Buffalo Law Review

Volume 16 | Number 3 Article 21

4-1-1967

Criminal Procedure—Indictment—Evidence Inadmissible at Trial Is Inadmissible in Grand Jury Proceedings

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RECENT CASE

CRIMINAL PROCEDURE—INDICTMENT—EVIDENCE INADMISSIBLE AT TRIAL IS ADMISSIBLE IN GRAND JURY PROCEEDINGS

Defendant sold marijuana to an undercover officer. Several days later the police obtained marijuana from the defendant's residence, under color of a defective warrant. Defendant was arrested and later indicted by the grand jury on separate counts of sale and possession of marijuana. When it was subsequently determined that the evidence of possession was inadmissible as illegally obtained, the possession count was either formally dropped or not pursued. Defendant was convicted on the sale of marijuana charge. On appeal defendant contended, *inter alia*, that the entire indictment should be dismissed on the grounds that the illegally seized evidence influenced the finding of a true bill on both counts, and that the grand jury should not have been allowed to consider the inadmissible evidence. *Held*, the fourth amendment exclusionary rule has no application to grand jury proceedings; thus the grand jury's consideration of evidence inadmissible at a trial does not render the indictment and subsequent proceedings invalid. *West v. United States*, 359 F.2d 50 (8th Cir.), *cert. denied mem.*, 87 Sup. Ct. 131 (1966).

The exclusion at a criminal trial of evidence obtained by an illegal search and seizure, as mandated by the fourth amendment,[1] is now considered one of "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[2] The doctrine has had a long and controversial past;[3] as originally formulated, the exclusion of illegally obtained evidence was based on its supposedly unreliable nature,[4] but it is now directed toward preventing police practices from unjustly impinging on an individual's constitutional rights.[5] The legality of the search depends on whether there was probable

1. The fourth amendment in part guarantees "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."

2. Palko v. Connecticut, 302 U.S. 319, 328 (1937) (per Cardozo, J.).

3. For the history and the development of the rule excluding illegally obtained evidence, see Day, *Some Historical Aspects and Recent Developments in the Exclusionary Rule of Mapp v. Ohio*, 1 Crim. L. Bull. No. 7 (1965); Kamisar, *Illegal Searches and Seizures and Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. Ill. L.F. 78: Morris, *The End of an Experiment in Federalism—A Note on Mapp v. Ohio*, 36 Wash. L. Rev. 407 (1961); Wolfe, *A Survey of the Expanded Exclusionary Rule*, 32 Geo. Wash. L. Rev. 193 (1963); Annots. 93 L. Ed. 1797 (1949), 96 L. Ed. 145 (1953), 98 L. Ed. 581 (1954), 100 L. Ed. 239 (1957), 6 L. Ed. 2d 1544 (1962), 84 A.L.R. 2d 933 (1962).

4. Boyd v. United States, 116 U.S. 616 (1886); Adams v. New York, 192 U.S. 585 (1904); People v. Defore, 242 N.Y. 13, 150 N.E. 585, *cert. denied*, 270 U.S. 657 (1926) (The Court, per Cardozo, J., refused to apply the federal rule of *Weeks* to New York.).

5. The Court has said, "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibition of the Constitution intended for the protection of the people against such unauthorized action." Weeks v. United States, 232 U.S. 383, 394 (1914); "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the Constitutional guarantee in the only available way—by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960) (Evidence illegally obtained by state officers is inadmissible in a federal criminal trial.). See also Mapp v. Ohio, 367 U.S. 643 (1961), *overruling in part*, Wolf v. Colorado,

cause for the issuance of a search warrant[6] or an arrest warrant[7] or for a warrantless search[8] incident to a lawful arrest.[9] What constitutes probable cause is a difficult question,[10] since the test concerns "probabilities . . . [derived from] the factual and practical considerations of every day life."[11] It is clear that the evidence[12]

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338 U.S. 25 (1949) (*Mapp* extended the federal exclusionary rule of *Weeks* to state criminal trials.). Some states had already followed *Weeks*; see, *e.g.*, People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955). See also Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955) (Tort remedies for illegal arrests are hard to maintain.); Nagel, *Law and Society-Testing the Effect of Excluding Illegally Seized Evidence*, 1965 Wis. L. Rev. 283 (Statistical evidence shows that *Mapp* has caused improved police conduct.); Traynor, *Mapp v. Ohio at Large in Fifty States*, 1962 Duke L.J. 319.

6. "[N]o Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. See Fed. R. Crim. P. 41(b); N.Y. Code Crim. Proc. § 792; Aguilar v. Texas, 378 U.S. 180 (1965).

7. Giordenello v. United States, 357 U.S. 480, 485-86 (1958); Albrecht v. United States, 273 U.S. 1, 5 (1927).

8. Although the arrest be valid, the incidental search must be reasonable. See United States v. Rabinowitz, 339 U.S. 56, 66 (1950) ("The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."); Henry v. United States, 361 U.S. 98, 104 (1961) ("[A]n arrest is not justified by what the subsequent search discloses. . . ."); Ker v. California, 374 U.S. 23 (1963) (A single standard of reasonableness exists for warrantless searches under the fourth and fourteenth amendments.); Preston v. United States, 376 U.S. 364 (1964) (A search cannot be too remote in time or place and be upheld as incident to a valid arrest.); People v. Gary, 14 N.Y.2d 730, 199 N.E.2d 171, 250 N.Y.S.2d 75 (1964), *cert. denied*, 379 U.S. 937 (1965); People v. O'Neill, 11 N.Y.2d 148, 182 N.E.2d 95, 227 N.Y.S.2d 416 (1962). *Cf.* Cooper v. California, 87 Sup. Ct. 788 (1967).

9. Brinegar v. United States, 338 U.S. 160 (1949) (A valid arrest depends on whether there was probable cause for it.); N.Y. Code Crim. Proc. § 177 (N.Y. Sess. Laws 1964, ch. 86); People v. Valentine, 17 N.Y.2d 128, 216 N.E.2d 321, 269 N.Y.S.2d 111 (1966); People v. Loria, 10 N.Y.2d 368, 373, 179 N.E.2d 478, 482, 223 N.Y.S.2d 462, 466 (1962). See also Barrett, *Personal Rights, Property Rights and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46; Foote, *Safeguards in the Law of Arrest*, 52 Nw. U.L. Rev. 16 (1957); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 Nw. U.L. Rev. 65 (1957); Rothblatt, *The Arrest: Probable Cause and Search Without a Search Warrant*, 35 Miss. L.J. 252 (1964).

