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Does Evidence Law Matter in Criminal Suppression Hearings

Elizabeth Phillips Marsh

DOES EVIDENCE LAW MATTER IN CRIMINAL SUPPRESSION HEARINGS?

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When the topic of this Symposium was first posed to me, my immediate response was that of course the law of evidence matters! Look at all of the efforts expended by judges, practicing attorneys, legislators, law students and legal scholars in the field. Many of us spend precious moments of our lives worrying through the thickets of conditional relevancy, Bayesian probability theory and the like. How could the law of evidence *not* matter, especially if one takes as a starting premise that this body of doctrine is crucial to the sane and civilized resolution of disputes in the quixotic search for the truth?[1]

On further reflection, however, my response changed as it was tempered by the observation that yes, the rules matter, but maybe not for the reasons that appear at first blush. The answer to the question of whether evidence law matters turns, at least in part, on the perspective of the person asking the question. It also hinges on the type of proceeding to which the rules are being applied. Finally, the importance of evidence law, I suspect, bears an inverse proportion to the complexity of any related questions of admissibility of evidence under doctrines other than

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1. The trial is often characterized as a search for the truth. This goal has been deemed a core value in the American legal system. *See* Arizona v. Fulminante, 111 S. Ct. 1246, 1247, 1257 (1991) (White, J., dissenting in Part III of the opinion) ("The search for truth is indeed central to our system of justice . . . .") However, perhaps this characterization expresses more an ideal than a reality. A consensus is easily reached that "a trial or hearing is a dispute resolution mechanism." RONALD L. CARLSON ET AL., EVIDENCE IN THE NINETIES 3 (3d ed. 1991).

Commentators are not in agreement, however, that the trial system, in fact, is designed to seek the truth. A number of writers have expressed skepticism about this notion. *See, e.g.*, J. Alexander Tanford, *A Political-choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 850 (1989).

> This vision of evidence (that it is driven by only a single dominant principle of accurate decision making) is inconsistent with the general theory of American litigation. That theory holds that trials are shaped by at least two competing principles: verdict accuracy and adversariness. The more fundamental characteristic of our trial system is in fact its adversarial structure, not its commitment to accurate results.

Id. at 849-50 (citations omitted).

the rules of evidence, such as constitutionally-based exclusionary rules.[2] Thus, in this Essay I examine pretrial hearings to suppress evidence in criminal cases because of alleged constitutional violations[3] in an effort to shed light on the question of whether evidence law matters and if so, to whom.

I. HEARINGS ON MOTIONS TO SUPPRESS: THE BASIC FORMAT

In criminal cases defendants often move to suppress evidence on the basis of an alleged constitutional violation.[4] Commonly, defendants al-

2. For example, evidence seized in violation of the Fourth Amendment warrant requirement must be suppressed. Mapp v. Ohio, 367 U.S. 643, 654-55 (1961). Statements taken in violation of a criminal defendant's Fifth Amendment rights should be suppressed. Miranda v. Arizona, 384 U.S. 436, 444 (1966). Additionally, statements made involuntarily have no place in the adjudicatory trial phase. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 167 (1986); Miller v. Fenton, 474 U.S. 104, 109-10 (1986); Brown v. Mississippi, 297 U.S. 278, 286-87 (1936). Moreover, statements by a criminal defendant taken in violation of his or her right to counsel should be suppressed. Brewer v. Williams, 430 U.S. 387, 400-01 (1977); Massiah v. United States, 377 U.S. 201, 207 (1964). Testimony concerning an eyewitness identification of the defendant must be suppressed when the identification was obtained in violation of defendant's right to an attorney. Kirby v. Illinois, 406 U.S. 682, 689-90 (1972); United States v. Wade, 388 U.S. 218, 227 (1967). Testimony concerning an eyewitness identification of the defendant must also be suppressed when the identification procedure violated due process. Manson v. Brathwaite, 432 U.S. 98, 112-13 (1977); Stovall v. Denno, 388 U.S. 293, 301-02 (1967).

3. The focus of this Essay is solely upon suppression for alleged constitutional violations. Note, however, that suppression may be sought on other grounds as well. For example, the United States Supreme Court may exercise a supervisory authority over lower federal courts. *See* McNabb v. United States, 318 U.S. 332, 340 (1943) (holding scope of United States Supreme Court's reviewing power not limited to determining constitutional validity but includes "establishing and maintaining civilized standards of procedure and evidence"). Some defendants have alleged ethical violations as a basis for the suppression of evidence. *E.g.*, United States v. Hammad, 678 F. Supp. 397, 400-01 (E.D.N.Y.), *rev'd*, 858 F.2d 834 (2d Cir. 1988). Suppression may be based on federal statutory grounds, *see* Grau v. United States, 287 U.S. 124, 128 (1932), *overruled by* Brinegar v. United States, 338 U.S. 160 (1949), on other grounds, or on state grounds, *see* EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 166, at 450-55 (Edward W. Cleary ed., 3d ed. 1984).

4. In federal courts, Federal Rule of Criminal Procedure 12 governs motions to suppress evidence. Rule 12 provides, in pertinent part:

> (b) PRETRIAL MOTIONS. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
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> . . . .
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> . . . (3) Motions to suppress evidence; . . . .
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> (e) RULING ON MOTION. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual

lege violations of their Fourth,[5] Fifth[6] or Sixth Amendment[7] rights. Assuming that the movant has standing[8] and has made a sufficient preliminary showing,[9] the trial judge will order that a hearing be held to adjudicate the suppression issue(s).

Hearings on the admissibility of confessions must be held outside the presence of the jury[10] and virtually all hearings on motions to suppress based on other grounds are decided by a judge alone.[11] The rationale for this format is obvious. If the evidence in question should be suppressed, it would be improper for a jury to hear the evidence during the preliminary determination. Once a jury has heard evidence that was

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issues are involved in determining a motion, the court shall state its essential findings on the record.

. . . .

(i) PRODUCTION OF STATEMENTS AT SUPPRESSION HEARING. Except as herein provided, rule 26.2 [Production of Statements of Witnesses] shall apply at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer shall be deemed a witness called by the government, and upon a claim of privilege the court shall excise the portions of the statement containing privileged matter.

