in existence in the way of reports and their nature.⁵⁹ In one case a government agent testified to the making of one report when in fact he had made two.⁶⁰ While these scattered instances afford slight basis for generalization, they do indicate that the professional stresses anticipated by *Hickman* may not be wholly absent.

3. *A new approach to the criminal cases is indicated.*—If the suggestion be advanced that the difference in result between *Hickman* and *Jencks* may be justified on the ground that the former is civil and the latter criminal, an obvious answer is that the best possible brand of justice ought to be dispensed in both. When a basic difference in

55. *Ibid.*

56. *Campbell v. United States*, 365 U.S. 85 (1961); *United States v. Thomas*, 282 F.2d 191 (2d Cir. 1960); *Borges v. United States*, 270 F.2d 332 (D.C. Cir. 1959); *Johnson v. United States*, 269 F.2d 72 (10th Cir. 1959); *Travis v. United States*, 269 F.2d 928 (10th Cir. 1959). Cf. *United States v. Stromberg*, 268 F.2d 256 (2d Cir. 1959); *De Freese v. United States*, 270 F.2d 737 (5th Cir. 1959). The substantial absence of *Jencks* cases from recent volumes of reports may indicate that the questions have been answered or that producible statements are no longer being taken.

57. *United States v. Thomas*, 282 F.2d 191 (2d Cir. 1960). And see *Campbell v. United States*, 365 U.S. 85 (1961); *Johnson v. United States*, 269 F.2d 72 (10th Cir. 1959).

58. *United States v. Sheer*, 278 F.2d 65 (7th Cir. 1960). And see *Johnson v. United States*, 269 F.2d 72 (10th Cir. 1959).

59. *Campbell v. United States*, 365 U.S. 85 (1961); *Johnson v. United States*, 269 F.2d 72 (10th Cir. 1959).

60. *United States v. Prince*, 264 F.2d 850 (3d Cir. 1959).

approach is urged in the two types of cases, the burden would seem to lie upon those who urge the validity of a departure.

No one will argue against the proposition that the interest of the United States in criminal cases "is not that it shall win a case, but that justice shall be done."⁶¹ The question is one of making the adversary system work to best advantage in criminal cases. Perhaps we are tending toward the continental pattern. *Jencks* attempted to effect some rearranging: the adversary character of the prosecutor was deemphasized, while defense counsel's participation was enhanced through disapproval of too great a role for the judge in determining the usefulness of statements for purposes of impeachment. Congress undercut the defense in a degree and reinstated the judge accordingly.

Perhaps the best resolution of the conflict between *Hickman* and *Jencks* lies in recognizing that every criminal case has built-in inequality between the adversaries as regards resources and facilities.⁶² On this assumption, every criminal case is one of "hardship and injustice" within the exception recognized by *Hickman*. The remedy, however, should not be sought in the direction of applying in every criminal case a practice demonstrably demoralizing to the profession and so found in *Hickman*. It would seem rather to lie in expanding the role of discovery in criminal cases to the broad area within which it now operates in civil cases.

This proposal is advanced with full cognizance of the difficulties at hand. A principal argument against discovery in criminal cases has been that, due to the privilege against self-incrimination, it is a one way street, running only in the direction of the accused.⁶³ Here it seems that systematic exploration of the possibilities of making discovery, in the broadest sense, reciprocal is required, including even consideration of the potentialities of waiver as a condition to making discovery available to the accused. It must also be recognized that the prosecutor has no client in the sense of an ordinary litigant, and hence that the main thrust of discovery sought from the prosecution in criminal cases must be directed against the prosecutor himself. Yet in a real sense he is not much less involved in the civil cases.⁶⁴ The ancient argument that broad discovery breeds fabrication and perjury is directed against all discovery. With increased experience, today it

61. *Berger v. United States*, 295 U.S. 78, 88 (1935), quoted in *Jencks*, 353 U.S. 657 at 688.

62. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 312 (1960); Grady, *Discovery in Criminal Cases*, 1959 U. ILL. L. FORUM 827 n.2; Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960). See also Richardson, *Rochin and Breithaupt in Context*, 14 VAND. L. REV. 879, 897-98 (1961).

63. Fletcher, *supra* note 62, at 315. Cf. Goldstein, *supra* note 62, at 1185.

64. Counsel himself was held in contempt in *Hickman*.

is heard infrequently in regard to civil cases. The same result could reasonably be expected in the criminal field. Only empirical testing can afford a satisfactory answer.

Discovery in criminal cases is presently being allowed on an increasing scale, both by statute and by decision.⁶⁵ However, the statutes are sporadic, and the cases are the unsystematic product of the accidental processes of the common law method of manufacturing law. A comprehensive approach is indicated.⁶⁶

65. Fletcher, *supra* note 62; Grady, *supra* note 62.

66. Comment, *Pre-Trial Disclosure in Criminal Cases*, 60 YALE L.J. 626 (1951). And see Kaufman, *Pre-Trial in Criminal Cases*, 42 J. AM. JUD. Soc'y 150 (1959); *The Apalachin Trial: Some Further Observations On Pre-Trial In Criminal Cases*, 44 J. AM. JUD. Soc'y 53 (1960); Goldstein, *supra* note 62.