10. The classic test is stated in Draper v. United States, 358 U.S. 307 (1959):

> Probable cause exists where "the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

Id. at 317, quoting in part, Carroll v. United States, 267 U.S. 132, 162 (1925); see also People v. Marshall, 13 N.Y.2d 28, 191 N.E.2d 798, 241 N.Y.S.2d 417 (1963) (equating probable with reasonable); Moul, *Probable Cause: The Federal Standard*, 25 Ohio St. L.J. 502 (1964) (extensive study of federal cases).

11. Brinegar v. United States, 338 U.S. 160, 175 (1949).

12. Jones v. United States, 362 U.S. 257 (1960), *reaffirmed in*, Rugendorf v. United States, 376 U.S. 528 (1964) (A search warrant is valid if based on an affidavit relying on hearsay information obtained from confidential informants.).

Generally this hearsay evidence is based on tips obtained from a confidential informant. This in turn creates a problem of disclosure or non-disclosure of the informant's identity. See Rovario v. United States, 353 U.S. 53 (1957) (An informant's identity must be disclosed unless there is sufficient corroborative evidence to establish probable cause.); People v. Malinsky, 15 N.Y.2d 86, 204 N.E.2d 188, 262 N.Y.S.2d 65 (1965); People v. Coffey, 12 N.Y.2d 443, 191 N.E.2d 263, 240 N.Y.S.2d 721 (1962); Priestly v. Superior Court of San Francisco, 50 Cal. 2d 812, 330 P.2d 39 (1958) (per Traynor, J.); Drouin v. State, 222 Md. 271, 160 A.2d 85 (1960). See also 8 Wigmore § 2374 (McNaughton rev. 1961); Comment, 53 Calif. L. Rev. 840 (1965); Comment, 17 Hastings L.J. 49 (1965); Annot., 76 A.L.R.2d 257 (1961).

which establishes the requisite probable cause must be specific and particular[13] rather than general.[14] The whole area of probable cause and the exclusion of illegally obtained evidence can be considered a morass, to be approached negatively instead of positively:[15] the peripheral areas of the exclusionary rule dealing with the extension of the "fruit of the poisonous tree" doctrine,[16] criminal,[17]

13. See United States v. Ventresca, 380 U.S. 102, 110-11 (1965) (Detailed and specific affidavits based on observations of government officials, showing underlying circumstances leading to conclusions, established probable cause for the issuance of a search warrant.); Aguilar v. Texas, 378 U.S. 108 (1964) (Where informant's tip establishes probable cause, the factual basis of information must be shown along with the reliability of the informant.); Beck v. Ohio, 379 U.S. 89 (1964) (The officer must reveal what the informant said and why he believed this information credible.); *cf.* Jones v. United States, 362 U.S. 257 (1960) (indicating that in marginal cases search warrants may prevail where warrantless searches would fail); *but see*, Ker v. California, 374 U.S. 23 (1963) (There is still a distinction between inadmissibility of evidence based on the Supreme Court's supervisory power over the lower federal courts, and that evidence held inadmissible in the state courts because commanded by the Constitution.). See also Paulsen, *Safeguards in the Law of Search and Seizure*, 52 Nw. U.L. Rev. 65 (1957).

14. Jones v. United States, 362 U.S. 257 (1960) (Mere recital of conclusions is not enough.); Henry v. United States, 361 U.S. 98, 102 (1960) ("[G]ood faith on the part of the arresting officers is not enough. . . ."); Scher v. United States, 305 U.S. 254 (1938) (Unsupported testimony of an officer of what an informant told him is not enough.); see Stanford v. Texas, 379 U.S. 476 (1965) (The fourth amendment forbids a general warrant.); Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 13 (1960) (Mere suspicion is not probable cause.); Note, 51 Calif. L. Rev. 907 (1963) (demonstrates that problems in attempting a balancing approach to finding probable cause, conceptually and in practice, result in "general" probable cause and "exploratory" searches).

15. It is easier to say what is not probable cause than what is, unless the probative evidence leading to a finding of probable cause is clear and plentiful, as in United States v. Ventresca, 380 U.S. 102 (1965); see generally Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 Calif. L. Rev. 474 (1961).

16. The problem here is how far to extend the causal chain from the initial unlawful arrest or search to the obtaining of the incriminating evidence. See, *e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963) (Where an entry is unlawful and the arrest invalid, the subsequent incriminating statements are protected by the fourth amendment and inadmissible in a federal criminal proceeding.). See *infra* notes 76-77 and accompanying text. It is evident that here the distinction between the fourth and fifth amendments is blurred. For a discussion of this, see Schmerber v. California, 384 U.S. 757 (1966), 35 Fordham L. Rev. 131, 44 Texas L. Rev. 1616 (1966) (taking a sample of defendant's blood did not violate either the fourth or the fifth amendment).

17. See Burdeau v. McDowell, 256 U.S. 465 (1921) (Evidence illegally obtained by a private person is admissible in a criminal proceeding.); United States v. Carter, 15 U.S.C.M.A. 495, 35 C.M.R. 367 (1965). See generally Comment, *Exclusion of Evidence Wrongfully Obtained by Private Individuals*, 1966 Utah L. Rev. 271; *but see* Note, 64 Mich. L. Rev. 143 (1965).

For another exception to the exclusionary rule, see Frank v. Maryland, 359 U.S. 360 (1959) (5-4 decision; majority upheld defendant's conviction for refusal to allow a health inspector without a warrant to examine his home for rodents pursuant to a local ordinance); Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960) (4-4 affirmance of conviction under a health inspection ordinance allowing a health inspector to inspect on demand). These cases were overruled by Camara v. Municipal Court, 87 Sup. Ct. 1727 (1967). See also Comment, 44 Minn. L. Rev. 513 (1960) (discusses the relationship of health inspection statutes to the fourth amendment).