FED. R. CRIM. P. 12.

5. The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no 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.

6. In pertinent part, the Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V.

7. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

8. The standing requirement is common to all constitutional challenges. There are some special nuances, however, in the criminal procedure arena, especially in cases in which Fourth Amendment violations are alleged. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3 (2d ed. 1987).

9. Generally, defense counsel must allege the grounds upon which the motion to suppress is based. In addition, many jurisdictions require facts to support the allegations. *See, e.g.*, 4 *id.* § 11.2, at 213-17.

10. FED. R. EVID. 104(c); Jackson v. Denno, 378 U.S. 368 (1964).

11. The question arises, however, whether the jury will confront similar issues at trial. *See infra* notes 89-91 and accompanying text.

later suppressed, it would be difficult to ascertain whether or not the jury considered it in its adjudication on the merits, even in the face of the most punctilious judicial instructions to disregard the evidence. It would be like asking the jury not to think of a pink elephant when reaching its decision.[12]

In addition, by holding the hearing outside the presence of the jury, the defendant is given an option to testify as to the conditions governing admissibility without taking the stand in the case-in-chief.[13]

II. WHAT EVIDENTIARY RULES APPLY AT A HEARING ON A MOTION TO SUPPRESS? AND SHOULD THE STANDARD CHANGE?

The extent to which the rules of evidence apply to hearings on motions to suppress is not as straightforward as one might think. Before we ask whether the law of evidence matters, it might be wise to take at least a moment to ask what *is* the law of evidence? The law of evidence has been classically defined as "the system of rules and standards by which the admission of proof at the trial of a lawsuit is regulated."[14] Of course,

12. When a defendant requests a bench trial, the trial judge will first handle the hearing on the motion to suppress, then adjudicate guilt or innocence. Presumably, a judge would be better able than a jury to disregard evidence revealed at the hearing on the motion to suppress, but excluded at the trial. As Professor Patton has noted, however, not all commentators agree that judges are able to disregard prejudicial (or unreliable) evidence. *See* William W. Patton, *Evolution in Child Abuse Litigation: The Theoretical Void Where Evidentiary and Procedural Worlds Collide*, 25 LOY. L.A. L. REV. 1009, 1012 & n.9 (1992). This situation, however, need not detain us, since this Essay focuses on the more traditional judge-adjudicated hearing followed by a jury-adjudicated trial.

13. FED. R. EVID. 104(c) advisory committee's note. If a defendant exercises the option to testify, however, there is a cost. While the prosecutor may not introduce the hearing testimony during the case-in-chief at trial, the prosecutor may use the hearing testimony to impeach the defendant should that individual choose to testify at trial. *See infra* text accompanying notes 73-74.

14. CLEARY, *supra* note 3, § 1, at 1. Codes of evidence have been critiqued from the feminist perspective as a "body of formal, abstract, complex evidentiary rules" that do not further the truth-seeking process. *See, e.g.*, Kit Kinports, *Symposium in Honor of Edward W. Cleary: Evidence and Procedure for the Future: Evidence Engendered*, 1991 U. ILL. L. REV. 413, 419. For example, Professor Kinports posits that:

> Feminist theory would question on several levels the very concept of a code of evidence—a body of formal, abstract, complex evidentiary rules like the Federal Rules of Evidence. In place of the current evidence codes, a feminist perspective would advocate an approach to evidence that was less abstract and more tied to the context of a particular case, that simplified the rules to make them more accessible to nonlawyers and therefore less hierarchical, that fostered cooperation rather than competition between the parties, and that envisioned less formal procedures. At the same time, a feminist approach would strive to incorporate women's perspectives and accommodate their needs. Accomplishing the latter goals requires efforts to ensure that the law of evidence does not explicitly discriminate against women and that facially neutral rules are not applied in ways detrimental to women. In addition, the

we are not concerned solely with trials but with any proceeding in which factual resolutions are at issue. For our immediate purpose, let us focus on the Federal Rules of Evidence to determine the extent that they govern in hearings on motions to suppress in federal courts.

The Federal Rules of Evidence govern all proceedings in United States courts with a number of exceptions.[15] These exceptions are outlined in Rule 1101.[16] Clearly the Rules apply to both civil and criminal cases,[17] but certain aspects of criminal proceedings are specifically exempted from coverage. It is clear that if the Rules apply at all to hear-

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evidence rules must reflect not only the views of privileged white men but also the differing concerns and perspectives of others.

Id. (citations omitted).

15. Federal Rule of Evidence 101 provides: "These rules govern proceedings in the courts of the United States and before United States magistrates, to the extent and with the exceptions stated in rule 1101." FED. R. EVID. 101.

16. Federal Rule of Evidence 1101 provides, in pertinent part:

> (a) **Courts and magistrates.** These rules apply to the United States district courts, . . . the United States courts of appeals, the United States Claims Court and to United States magistrates, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States magistrates.
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> (b) **Proceedings generally.** These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act similarly, and to proceedings and cases under title 11, United States Code.
>
> (c) **Rule of privilege.** The rule with respect to privilege applies at all stages of all actions, cases, and proceedings.
>
> (d) **Rules inapplicable.** The rules (other than with respect to privileges) do not apply in the following situations:
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> (1) **Preliminary questions of fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.
>
> (2) **Grand jury.** Proceedings before grand juries.
>
> (3) **Miscellaneous proceedings.** Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.
>
> (e) **Rules applicable in part.** In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of minor and petty offenses by United States magistrates; . . . prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; . . . habeas corpus under sections 2241-2254 of title 28, United States Code, motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code . . . .

FED. R. EVID. 1101.

17. FED. R. EVID. 1101(b). In spite of specific situations in which the Rules provide for differentiated treatment of civil and criminal cases—for example Rules 104(c), 404 and 608—Rule 1101(b) "contemplates a unitary system of evidence." GLEN WEISSENBERGER, WEISSENBERGER'S FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY § 1101.1, at 703 (1987).

It would seem that courts are more willing to apply the rules in civil contexts than criminal. Thus, it is somewhat anomalous that the rules apply in contexts such as resolution of fee

ings on motions to suppress, they are—at the very least—dramatically relaxed. Rule 1101 does not, however, specifically name hearings on motions to suppress as one of the exclusions from the applicability of the Rules.[18]

Should the Federal Rules of Evidence apply to such hearings? Are there similarities between hearings on motions to suppress on the basis of alleged constitutional violations and the proceedings that are specifically exempted from Rule 1101 that would make exclusion desirable as a policy matter?

First, what is being adjudicated at a hearing on a motion to suppress? Although it may be oversimplistic, a review of some of the common grounds might be useful. When criminal defendants allege a Fourth Amendment violation seeking to suppress real evidence, claims commonly may include the following:[19] (1) the police acted to search or seize in the absence of the requisite probable cause;[20] (2) the police lacked a warrant and none of the recognized warrant exceptions were applica-

disputes, but not to matters that might govern whether or not an individual is incarcerated. *See In re* Fine Paper Antitrust Litigation, 751 F.2d 562, 584, 597 (3d Cir. 1984).

18. The Advisory Committee does acknowledge the need for constitutional adjudication, but does so by stating that Rule 1101(d) "is not intended as an expression as to when due process or other constitutional provisions may require an evidentiary hearing." FED. R. EVID. 1101(d) advisory committee's note.

19. For a discussion of exceptions that include instances that are not deemed to implicate Fourth Amendment interests, see Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473 n.21 (1985).

20. Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

ble;[21] (3) the police had a warrant, but it was defective;[22] (4) a *Terry*[23] intrusion occurred in the absence of a sufficient articulable suspicion or the level of police intrusion was not reasonably related to the factors that precipitated the police action; or (5) consent was lacking.[24]

If defendants allege a Fifth Amendment violation seeking to suppress their own statements, common claims may include: (1) assuming that the defendant was in custody and subjected to interrogation, the police failed to give *Miranda* warnings prior to the statement;[25] (2) even if *Miranda* warnings were appropriately given, the defendant did not voluntarily waive his or her rights;[26] or (3) the statements, regardless of *Miranda* concerns, were made involuntarily and thus violated due process.[27]

When defendants allege a Sixth Amendment violation seeking to suppress statements by the accused, a denial of a right to counsel at a critical stage must be established.[28] Additionally, Sixth Amendment

21. Agreed-upon exceptions to the warrant requirement would include the automobile exception, California v. Acevedo, 111 S. Ct. 1982 (1991); United States v. Ross, 456 U.S. 798 (1982), the arrest-in-a-public-place exception, United States v. Watson, 423 U.S. 411 (1976), the search-incident-to-a-valid-arrest exception, Chimel v. California, 395 U.S. 752 (1969), the plain-view exception, Horton v. California, 496 U.S. 128 (1990), the hot-pursuit exception, Warden v. Hayden, 387 U.S. 294 (1967), the exigent-circumstances exception, *id.*, the border search exception, United States v. Montoya de Hernandez, 473 U.S. 531 (1985), and the consent exception, Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Some courts would include stop and frisk as an exception. Terry v. Ohio, 392 U.S. 1 (1968). More recently, the Supreme Court has adopted new doctrines that might be categorized as exceptions, including the inventory exception to the warrant requirement, Florida v. Wells, 495 U.S. 1 (1990); Colorado v. Bertine, 479 U.S. 367 (1987); Illinois v. Lafayette, 462 U.S. 640 (1983), roadblock searches, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990), searches in which officers rely, in good faith, on a statute defining police powers which is later found to be unconstitutional, Illinois v. Krull, 480 U.S. 340 (1987), drug testing, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); Treasury Employees v. Von Raab, 489 U.S. 567 (1988), and the doctrine of inevitable discovery, Nix v. Williams, 467 U.S. 431 (1984).

See the discussion of these exceptions in Elizabeth P. Marsh, *On Rollercoasters, Submarines, and Judicial Shipwrecks: Acoustic Separation and the Good Faith Exception to the Fourth Amendment Exclusionary Rule*, 1989 U. ILL. L. REV. 941, 959 nn.110-11.

22. *See, e.g.*, United States v. Leon, 468 U.S. 897, 922 (1984).

23. *Terry*, 392 U.S. at 16-17, 26-27.

24. *Schneckloth*, 412 U.S. at 248-49; *see* Illinois v. Rodriguez, 110 S. Ct. 2793, 2796-98 (1990).

25. Miranda v. Arizona, 384 U.S. 436, 467-68 (1966).

26. *Id.* at 470.

27. Arizona v. Fulminante, 111 S. Ct. 1246, 1251-53 (1991); Colorado v. Connelly, 479 U.S. 157, 162 (1986); Haynes v. Washington, 373 U.S. 503, 506-07 (1963).

28. Massiah v. United States, 377 U.S. 201, 205 (1964). *But see* Moran v. Burbine, 475 U.S. 412 (1986) (holding pre-arraignment confession of defendant admissible and not in violation of Sixth Amendment right to counsel where police failed to inform defendant that his sister had retained attorney for him, because adversary proceedings had not been commenced, thus critical stage not established).

waiver issues may need to be adjudicated.[29]

Similarly, alternative theories are available to suppress identification testimony offered against a criminal defendant. If a defendant alleges a Fifth Amendment violation, a common claim may be that the identification procedure was so suggestive that it precluded any reliable identification and thus violated due process.[30] If a defendant alleges a Sixth Amendment violation, the defense must allege that the defendant was denied a right to counsel at a critical stage of the proceeding during which an identification procedure was conducted.[31]

Although hearings on motions to suppress could conceivably be considered part of the "preliminary examinations in criminal cases," which are exempted from coverage by the Rules of Evidence,[32] it seems more logical to treat the decision as to whether or not evidence will be excluded on the basis of a constitutional violation as a preliminary question of fact to be determined by the court under Rule 104.[33] Under either treatment, the Federal Rules of Evidence (other than the rules of privilege) theoretically would not apply.[34] Yet it is difficult to imagine that hearings on motions to suppress would be completely unfettered from any consideration of the Rules.