For problems dealing with "consent" to search and the admissibility of evidence, see State v. Coolidge, 106 N.H. 186, 208 A.2d 322 (1965) (Evidence gained from search to which wife consented is admissible against the husband in a criminal prosecution for murder.); see Note, 66 Colum. L. Rev. 400 (1966); Note, 79 Harv. L. Rev. 1513 (1966) (both contain good dicussions of problems dealing with consent).

For possible problems dealing with "exploratory" searches, see N.Y. Code Crim. Proc. § 180-a (as amended by N.Y. Sess. Law 1964, ch. 86), and cases interpreting the "Stop-and-Frisk" law, *i.e.*, People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 24, 252 N.Y.S.2d 452 (1964),

quasi-criminal,[18] and civil proceedings,[19] and those areas of exclusion substantially preempted by statute (*e.g.*, wiretapping)[20] demonstrate the confusion. The anomalous role of the grand jury in criminal proceedings compounds the entire problem.

The grand jury is firmly entrenched in Anglo-American law.[21] Although its role in the judicial process has been somewhat truncated,[22] it is still considered

cert. denied, 379 U.S. 978 (1965); People v. Peters, 18 N.Y.2d 238, 219 N.E.2d 595, 273 N.Y.S.2d 217 (1966), *probable jurisdiction noted*, 87 Sup. Ct. 1291 (1967); see Note, 14 Buffalo L. Rev. 545 (1965); Note, 78 Harv. L. Rev. 473 (1964).

18. See Abel v. United States, 362 U.S. 217 (1960) (5-4 decision; majority held evidence admissible in a criminal prosecution seized during a search incident to an arrest based on an administrative warrant); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) (Unanimous Court held that the exclusionary rule applies to forfeiture proceedings.); People v. Randazzo, 220 Cal. App. 2d 768, 34 Cal. Rptr. 65 (Dist. Ct. App. 1963), *cert. denied*, 277 U.S. 1000 (1964), 12 U.C.L.A.L. Rev. 232 (1964) (demonstrates problems of using evidence seized by private store detectives in a criminal proceeding).

19. See Sackler v. Sackler, 33 Misc. 2d 600, 224 N.Y.S.2d 790 (Sup. Ct.), *rev'd*, 16 A.D.2d 423, 229 N.Y.S.2d 61 (2d Dep't 1962), *aff'd*, 15 N.Y.2d 40, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964) (Evidence of adultery procured by husband's forced entry into wife's apartment admissible in a divorce proceeding.); Comment, *Mapp v. Ohio and Exclusion of Evidence Illegally Obtained by Private Parties*, 72 Yale L.J. 1062 (1963).

The distinction between private and state action has been blurred by Shelley v. Kraemer, 334 U.S. 1 (1953), which held that the enforcement of restrictive covenants against Negroes by state courts constitutes state action forbidden by the fourteenth amendment. See Lewis, *The Meaning of State Action*, 60 Colum. L. Rev. 1083 (1960).

See Comment, 1966 Utah L. Rev. 271, 275 n.26 which suggests that tort damages are not a substitute for enforcement of the exclusionary rule in civil proceedings. See generally Foote, *supra* note 5; Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173 (1931).

20. Evidence obtained from wiretapping was held admissible under the fourth amendment in Olmstead v. United States, 277 U.S. 438 (1928) (5-4 decision; Brandeis and Holmes, JJ., dissenting). However, this was remedied by the Federal Communications Act of 1934, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1964). Nardone v. United States, 302 U.S. 379 (1937), and Benanti v. United States, 355 U.S. 96 (1953), have interpreted this act to apply to federal, state and private persons in excluding wiretap evidence from federal prosecutions. See also Weiss v. United States, 308 U.S. 321 (1939) (The act applies to both interstate and intrastate communications.). Swartz v. Texas, 364 U.S. 199 (1952) (Wiretap evidence is admissible in state prosecutions.), and People v. Dinan, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962) (Wiretap evidence is admissible where obtained pursuant to N.Y. Code Crim. Proc. § 813-a.) have apparently been overruled by Berger v. New York, 87 Sup. Ct. 1873 (1967), striking down N.Y. Code Crim. Proc. § 813-a. Note, 63 Colum. L. Rev. 369 (1963) (other state statutes are collected here); see also Donnelly, *Comments and Caveats on the Wire Tapping Controversy*, 63 Yale L.J. 799 (1954); Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*, 44 Minn. L. Rev. 855 (1960).

For other types of electronic devices, *compare* Lopez v. United States, 373 U.S. 477 (1963) (6-3 majority upheld conviction based on recorded bribe), *with* Silverman v. United States, 365 U.S. 505 (1961) (Incriminating statements gained by placing a "spike mike" in the wall of defendant's house violated the fourth amendment.).

21. For the development of the grand jury in England and the United States, see Edwards, The Grand Jury (1906); 1 Holdsworth, A History of English Law 320-50 (7th ed. 1956); Jenks, A Short History of English Law (1913); Orfield, Criminal Procedure From Arrest to Appeal (1947); Plucknett, A Concise History of the Common Law (5th ed. 1956); Pollock & Maitland, History of English Law 110-50 (2d ed. 1898); Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 101-20 (1931); see also United States v. Johnson, 319 U.S. 503 (1943); McGrain v. Daugherty, 273 U.S. 135 (1927); Blair v. United States, 250 U.S. 273 (1919); Hale v. Henkel, 201 U.S. 43 (1906); United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952).

22. Cook, *New York Troika: Conflicting Roles of the Grand Jury*, 11 Buffalo L. Rev. 42, at 53 (1961):

> [T]raditional grand jury roles have become debilitated in recent years as a result of irreconcilable intra-role conflict and in the face of inevitable social change. Each of

by a few writers to be a bulwark of American justice.[23] The need for the grand jury has long been a subject of debate: on the one hand, it is defended as one of the few institutions in the judicial process (along with the petit jury) in which the people participate as judges rather than as adversaries. On the other hand, this argument for its viability is questioned—at least during the initial stages of a criminal prosecution, it is perhaps more desirable to have objective standards controlling than the uncontrolled inferences of the grand jurors. Those who question the usefulness of the grand jury generally agree that it has a viable role as an investigatory institution in examining large-scale corruption or other such politically-tainted issues. But the converse may be true when dealing with emotionally-tempered crimes such as murders or rapes; in such cases, objective procedures and a detached magistrate would help to insure a fair determination of probable cause for arrest and detention. The grand jury's composition, powers and functions are generally prescribed by statute,[24] but in addition there have been some constitutional[25] and case law[26] developments.