The exclusions named in Rule 1101 are all based on particular policy considerations that warrant exemption from the Federal Rules of Evi-

29. Patterson v. Illinois, 487 U.S. 285, 292-94 (1988).

30. Manson v. Braithwaite, 432 U.S. 98, 103-04, 114-17 (1977); Neil v. Biggers, 409 U.S. 188, 189-90 (1972).

31. Kirby v. Illinois, 406 U.S. 682, 688-90 (1972); United States v. Wade, 388 U.S. 218, 226-27 (1967).

32. FED. R. EVID. 1101(d)(3).

33. Federal Rule of Evidence 104 states:

> (a) **Questions of admissibility generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except with respect to privileges.
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> (b) **Relevancy conditioned on fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
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> (c) **Hearing of jury.** Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.
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> (d) **Testimony by accused.** The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.
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> (e) **Weight and credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

FED. R. EVID. 104.

34. FED. R. EVID. 1101(d)(1).

dence. Generally, the rules do not apply "(1) when a Judge is deciding a preliminary question of fact—preliminary, that is, to a decision on whether or not to admit evidence; (2) in a grand jury proceeding and in preliminary examinations in criminal cases; (3) in probation and sentencing proceedings; (4) when a warrant is sought; and (5) in bail proceedings."[35] Thus, the Rules are inapplicable to federal grand jury proceedings.[36] Moreover, certain criminal or quasi-criminal proceedings such as extradition or rendition proceedings, sentencing or probation revocation proceedings, bail proceedings and the issuance of warrants for arrest or to search are excluded from the coverage of the Federal Rules of Evidence.[37] In short, a proceeding is exempt from the Rules when: (1) the issue is not a final adjudication of guilt but only a preparatory step;[38] or (2) the proceeding addresses the consequences[39] of a final adjudication of guilt or innocence rather than the determination itself. In virtually all of these proceedings, except the grand jury, the judge is the fact finder to the exclusion of the jury; the standard employed embodies a heavy component of judicial discretion; and the decision to be made is rarely outcome determinative on the merits.

In hearings on motions to suppress, as with most of the proceedings excluded from the operation of the Rules, the judge is the fact finder. Presumably, a judge is able to disregard irrelevant or prejudicial evidence and evidence that would tend to support a relaxation or elimination of the applicability of the Rules.[40] The standards for judicial determination are not purely discretionary, but they certainly include a high degree of

35. 2 STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 9 (5th ed. 1990) (editorial explanatory comment to Rule 1101).

36. FED. R. EVID. 1101(d)(2).

37. FED. R. EVID. 1101(d)(3).

38. Thus, the proceedings that precede a criminal trial would be excluded, such as bail proceedings, *see* United States v. Vaccaro, 719 F. Supp. 1510, 1514-15 (D. Nev. 1989); extradition hearings, *see* Melia v. United States, 667 F.2d 300, 302 (2d Cir. 1981); and grand jury proceedings, *see In re* Grand Jury Investigation, 918 F.2d 374, 378-80 (3d Cir. 1990); *see also* FED. R. EVID. 1101(d)(3) (exempting from Rules certain miscellaneous proceedings including preliminary examinations in criminal cases, issuance of arrest and search warrants, and sentencing hearings).

39. The "consequences" of an adjudication of guilt would include sentencing, *see* United States v. Roberts, 881 F.2d 95, 105-07 (4th Cir. 1989); United States v. Agyemang, 876 F.2d 1264, 1270-71 (7th Cir. 1989); United States v. Flores, 875 F.2d 1110, 1112-13 (5th Cir. 1989); United States v. Jarrett, 705 F.2d 198, 205-06 (7th Cir. 1983), probation revocation, *see* United States v. Miller, 797 F.2d 336, 340-41 (6th Cir. 1986); United States v. McCallum, 677 F.2d 1024, 1026 (4th Cir. 1982); United States v. Torrez-Flores, 624 F.2d 776, 778-80 (7th Cir. 1980); United States v. Francischine, 512 F.2d 827, 829 (5th Cir. 1975), and parole revocation, *see* Downie v. Klincar, 759 F. Supp. 425, 426-28 (N.D. Ill. 1991).

40. *See* Patton, *supra* note 12, at 1011. In theory, a proceeding before a judge alone is more expeditious than one before a jury and the consideration of objections to evidence is

flexibility premised on factual resolution.[41] For example, the standard for probable cause is far from a cut and dried rule. It turns on gauging the reasonableness of the belief of a reasonably prudent officer.[42] Similarly, the voluntariness of a statement[43] or of a waiver of constitutional rights[44] turns on the facts of each individual case. Unlike the situations specifically exempted from the operation of the Rules, however, a decision on the motion to suppress is often outcome determinative if it is adverse to the government. Thus, from the prosecution's viewpoint, if evidence is suppressed, at worst, the case will be dismissed; at best, valuable evidence will be lost and the defendant will be in an enhanced plea bargaining position.[45]

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much less time consuming. ROBERT E. KEETON, TRIAL TACTICS AND METHODS § 8.3, at 297-98 (2d ed. 1973).

41. This permits the "*legal gap*: the idea that, for some questions, there is no legal authority which requires the court to decide the issue one way or another." David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 940 (1990); *see also* Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231 (1990) (evaluating and defining reality of judicial discretionary decision-making).

42. Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

43. *See* Miller v. Fenton, 474 U.S. 104, 116 (1985):

> [T]he admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne.

Id. See also the discussion concerning "The Shortcomings of the 'Voluntariness' Test" found in YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES—COMMENTS—QUESTIONS 425-28 (7th ed. 1990) (discussing various criticisms of voluntariness test).

44. Patterson v. Illinois, 487 U.S. 285, 298 (1988) (Sixth Amendment); Schneckloth v. Bustamonte, 412 U.S. 218, 226, 244 (1973) (validity of consent to Fourth Amendment search, while not "waiver," turns on totality of circumstances analysis); Miranda v. Arizona, 384 U.S. 436, 444, 475-76 (1966) (Fifth Amendment).