The grand jury has two basic functions: it acts both as an inquisitorial and an accusatorial body. In its inquisitorial role[27] the grand jury is convened to

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the roles has had its effectiveness challenged—the role of inquisitor by modern professional police forces, the role of reporter by local representative government and the free press, and the role of protector by informations filed by an elected prosecutor supplemented by the right to an open preliminary hearing.

23. For arguments supporting the grand jury, see Current Notes, *Dewey Speaks on the Grand Jury*, 22 J. Crim. L., C. & P.S. 217 (1941); Lawyer, *Should the Grand Jury System be Abolished?*, 15 Yale L.J. 178 (1906); Morse, *A Survey of the Grand Jury System* (pts. 1-3), 10 Ore. L. Rev. 101, 217, 295 (1931); Younger, *The Grand Jury Under Attack*, 46 J. Crim. L., C. & P.S. 214 (1955); Note, *Should the Grand Jury System be Abolished?*, 45 Ky. L. Rev. 151 (1956). For arguments *contra*, see 2 Bentham, Works 171 (Bowring ed. 1843); Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 U. Ill. L.F. 423; Elliff, *Notes on the Abolition of Grand Juries in England*, 29 J. Crim. L., C. & P.S. 3 (1938); Heyting, *The Abolition of Grand Juries in England*, 19 A.B.A.J. 648 (1933); Kranitz, *The Grand Jury: Past—Present—No Future*, 24 Mo. L. Rev. 318 (1959); Vukasin, *Useful or Useless—The Grand Jury*, 34 Calif. S.B.J. 436 (1959).

24. Fed. R. Crim. P. 6-7 deal specifically with the grand jury, the indictment and the information. Although the Federal Rules of Criminal Procedure have just recently been revised there has been no great change of substance in Rules 6-7.

See N.Y. Code Crim. Proc. §§ 223-67, which deal with the grand jury and §§ 145-47, which deal with the information. New York is currently revising the entire Code of Criminal Procedure but tentative drafts are not yet available. See 7 N.Y. Temp. Comm'n on Constitutional Convention Rep., *Individual Liberties—The Administration of Criminal Justice* 115-62 (1967).

25. The Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend V. Capital or infamous has been interpreted to mean punishment at hard labor or imprisonment in a penitentiary for more than one year. United States v. Moreland, 258 U.S. 433 (1922); *Ex parte* Wilson, 114 U.S. 417 (1885).

In addition, grand jury indictments have been held not to be required in state criminal prosecutions. Hurtado v. California, 110 U.S. 516 (1884).

26. For an excellent statement of federal law on indictments and informations, see 1 Orfield, Criminal Procedure Under the Federal Rules 331-740 (1966). For selective topics on the development of New York law on grand juries see Van Voorhis, *The History in New York State of the Powers of Grand Juries*, 26 Albany L. Rev. 1 (1962).

27. See Orfield, *op. cit. supra* note 21, at 75; Dession & Cohen, *The Inquisitorial Functions of Grand Juries*, 41 Yale L.J. 687 (1932); Scigliano, *The Grand Jury, the Information, and the*

consider testimony and evidence of corruption, crime and disorder on a large scale. Here, as suggested above, the grand jury possibly performs its most valuable function; it is largely immune from the political pressures which confront an elected prosecutor acting alone. Generally this type of grand jury is impanelled at the request of an important executive or legislative body. It is arguable that even here, a specially-appointed investigator or prosecutor could perform this function, thus dispensing with this particular need for the grand jury.

In its accusatorial role,[28] the grand jury focuses on a particular person or crime, in contradistinction to the more general and wide-ranging investigation mentioned above. The narrower inquest is the grand jury's more common role, and the cause of much of the disenchantment with it. In this accusatorial role, the grand jury passes on the probable guilt[29] of an individual, either by finding a "no true bill" and releasing him[30] or by handing up an indictment[31] and sending him on to trial. If an indictment is found all the sanctions of the criminal process ensue, *viz.*, loss of liberty, humiliation, possible ostracism by the public and irreparable damage to the accused's reputation—even if he should be acquitted at the trial. These pre-conviction penalties mitigate the strength of the oft-repeated dogma that the accused is presumed innocent until proven guilty. This fact would seem to compel the use of precise and fair procedures to insure justice to both parties involved—accuser and accused alike. Yet it is questionable[32] whether the grand jury provides the needed fairness, especially since the grand jury is generally considered a mere rubber stamp for the prosecutor. The process of investigation and indictment, as distinguished from a proceeding by pre-

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Judicial Inquiry, 38 Ore. L. Rev. 303 (1959); Wickersham, *The Grand Jury*, 38 N.Y.S.B.J. 426 (1966); Note, *The Grand Jury as an Investigatory Body*, 74 Harv. L. Rev. 590 (1961); Note, 2 Drake L. Rev. 26 (1952).

28. See generally Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 Mich. L. Rev. 403 (1931); Morse, *supra* note 23; Orfield, *The Federal Grand Jury*, 22 F.R.D. 343 (1959).

29. Although the accused is ostensibly innocent until proven guilty, each stage in the criminal process leading to the ultimate decision of innocence or guilt requires a different quantum and quality of evidence and is subject to increasingly demanding procedures and standards. At the arrest stage the requisite standard of guilt is probable cause for the arrest. At the trial the standard required is guilt beyond a reasonable doubt. But the intermediate stage can be viewed as a grey area which focuses on the probable guilt of the accused. Where there is an information and a preliminary hearing it is theoretically simple to provide objective safeguards for both the prosecutor and the accused. But this is not true of the grand jury, for by its very nature, it is generally considered a sounding board for the prosecutor and is subject to few pre-trial judicial controls. Thus it is hard to judge whether the grand jury finds an extended probable cause of guilt or the probable guilt of the accused.