45. In his dissenting opinion in a case defining the scope of Sixth Amendment public access to suppression hearings, Justice Blackmun noted:

> First, the suppression hearing resembles and relates to the full trial in almost every particular. Evidence is presented by means of live testimony, witnesses are sworn, and those witnesses are subject to cross-examination. Determination of the ultimate issue depends in most cases upon the trier of fact's evaluation of the evidence, and credibility is often crucial. Each side has incentive to prevail, with the result that the role of publicity as a testimonial safeguard, as a mechanism to encourage the parties, the witnesses, and the court to a strict conscientiousness in the performance of their duties, and in providing a means whereby unknown witnesses may become known, is just as important for the suppression hearing as it is for the full trial.
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> Moreover, the pretrial suppression hearing often is critical, and it may be decisive, in the prosecution of a criminal case. If the defendant prevails, he will have dealt the prosecution's case a serious, perhaps fatal, blow; the proceeding often then will be dismissed or negotiated on terms favorable to the defense. If the prosecution successfully resists the motion to suppress, the defendant may have little hope of success at trial (especially where a confession is in issue), with the result that the likelihood of a guilty plea is substantially increased.

Gannett v. DePasquale, 443 U.S. 368, 434 (1979) (Blackmun, J., dissenting) (citations omit-

There is a tendency to question the applicability of the Rules of Evidence with an all-or-nothing approach. This perspective fails to account for the checkerboard approach courts have taken. While occasionally prosecutors contend that the Rules of Evidence are not applicable at all to pretrial hearings on motions to suppress,[46] courts are nonetheless reluctant to jettison the Federal Rules of Evidence in toto.[47]

One of the key areas of concern is hearsay. Traditionally, hearsay is admissible at hearings on motions to suppress,[48] making article 8 of the Federal Rules of Evidence inapplicable. This longstanding practice is premised on the difference between determining guilt and the more preliminary issue of probable cause.[49] Hearsay is usually received in preliminary hearings where the key issue is whether or not there is probable cause to believe a crime has been committed and this individual committed it. Similarly, federal grand juries may consider hearsay in determining probable cause.[50] Hearsay is also admissible in forfeiture actions[51]

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ted); *see also* Paul S. Grobman, Note, *The Constitutionality of Statutorily Restricting Public Access to Judicial Proceedings: The Case of the Rape Shield Mandatory Closure Provision*, 66 B.U. L. REV. 271, 288 (1986) (discussing public's right of access to pretrial proceedings).

46. *See, e.g.*, United States v. Brewer, 947 F.2d 404, 408 (9th Cir. 1991) (citing supplemental brief for appellee at 3).

47. *See id.* at 410.

48. United States v. Matlock, 415 U.S. 164, 172-75 (1974). The Court referred to the Federal Rules of Evidence only for the purpose of analogy. *Id.* at 172 n.8.

49. Discussing the difference between determining probable cause and guilt, the Court in *Matlock* discussed the earlier case of Brinegar v. United States:

> It [the *Brinegar* Court] distinguished between the rules applicable to proceedings to determine probable cause for arrest and search and those governing the criminal trial itself—"There is a large difference between the two things to be proved, as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them." That certain evidence was admitted in preliminary proceedings but excluded at the trial—and the Court thought both rulings proper—was thought merely to "illustrate the difference in standards and latitude allowed in passing upon the distinct issues of probable cause and guilt."

Id. at 173 (quoting Brinegar v. United States, 338 U.S. 160, 173, 174 (1949)) (citations omitted).

50. FED. R. EVID. 1101(d)(2). An indictment may be based solely on hearsay evidence. Costello v. United States, 350 U.S. 359, 361-64 (1956); *see also* United States v. Callahan, 442 F. Supp. 1213, 1218 (D. Minn. 1978) (upholding admission of polygraph evidence in grand jury proceeding when inadmissible at trial), *rev'd on other grounds*, 596 F.2d 759 (8th Cir. 1979).

The admissibility of hearsay evidence in the grand jury, however, creates an anomaly: an accused can stand indicted on evidence that would not support a conviction at trial. Presumably, prosecutors would not seek to charge an individual if the charge could not be proven before a jury. In some instances, however, a prosecutor might be lured into seeking an indictment in the hopes of reaching a plea bargain with the accused before being pressed for proof at trial.

51. United States v. One 1986 Chevrolet Van, 927 F.2d 39, 41-42 (1st Cir. 1991); United States v. 1964 Beechcraft Baron Aircraft, 691 F.2d 725, 728 (5th Cir. 1982), *cert. denied*, 461

where the issue is, once again, one of probable cause. Evidence is not excluded from grand jury proceedings[52] or preliminary hearings[53] because of constitutional violations; however, the Fourth Amendment exclusionary rule applies to forfeiture proceedings.[54]

At least one commentator has suggested that it is the applicability of hearsay, and not the Rules of Evidence in general, that is at the heart of Rule 1101:

> As we have pointed out in connection with several Rules, even though Congress has chosen to provide that the Federal Rules of Evidence should not apply during most preliminary and post-trial parts of litigation, the fact remains that many of the Rules will be borrowed and continued in effect during these proceedings. Most of the Congressional concern was with the hearsay rule, and it is difficult to imagine that Congress intended that witnesses should testify without taking an oath, that interpreters should not be provided for non-English speaking persons, and that proper objections should not be made to offers of evidence in proceedings other than trials on the merits. The decisions to date indicate that *Rule 1101 is primarily a restriction on the application of the hearsay rule*.[55]

It is appropriate to admit hearsay at hearings on motions to suppress given the nature of the matter to be adjudicated.

In the Fourth Amendment area, the very basis of probable cause is hearsay.[56] If hearsay were inadmissible, the hearing on the motion to suppress would require most, if not all, of the trial witnesses to appear at the hearing. This would increase the cost of holding such hearings significantly, since a greater number of witnesses would have to be called;

U.S. 914 (1983); Ted's Motors v. United States, 217 F.2d 777, 780 (8th Cir. 1954); United States v. $87,279, 546 F. Supp. 1120, 1126 (S.D. Ga. 1982).