30. Fed. R. Crim. P. 6(f).

31. Fed. R. Crim. P. 6(f); see generally Orfield, *op. cit. supra* note 21; McClintock, *Indictment by a Grand Jury*, 26 Minn. L. Rev. 153 (1942).

32. See Baker & De Long, *The Prosecuting Attorney: The Process of Prosecution*, 26 J. Crim. L., C. & P.S. 3 (1935); Goldstein, *The State and the Accused: Balance of Advantage on Criminal Procedure*, 69 Yale L.J. 1149 (1960); Miller, *Informations or Indictments in Felony Cases*, 8 Minn. L. Rev. 379 (1924); Morse, *supra* note 23, at 295; Whyte, *Is the Grand Jury Necessary?*, 45 Va. L. Rev. 461 (1959).

sentment[33] or by an information,[34] is cloaked in secrecy[35] with the accused having few rights. Proceedings of the grand jury are ex parte; it has general powers of subpoena; and rules of evidence are not applicable to its secret proceedings. If subpoenaed to testify the accused has no right to be represented by counsel or to confront accusing witnesses.[36] Perhaps the only beacon of light in this area is that the prospective defendant cannot be compelled to give incriminating testimony before the grand jury.[37]

Generally an indictment valid on its face is sufficient to call for a trial on the merits of the charge,[38] unless a timely motion to dismiss[39] is granted. Such a motion may be based on procedural or substantive defects in the indictment, such as that the grand jury was improperly impanelled,[40] that there was an

33. "A presentment is an accusation originating with the grand jury, rather than with the prosecutor, which must be drawn into a bill of indictment and resubmitted to the jury." Cook, *supra* note 22, at 42 n.26; see generally Orfield, *op. cit. supra* note 21, at 157; Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 Colum. L. Rev. 1103 (1955); Oliver, *The Grand Jury: An Effort To Get a Dragon Out of His Cave*, 1962 Wash. U.L.Q. 166; Weinstein & Shaw, *Grand Jury Reports—A Safeguard of Democracy*, 1962 Wash. U.L.Q. 191; *but see* United States v. Cox, 342 F.2d 167 (5th Cir. 1965), 51 Va. L. Rev. 333 (1965) (A grand jury may not compel a United States Attorney to sign an indictment.).

34. Fed. R. Crim. P. 7(a). The information is generally filed immediately after the accused has had a hearing before a magistrate for a determination of probable guilt. The information is considered by many writers more commensurate with the modern needs and views of the criminal process. Not only is it more efficient and expedient than the grand jury indictment, but it also is subject to certain procedural safeguards, *viz.*, the hearing is an adversary proceeding, the accused has a right to counsel and confrontation of witnesses at the hearing, and the exclusionary rules of evidence apply. See Calkins, *supra* note 23; Miller, *supra* note 32; Moley, *The Use of the Information in Criminal Cases*, 17 A.B.A.J. 292 (1931); Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 Mich. L. Rev. 403 (1931); Morse, *supra* note 23, at 217, 295. For arguments criticizing certain aspects of the information, see Hall, *Analysis of Criticism of the Grand Jury*, 22 J. Crim. L., C. & P.S. 692 (1932); Pound, *The Future of the Criminal Law*, 21 Colum. L. Rev. 1 (1921); Scigliano, *The Grand Jury, the Information, and the Judicial Inquiry*, 38 Ore. L. Rev. 303, 308-09 (1959).

See Pointer v. Texas, 380 U.S. 400 (1965), which adopted the federal rule from *In re* Oliver, 333 U.S. 257 (1948), that the sixth amendment's right of confrontation of witnesses at a preliminary hearing applies to the states. *But see* Blue v. United States, 342 F.2d 894 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 944 (1965) (The finding of an indictment obviates the necessity of a preliminary hearing; there is no constitutional right to a preliminary hearing).

35. An argument supporting secrecy is that secrecy allows the accused to be protected from public humiliation and harassment if the grand jury finds a no true bill. See Scigliano, *supra* note 34, at 308-09 (1959). On the other hand, secrecy is considered an archaism which allows too much discretion to the prosecutor acting in conjunction with the grand jury. See Calkins, *supra* note 23, at 432-35 (1966); Calkins, *Grand Jury Secrecy*, 63 Mich. L Rev. 455 (1965); Heyting, *supra* note 23. *But see* Fed. R. Crim. P. 6(e) (disclosure of proceedings "upon a showing that grounds may exist for a motion to dismiss the indictment"); Dennis v. United States, 384 U.S. 855 (1966) (disclosure of grand jury minutes where testimony at trial is uncorroborated and essential to proving the charge).

36. See *supra* note 34.

37. See Counselman v. Hitchcock, 142 U.S. 547 (1892) (federal grand juries); Taylor v. Forbes, 143 N.Y. 219, 38 N.E. 303 (1894) (New York grand juries); Birzon & Gerard, *The Prospective Defendant Rule and the Privilege Against Self-Incrimination in New York*, 15 Buffalo L. Rev. 595 (1966).

38. Costello v. United States, 350 U.S. 359, 363, *rehearing denied*, 351 U.S. 904 (1956); Lawn v. United States, 355 U.S. 339, *rehearing denied*, 355 U.S. 967 (1958), 4 How. L.J. 267 (1958).

39. Fed. R. Crim. P. 12(b).

40. Romney v. United States, 167 F.2d 521 (D.C. Cir.), *cert. denied*, 334 U.S. 847

amendment or substantive change in the indictment,[41] that the charge of a crime was too general to allow the accused to prepare a defense[42] or that the indictment was based on insufficient or illegal evidence. This last ground for dismissal is the least clear. An indictment not supported by any evidence will fall,[43] but if based on insufficient evidence it will probably stand. Insufficient evidence refers to the grey area where probable cause of guilt may or may not exist because the quantum or quality of evidence is not sufficiently probative to link the accused with the charged offense. Because grand jury proceedings are ex parte, secret and not subject to rules of evidence, courts will generally not dismiss the indictment on this ground.[44] An indictment will not be dismissed if based on incompetent evidence, *i.e.*, evidence having auxiliary probative value, such as hearsay.[45] An indictment will not be dismissed if based either entirely or in part on evidence which is illegal because it is the fruit of some act forbidden by a statute or the Constitution.[46] Although some state statutes provide that a grand jury shall

(1948); *but see* United States *ex rel.* McCann v. Thompson, 56 F. Supp. 661 (S.D.N.Y.), *aff'd*, 144 F.2d 604 (2d Cir.), *cert. denied*, 323 U.S. 790 (1944) (There is no challenge for cause other than legal qualifications.).

41. Fed. R. Crim. P. 7(e); Stirone v. United States, 361 U.S. 212 (1960); *Ex parte* Bain, 121 U.S. 1 (1887); United States v. Harmon, 34 Fed. 872 (8th Cir. 1888).

42. Fed. R. Crim. P. 7(c); United States v. Sampson, 371 U.S. 75 (1962) (A motion to dismiss an indictment is tested by its sufficiency to charge an offense.); United States v. Debrow, 346 U.S. 374 (1953); United States v. Kelley, 254 F. Supp. 9 (S.D.N.Y. 1966). However, this defect can perhaps be remedied by a bill of particulars under Fed. R. Crim. P. 7(f).

43. Brady v. United States, 24 F.2d 405 (8th Cir. 1928) (holding); Shushan v. United States, 117 F.2d 110 (5th Cir. 1941), *cert. denied*, 313 U.S. 574, *rehearing denied*, 314 U.S. 706 (1942) (dictum); United States v. Farrington, 5 Fed. 343 (N.D.N.Y. 1881) (dictum); People v. Ristenblatt, 1 Abb. Pr. 268 (Ct. Gen. Sess. N.Y. 1855) (holding).

44. See United States v. Grosso, 358 F.2d 154 (3d Cir. 1966) (An indictment is not open to challenge on the ground that evidence presented to the grand jury was either incompetent or inadequate.); United States *ex rel.* Combs v. Denno, 231 F. Supp. 942 (S.D. N.Y. 1964); see also Grace v. United States, 4 F.2d 658 (5th Cir.), *cert. denied*, 268 U.S. 702 (1925) (A motion to quash is addressed to the discretion of the court.); United States v. Beadon, 49 F.2d 164 (2d Cir.), *cert. denied*, 284 U.S. 625 (1931).

45. Incompetent evidence includes evidence excludable under the best evidence, character, hearsay and opinion rules of evidence. See generally 8 Wigmore, Evidence § 2175 *passim* (3d ed. 1940).

However, incompetent evidence is used to establish probable cause for the arrest, for the issuance of a search warrant and for the indictment. See Draper v. United States, 358 U.S. 307 (1959) (Hearsay of informant and the personal observations of an officer established probable cause for the arrest.); Jones v. United States, 362 U.S. 257 (1960) (hearsay as basis for a search warrant); Holt v. United States, 218 U.S. 245 (1910) (The Court, per Holmes, J., held that incompetent evidence, so long as it provided a "substantial basis," could establish probable cause for an indictment.); *accord*, Costello v. United States, 350 U.S. 359 (1956); United States v. Payton, 363 F.2d 996 (2d Cir. 1966); *In re* Fried, 68 F. Supp. 961 (S.D.N.Y.), *modified*, 161 F.2d 453 (2d Cir. 1946), *writ dismissed*, 332 U.S. 807 (1947), 60 Harv. L. Rev. 1145 (1947); see Comment, 1963 Wash. U.L.Q. 102, 104 n.8 for federal cases following *Holt*. For cases *contra*, see Nanfito v. United States, 20 F.2d 376 (8th Cir. 1930); United States v. Bolles, 209 Fed. 682 (7th Cir. 1913); United States v. Rubin, 218 Fed. 245 (D. Conn. 1914).

For an excellent perspective of this area of the law see Comment, *The Rules of Evidence as a Factor in Probable Cause in Grand Jury Proceedings and Preliminary Examinations*, 1963 Wash. U.L.Q. 102; Comment, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings*, 72 Yale L.J. 590 (1963); Note, 62 Harv. L. Rev. 111 (1948); Annot., 100 L. Ed. 397 (1957).

46. See Costello v. United States, 350 U.S. 359 (1956); Anderson v. United States, 273 Fed. 20 (8th Cir.), *cert. denied*, 257 U.S. 647 (1921); Hillman v. United States, 192

consider only legal evidence,[47] the state courts have interpreted these statutes as only directory[48] since grand jury proceedings are ex parte and there is no presiding judge to pass on the legality of the evidence. There is no such comparable rule of evidence in the Federal Rules of Criminal Procedure as in these state statutes. Nor have the Supreme Court and the circuit courts recognized such a rule under the *McNabb-Mallory*[49] doctrine of judicial supervision over the lower federal courts.[50]

In the instant case the court maintained that since "an indictment is only a formal charge . . . to bring an accused into court to answer the charge made . . . all evidence necessary to substantiate that charge beyond a reasonable doubt . . . at trial—incompetent or inadmissible evidence . . . is not admitted and of course could not affect the trial proceedings."[51] Thus there is no reason to

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Fed. 264 (8th Cir.), *cert. denied*, 225 U.S. 699 (1911); United States v. Block, 202 F. Supp. 705 (S.D.N.Y. 1962); United States v. Antonelli Fireworks Co., 53 F. Supp. 870 (W.D.N.Y. 1943); United States v. Gouled, 253 Fed. 242 (S.D.N.Y. 1918); Rex v. Dodd, 1 Leach C.L. 155, 108 Eng. Rep. 180 (1777); *contra*, United States v. Smith, 23 F. Supp. 528 (E.D. Mo. 1938); United States v. Yuck Kee, 281 Fed. 228 (D.C. Minn. 1922); United States v. Bush, 269 Fed. 455 (W.D.N.Y. 1920).

Also see Nardone v. United States, 308 U.S. 338 (1939) which held that the Federal Communications Act of 1934 made wiretapping evidence illegal and hence inadmissible in federal grand jury proceedings.