52. United States v. Calandra, 414 U.S. 338, 349-52 (1974).

53. *Calandra*, 414 U.S. at 348; Giordenello v. United States, 357 U.S. 480, 483 (1958); United States v. Alvarez-Porras, 643 F.2d 54, 66-67 (1981).

54. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696-702 (1965).

55. SALTZBURG & MARTIN, *supra* note 35, at 565 (emphasis added).

56. Police may rely on hearsay to constitute probable cause if there is some corroborating evidence gathered by the arresting officers. Whiteley v. Warden, 401 U.S. 560, 567 (1971).

Hearsay is also permissible as grounds to establish reasonable suspicion. United States v. Merritt, 695 F.2d 1263, 1270 (10th Cir. 1982), *cert. denied*, 461 U.S. 916 (1983).

> Since the police may rely on hearsay, even the hearsay of an anonymous but reliable informant . . . as the basis for reasonable suspicion to make a stop, they should also be permitted to offer that same hearsay as testimony to support their reasonable suspicion when a defendant moves to suppress evidence on the ground that reasonable suspicion did not exist.

Id. (citation omitted).

more testimony would have to be adduced; and more court, attorney and staff time would be used. Another result might be that courts would be tempted to stretch the hearsay exceptions in the hearing context in an effort to allow more evidence in using fewer witnesses and thus decrease the burdens of conducting the hearing. Moreover, there is a great deal of hearsay information on which police rely on a daily basis that could no longer be used if admissibility at a later hearing was in doubt. For example, police reports are sometimes excluded as hearsay at a criminal trial,[57] yet they are by definition a key source of information for law enforcement officers. To exclude these at hearings on motions to suppress would greatly hamper law enforcement and might impede defense concerns as well. The concerns are similar in the other categories of suppression hearings.

Yet hearsay is excluded at trial precisely because it is unreliable.[58] Thus, in cases permitting hearsay because the Federal Rules of Evidence are not applicable under Rule 1101, a defendant must be given an opportunity to challenge the reliability of disputed evidence.[59] Reliance on hearsay as inflexibly conclusive evidence has been found to be impermissible.[60] This same tension between the need to rely on hearsay and the skepticism about its reliability is found in the Fourth Amendment area: although there is a presumption that information supplied in an affidavit to support a warrant is true, a defendant may challenge the truthfulness in a motion to suppress if a substantial showing is made that the state-

57. *See* FED. R. EVID. 803(6), (8). Police reports have run afoul of the duty to record requirement of the business record exception. Johnson v. Lutz, 170 N.E. 517, 518 (N.Y. 1930) (stating informant has no duty to report, so police report relying on informant inadmissible); *see also* FED. R. EVID. 803(6) advisory committee's note (stating supplier of information must have duty to report; information supplied by bystander does not qualify). Moreover, Rule 803(8) precludes the use of public records in criminal matters unless they are offered against the Government. FED. R. EVID. 803(8)(B), (C). Even then, there may be problems with admissibility if the report is excludable under 803(6). United States v. Oates, 560 F.2d 45, 78 (2d Cir. 1977) (reports excluded under 803(8)(B), (C) never admissible as business records).

58. CLEARY, *supra* note 3, § 245, at 728-29.

59. *See, e.g.*, United States v. Agyemang, 876 F.2d 1264, 1271-72 (7th Cir. 1989):

> Some tension does exist between the more lax evidentiary standards at sentencing—including allowing hearsay—and a defendant's right not to be sentenced based on inaccurate information. . . . This court has resolved that tension by insisting that a defendant have a reasonable opportunity to rebut contested hearsay and that the contested hearsay be reliable . . . . [W]e do not mean that the hearsay must fit into some recognized hearsay exception or that the government must prove the hearsay is true beyond a reasonable doubt; rather, the sentencing judge must be satisfied, in light of all the circumstances that the hearsay is worthy of credence.

Id.

60. Downie v. Klincar, 759 F. Supp. 425, 428-29 (N.D. Ill. 1991) (challenging policies and practices of parole board on issue of whether board, at final revocation hearing, is entitled to rely on eyewitness police reports as conclusive evidence).

ments were knowingly and intentionally false, or made with a reckless disregard for the truth.[61] Thus, while hearsay may be used, it is not immune from challenge.

What about the other Rules of Evidence? Must evidence always be relevant?[62] If the Rules are truly inapplicable, as Rule 1101 suggests, irrelevant evidence could abound. Of course, as a practical matter, judges would not waste time with such evidence in the majority of cases, but nothing would prevent its admission.

Must witnesses always be sworn?[63] Again, if the Rules are truly inapplicable, as Rule 1101 suggests, there would be no requirement that a witness be sworn. Yet an oath or affirmation is required by every witness in suppression hearings and no one objects to this requirement. In fact, it is usually to the advantage of the parties to have the oath administered in the event that the testimony must be used for another purpose later on.[64] Similarly, a witness could testify without being competent[65] or without personal knowledge,[66] yet few courts would waste much time on such evidence.

A more troublesome question arises, however, when we consider the concerns of impeachment,[67] sequestration,[68] cross-examination[69] and confrontation.[70] At trial these are a matter of right. At a hearing they

61. Franks v. Delaware, 438 U.S. 154, 171 (1978).

62. *See* FED. R. EVID. 401-412.

63. FED. R. EVID. 603.

64. For example, prior recorded testimony is admissible if a witness is unavailable at trial. FED. R. EVID. 804(b)(1). Prior inconsistent statements are admissible as substantive evidence only if made under oath. FED. R. EVID. 801(d)(1)(A).

65. FED. R. EVID. 601.

66. *See* FED. R. EVID. 602.

67. FED. R. EVID. 607-610.

68. FED. R. EVID. 615.

69. FED. R. EVID. 611; *see* Delaware v. VanArsdall, 475 U.S. 673 (1986).

70. *See, e.g.*, White v. Illinois, 112 S. Ct. 736 (1992) (rejecting argument that declarant must be produced or shown to be available before hearsay statements would be admitted at trial under "firmly rooted" hearsay exception(s)); Maryland v. Craig, 110 S. Ct. 3157 (1990) (finding Confrontation Clause does not prohibit child witness from testifying via closed circuit television); Idaho v. Wright, 110 S. Ct. 3139 (1990) (noting hearsay statements of child victim lacked particularized guarantees of trustworthiness required for admission under Confrontation Clause); Coy v. Iowa, 487 U.S. 1012 (1988) (finding that procedure for placing screen between testifying complaining witness and dependant at trial violated right of confrontation in absence of individualized findings that child witnesses needed special protection); Ohio v. Roberts, 448 U.S. 56 (1980) (noting testimony of witness at preliminary hearing admissible at trial where there was opportunity for cross-examination and witness is unavailable); Davis v. Alaska, 415 U.S. 308 (1974) (finding that despite state policy protecting identity of juvenile offenders, refusal of right to cross-examine is violation of Sixth Amendment rights); California v. Green, 399 U.S. 149 (1970) (stating prior inconsistent statement admissible if witness afforded opportunity to explain); Barber v. Page, 390 U.S. 719 (1968) (finding testimony of

are not guaranteed. There is an inherent sense of fair play that if a witness testifies under oath, the other side should have the right to cross-examine and attempt to impeach that person, but the scope of these efforts in a hearing may be greatly curtailed, subject to the judge's discretion. The Sixth Amendment right of confrontation, so crucial at trial, is not applicable in a hearing on a motion to suppress.[71] Thus, criminal defendants are dependent upon court discretion to define the scope of allowable confrontation, if any. Courts rarely issue opinions on these topics. Courts have held, however, that notwithstanding Rule 1101 Federal Rule of Evidence 615 requiring the sequestration of witnesses at the request of a party applies in hearings on motions to suppress.[72]

Are these evidentiary standards for motions to suppress, such as they are, appropriate? This depends, in part, upon the perspective of who is asking the question and what it is that we seek to accomplish in hearings on motions to suppress.

III. THE ALTERNATIVE PURPOSES OF THE HEARING ON A MOTION TO SUPPRESS: WHAT DOES IT MATTER, ANYWAY, AFTER THE HEARING ON THE MOTION IS OVER?

It is axiomatic that different parties to litigation will have different perspectives on the importance of the evidentiary rules. Litigators have sometimes seen the Federal Rules of Evidence as a troublesome obstacle course of impediments to admissibility. These hurdles to admissibility, however, can often be circumvented if one is but creative and dogged enough. Thus, the Federal Rules of Evidence matter, but they matter more for the symbolic values represented than for the ultimate outcome of any objection as to admissibility. In short, the Rules try to keep litigators honest; their aim is not necessarily to create insurmountable barriers to the presentation of evidence, but rather to ensure that the lawyer is

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witness at preliminary hearing inadmissible when state makes no effort to obtain witness's presence at trial); Pointer v. Texas, 380 U.S. 40 (1965) (noting testimony from preliminary hearing inadmissible at trial where defendant had no opportunity to cross-examine).

71. McCray v. Illinois, 386 U.S. 300, 310-12 (1967) (holding Sixth Amendment did not compel disclosure of informant's identity at hearing on motion to suppress) (distinguishing Roviaro v. United States, 353 U.S. 53 (1957)).

72. United States v. Brewer, 947 F.2d 404, 410 (9th Cir. 1991) (Rule 615 applicable to evidentiary hearing conducted to resolve factual issues presented in motion to suppress evidence pursuant to Rule 12(b)(3) of Federal Rules of Criminal Procedure).

The Fifth Circuit Court of Appeals has also found Federal Rule of Evidence 615 applicable to hearings on motions to suppress. Sitting *en banc*, the court agreed with the three-judge panel's opinion that found error in the hearing judge's refusal to exclude government witnesses from a suppression hearing but held the error harmless. United States v. Warren, 578 F.2d 1058, 1076 (5th Cir.), *cert. denied*, 434 U.S. 1016 (1978).

offering evidence for the right reason and at the right time. Judges may perceive the Rules not only as positive guideposts, but as pitfalls in the appellate process. Thus, judges may tend to obscure the reasons for their rulings to protect the record. Litigants may view the Rules as mere technicalities that mystify the process and increase the power of the judges and lawyers.

The relaxed evidentiary standards at the hearing on any motion to suppress ease the determination of the underlying issues. In addition, however, they further the often unspoken secondary goal of the hearing: if a defense counsel succeeds in obtaining a hearing on a motion to suppress, it provides an excellent discovery device regardless of the final outcome. In addition, the defense counsel is given an opportunity to hear at least one crucial law enforcement witness to the case and develop an entire transcript that may provide fodder for impeachment by a prior inconsistent statement at trial. Occasionally, a civilian witness may be called to testify in a hearing on a motion to suppress, especially when the defendant challenges identification testimony as tainted.

The relaxed evidentiary standard may also encourage the defendant to testify in an effort to suppress evidence. This would be especially true in attempts to suppress statements made by a defendant. Who better to discuss the validity of a *Miranda* or Sixth Amendment waiver? Who better to discuss the individualized factors making a confession involuntary? In one respect, this can be seen as empowering a criminal defendant, permitting input into the decision-making process. From another viewpoint, however, the hearing becomes a discovery device for the prosecution as well, previewing possible defense trial theories and providing material for impeachment should the defendant testify at trial.

If a defendant testifies at the hearing, the prosecution may not introduce the testimony against him or her at trial to establish guilt.[73] However, the testimony adduced at the hearing *may* be used to impeach the defendant should he or she choose to testify at trial. This is consistent with the line of cases permitting the defendant to be impeached with unconstitutionally obtained evidence.[74]

A problem arises, however, when the witness, especially the criminal defendant, testifies at a hearing conducted under relaxed evidentiary

73. Thus, the early concern expressed in Jones v. United States, 362 U.S. 257, 262 (1960), that testifying at the hearing on the motion to suppress placed the defendant on the "horn[s] of [a] dilemma" was alleviated, at least in theory, by the holding in Simmons v. United States, 390 U.S. 377, 389 (1968), that the hearing testimony could not be used to establish guilt at trial.