47. See Ala. Code tit. 30, § 86 (1958); Ariz. R. Crim. P. § 103 (1956); Ark. Stat. Ann. § 43-918 (1947); Cal. Pen. Code § 939.6 (1960); Idaho Code Ann. § 19-1105 (1948); Iowa Code Ann. § 771.17 (1950); Ky. Crim. Code Prac. § 107 (1960); La. Rev. Stat. Ann. § 15.213 (1951); Minn. Stat. Ann. § 628.59 (1963); Mont. Rev. Codes Ann. § 94.6318 (1947); Nev. Rev. Stat. § 172.260 (1950); N.M. Stat. Ann. § 41-5-22 (1953); N.D. Cent. Code § 29-10-24 (1960); Okla. Stat. Ann. tit. 22, § 333-34 (1937); Ore. Rev. Stat. § 132.320 (1959); Utah Code Ann. § 77-19-3 (1953). New York had such a statute in N.Y. Code Crim. Proc. § 256, but this section was repealed by N.Y. Sess. Laws 1960, ch. 551.

48. See, *e.g.*, Sparrenberger v. State, 53 Ala. 481 (1875); Pfeiffer v. State, 35 Ariz. 321, 278 Pac. 63 (1929); McDonald v. State, 155 Ark. 142, 244 S.W. 20 (1922); People v. Hatch, 13 Cal. App. 521, 109 Pac. 1097 (1910); State v. Hiatt, 231 Iowa 643, 1 N.W.2d 736 (1942); Birchan v. Commonwealth, 238 S.W.2d 1008 (Ky. 1951); State v. Simpson, 216 La. 212, 43 So. 2d 585 (1949); State v. Ernster, 147 Minn. 811, 179 N.W. 640 (1920); Nevada v. Logan, 1 Nev. 509 (1865); State v. Chance, 29 N.M. 34, 221 Pac. 183 (1923); Robinson v. Territory, 16 Okla. 241, 85 Pac. 451 (1905), *rev'd on other grounds*, 148 Fed. 830 (8th Cir. 1906); State v. McDonald, 231 Ore. 24, 361 P.2d 1001 (1961).

Most states will not quash an indictment because the grand jury considered some incompetent evidence. See Comment, *The Rules of Evidence as a Factor in Probable Cause in Grand Jury Proceedings and Preliminary Examinations*, 1963 Wash. U.L.Q. 102, 112 n.47. *But see* People v. Rodriguez, 28 Misc. 2d 310, 215 N.Y.S.2d 22 (Sup. Ct. 1961), holding that even if there is sufficient competent evidence, the indictment will be dismissed if the incompetent evidence unduly influenced the finding of the indictment.

49. The Supreme Court closely supervises federal criminal procedure with resulting rules that are not expressly compelled by the Constitution or a statute. McNabb v. United States, 318 U.S. 332 (1943), *reaffirmed in*, Mallory v. United States, 354 U.S. 449 (1957).

50. But *compare* Justice Field's Charge to Grand Jury, 30 Fed. Cas. 992, 993 (No. 18225) (C.C.D. Cal. 1872) ("[Y]ou will receive only legal evidence, to the exclusion of mere reports, suspicions and hearsay evidence. . . ."); *and* Charge to Grand Jury, 30 Fed. Cas. 1036 (No. 18272) (C.C.S.D. Ohio 1861); *and* Charge to Grand Jury, 30 Fed. Cas. 998 (C.C.D. Md. 1836) (per Chief Justice Taney); *and* Charge to Grand Jury, 16 F.R.D. 93, 94 (S.D. Cal. 1954) ("There must be some competent testimony before you, otherwise there is no probable cause. . . ."); *with* Holt v. United States, 218 U.S. 245 (1910) (Incompetent evidence can be used to establish probable cause so long as it provides a "substantial basis" for the indictment.).

51. West v. United States, 359 F.2d 50, 56 (8th Cir.), *cert. denied mem.*, 87 Sup. Ct. 131 (1966).

extend the exclusionary rule of *Elkins v. United States*[52] to grand jury proceedings.[53] Citing *Costello v. United States*[54] as holding that "grand jury consideration of inadmissible evidence does not render the indictment defective,"[55] the court reasoned that the policy behind the exclusionary rule, the need "to curb illegal police practices,"[56] would not be furthered, that an undue burden would be placed upon the government to make an "ex parte determination of the legality of the offered evidence"[57] and that since there is no presiding judge it would be impossible to have "at this point in the litigation a final and binding determination of the legality of the offered evidence."[58] Finally the court said the mere fact that "there was illegally seized evidence before the grand jury"[59] does not compel the conclusion that this evidence "adversely influenced the entire balance of the indictment, including the entirely independent count [sale of marijuana] unrelated to the charge for which the evidence was presented."[60]

As previously stated,[61] there is some question as to what the grand jury finds: probable guilt or a form of probable cause for believing the accused guilty. If the grand jury does pass on the probable guilt of an accused, which may be the case,[62] it has been suggested that a better approach to the indictment process would be to change the standard to one of probability of conviction.[63] This would provide a proper balance between the need for protection of the innocent from the stringent penalties of the criminal process and the need for insuring the prosecution proper and effective machinery to bring criminals to justice. However, the grand jury proceeding, unlike the information and preliminary examination, is not subject to procedural safeguards.[64] This creates an anomalous situation in light of *Mapp v. Ohio*,[65] the prospective defendant rule[66] and other

52. 364 U.S. 206 (1960) (Evidence illegally obtained by state officers is inadmissible in a federal criminal trial.).

53. West v. United States, 359 F.2d at 55-56 (1966).

54. 350 U.S. 359 (1956) (In this pre-*Mapp* case, the Court was considering an indictment based on hearsay and not an indictment based on illegal evidence although there is sweeping dicta to the contrary.).

55. West v. United States, 359 F.2d at 56 (1966).

56. *Ibid.*

57. *Ibid.*

58. *Ibid.*

59. *Ibid.*

60. *Id.* at 57.

61. See *supra* note 29 and accompanying text.

62. See Note, 62 Harv. L. Rev. 111 n.5 (1948).

63. Comment, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings*, 72 Yale L.J. 590, 592 (1963):

> While the presumption of innocence prohibits the ascription of "guilt" except upon conviction, its broadening of "innocence" to include all states of nonconviction suggests the need for a prospective view of a subject's innocence—prognostic innocence. A man is prognostically innocent when the body of evidence relating to him cannot lead to a conviction at trial. In screening out unfounded accusations, the grand jury should not indict any one prognostically innocent in relation to the evidence it has heard; the foundation for the accusation of such a person cannot lead to a destruction of his state of innocence, and cannot be justified as part of a process leading to conviction.

64. See *supra* note 36 and accompanying text.

65. 367 U.S. 643 (1961); see *supra* note 5.

66. See *supra* note 36.

recent developments[67] in criminal procedure. *Mapp* seemed to indicate that illegally seized evidence is not to be used at all to convict an accused.[68] Arguably, the returning of an indictment is a form of conviction, because it sets in motion several pre-conviction penalties. Both the grand jury and the preliminary hearing perform the same function, *viz.*, finding some form of probable cause of guilt of an accused, yet only the preliminary hearing is subject to mandate of *Mapp* that judicial proceedings are not to consider illegally-seized evidence. Also, it is questionable whether it is constitutionally consistent to allow the prospective defendant invoke the fifth amendment's protection against self-incrimination if subpoenaed to testify before the grand jury, and then be subsequently indicted on the basis of illegal evidence. Finally, recent developments in the area of coerced confessions and the right to counsel immediately after arrest seem to compel a reconsideration of the issue of the grand jury's using illegally-seized evidence to indict an accused: on one hand the accused has certain inviolate rights from the moment of arrest, but after arrest his rights may be violated when he is indicted on the basis of illegal evidence.

Once it is recognized that the grand jury does pass on probability of conviction, and should not be allowed to consider illegal evidence, the question then becomes one of proper enforcement. Various methods are available, *e.g.*, abolish the grand jury;[69] allow a more liberal use of the motion to suppress the illegal evidence;[70] or formulate a rule which would compel the prosecution to inform the grand jury of the nature of the evidence it is considering.[71] The problem here is again one of enforcement of the judicial rule. Possible methods of enforcement are the use of injunctive relief,[72] a motion to suppress the evidence before the indictment is returned, a motion to quash the indictment, and the threat of reversal if any possible prejudice could have resulted to the accused from the use of the illegal evidence before the grand jury.[73] A liberal granting of motions

67. See, *e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966), 16 Buffalo L. Rev. 439 (1967) (both decisions holding that the sixth amendment compels the police to take positive steps in ensuring all statements obtained from the accused be voluntary, *e.g.*, the accused has an immediate right to counsel after arrest, he has an inviolate right to remain silent, etc.); see Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old Voluntariness Test*, 65 Mich. L. Rev. 59 (1966).

68. Mapp v. Ohio, 367 U.S. at 648 (1961); see *infra* note 73.

69. See *supra* note 23 and accompanying text. However, this would raise constitutional problems if advocated on the federal level.

70. Fed. R. Crim. P. 41(e); see Comment, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings*, 72 Yale L.J. 590, 594-95 (1963).

71. See *supra* note 48 and accompanying text. Also see United States v. Costello, 353 U.S. 359, 364 (1956) (Burton, J., concurring on the ground that there should be no indictment unless based on sufficient and rationally persuasive evidence); *accord*, United States v. Payton, 363 F.2d 996, 1000 (2d Cir. 1966) (Friendly, J., dissenting on the ground that if the indictment is to be based on hearsay the prosecutor should inform the grand jury of "the shoddy merchandise they are getting so they can seek something better if they wish."); Costello v. United States, 221 F.2d 668, 679 (2d Cir. 1955) (Frank, J., concurring); *In re* Fried, 161 F.2d 453, 460 (2d Cir. 1947).

72. *But see* Cleary v. Bolger, 371 U.S. 392 (1963) (Federal injunction against a state official's testifying in state criminal proceedings denied.).

73. See Fahy v. Connecticut, 375 U.S. 85 (1963) ("The question is whether there is a

to inspect the grand jury's minutes would facilitate the enactment of any or all of these methods of enforcement of the judicial rule.[74] However, even more difficult problems arise, as in the instant case,[75] where the causal relation between the illegally-obtained evidence and the entire indictment is hard to gauge.[76] It is harder yet to see the relation between the two separate offenses charged in the indictment.[77] Although the instant case was probably correctly decided, it was unnecessary to base the holding on the broad ground that the fourth amendment mandate against using illegal evidence in judicial proceedings has no application to grand jury proceedings. On the contrary, both recent developments in criminal procedure and basic concepts of fairness[78] seem to compel a different conclusion, especially in light of the fact that the grand jury's role in the judicial process has changed.[79] Although its substantive role has changed, its archaic procedures have not undergone the same process of modernization. If such a rule of evidence is applied to the indictment process, it would move the grand jury's procedures closer to those embodied in the preliminary hearing, which are presently considered more inherently just to both the accused and the state.[80]

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reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 86-87); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."); *but see* Spano v. New York, 360 U.S. 315 (1959) (Automatic reversal if coerced confession is used at trial; quantum of other evidence is irrelevant.).

74. See *supra* note 35.

75. West v. United States, 359 F.2d 50 (8th Cir.), *cert. denied mem.*, 87 Sup. Ct. 131 (1966).

76. See United States v. Blue, 384 U.S. 251 (1966) (Potential use of illegally obtained evidence is not cause for dismissal of an indictment.); Nardone v. United States, 308 U.S. 338 (1939) (The accused must establish a causal connection between the illegal governmental activity and the evidence on which the indictment is based.).

77. See Selvester v. United States, 170 U.S. 262 (1898) (Distinct offenses, although charged in one indictment, retain their separate character so that error to one has no basic influence on the other.).

78. For the premises on which strict and liberal views of criminal justice are based *compare* the warning of Judge Cardozo in People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926) that, "The criminal is to go free because the constable has blundered," *with* Justice Brandeis' warning in his dissent in Olmstead v. United States, 277 U.S. 438, 470 (1928) that:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become law unto himself; it invites anarchy. To declare that the end justifies the means—to declare that the Government may commit a crime in order to secure the conviction of a private criminal—would bring terrible retribution.

See generally Schwartz, *Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin*, 33 U. Chi. L. Rev. 719 (1966).

79. See *supra* note 22 and accompanying text.

80. See *supra* note 34 and accompanying text.