74. The impeachment exception to the constitutional exclusionary rules is relatively broad. United States v. Havens, 446 U.S. 620, 626 (1980) (stating impeachment exception provides

rules. Evidence not ordinarily admissible at trial may now be admissible to impeach. Thus, hearing judges should keep this potential future use at trial in mind and restrain at least the most egregious hearsay offered at the hearing.

IV. ADJUDICATING CONSTITUTIONAL CLAIMS IN A HEARING ON A MOTION TO SUPPRESS—IS IT MERELY AN EVIDENTIARY RULING?

As a teacher of both evidence and criminal procedure, it is easy to perceive a conflict of viewpoints in the general outlooks toward the two subject matters. In evidence class, the sense of the Federal Rules is to create a "bias towards admissibility."[75] In criminal procedure, however, evidence is excluded to further constitutional policy goals that may have nothing to do with the reliability of the evidence in question. These constitutional concerns go far beyond the merely procedural and touch upon the substantive concerns at trial. Thus, constitutional policy reasons eclipse purely evidentiary rules. The importance of evidentiary law bears an inverse relationship to the complexity of related questions of admissibility under criminal procedure doctrines. Constitutional doctrines, however, are not given equal weight by the courts in deciding admissibility. Those concerns that bear on the reliability of the evidence are more

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that when direct testimony suggests questions to reasonably competent cross-examiner, witness's answers may be impeached with "tainted" evidence).

The seminal case is Walder v. United States, 347 U.S. 62 (1954), which permitted the government to impeach the defendant with real evidence (heroin) seized illegally from his possession at the time of an earlier, unrelated arrest after the defendant "opened the door" at trial by denying that he had ever dealt in or possessed drugs. *Id.* at 65. Since then, the Supreme Court has permitted the prosecution to impeach a criminal defendant with statements taken in violation of *Miranda* rights, Harris v. New York, 401 U.S. 222, 226 (1971), even when the defendant asserted his or her right to an attorney under *Miranda*. Oregon v. Hass, 420 U.S. 714, 723 (1975); *see* Miranda v. Arizona, 384 U.S. 436 (1966).

Impeachment by means of statements taken in violation of Sixth Amendment rights has been prohibited, however. United States v. Brown, 699 F.2d 585, 590-91 (2d Cir. 1983). Nor may the prosecution impeach a criminal defendant by means of statements that were coerced in violation of due process. New Jersey v. Portash, 440 U.S. 450, 459 (1979); Mincey v. Arizona, 437 U.S. 385, 401-02 (1978); *see also* Christopher Harkins, Note, *The Pinocchio Defense Witness Impeachment Exception to the Exclusionary Rule: Combatting a Defendant's Right to Use with Impunity the Perjurious Testimony of Defense Witnesses*, 1990 U. ILL. L. REV. 375 (arguing for expansion of defendant impeachment exception to exclusionary rule to permit introduction of defendant's suppressed evidence to impeach defense witnesses testifying perjuriously for purpose of exculpating defendant).

75. Leonard, *supra* note 41, at 956, and authorities cited therein. "First, courts and codifiers have come to believe that truth is likely to emerge when more, rather than less, evidence is heard by the trier of fact. This has led to a decided bias toward admissibility rather than exclusion and the abrogation of many per se exclusionary rules." *Id.* (citations omitted).

likely to lead to exclusion than those that do not.[76]

Evidence seized in violation of the Fourth Amendment is usually extremely reliable evidence of a crime, such as physical evidence that is itself contraband or that indicates guilt.[77] From a purely procedural evidentiary viewpoint, such evidence should be allowed at trial. At common law courts did not inquire as to the source of evidence, unless its reliability was in question.[78] We have a strong tradition of admitting probative evidence when possible and excluding it only if there are very strong policy reasons. The constitutional doctrines giving rise to the ex-

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76. See the discussion of the hierarchy of rights contained in Professor Whitebread's article, Charles H. Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471, 478-84 (1985). Professor Whitebread suggests that of the Fourth, Fifth and Sixth Amendment rights applicable before trial, the Court places the Sixth Amendment, the amendment that most closely guards the reliability of evidence, at the top of the hierarchy; followed by the Fifth Amendment in the middle, again with a heavy emphasis on the reliability of evidence, be it confessions or identification testimony; and the Fourth Amendment at the bottom. The more the reliability of the evidence in question may be affected, the more the Court is willing to apply the exclusionary sanction. *Id.*

Professor Stacy suggests that the Burger and Rehnquist Courts have cited "the importance of accurate adjudication as a reason to interpret restrictively rights that can be called 'truth-impairing,' that is rights withholding relevant evidence of guilt from the adjudicative process," but that the age-old concern that we avoid mistaken guilt verdicts has been replaced by a concern to avoid overall errors. Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1369 (1991).

77. Thus, hostility toward the Fourth Amendment exclusionary rule is common. *See* Brewer v. Williams, 430 U.S. 387, 410 (1977) (Burger, C.J., dissenting) (referring to exclusionary rule as "the much-criticized course of punishing the public for mistakes and misdeeds of law enforcement officers, instead of punishing the officers directly . . . . It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross police misconduct or honest human error."); Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring) ("The exclusionary rule has been operative long enough to demonstrate its flaws. . . . Its function is simply the exclusion of truths from the factfinding process."); *id.* at 538 (White, J., dissenting) ("The [exclusionary] rule has been much criticized and suggestions have been made that it should be wholly abolished [as senseless obstacle to truth in criminal trials]."); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 420 (1971) (Burger, C.J., dissenting) (characterizing suppression doctrine as anomalous and ineffective mechanism to regulate law enforcement); *see* STEVEN R. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 62 (1977); Raymond G. Hall, *The Alternatives to the Exclusionary Rule*, 3 CRIM. JUST. J. 303, 307-08 (1980) (emphasizing changing nature of criminal trials from determination of defendant's culpability to analysis of police error); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983) (addressing four legitimate criticisms of exclusionary rule, including most prominent that rule deprives courts of reliable evidence resulting in freeing guilty persons).

78. Prior to the adoption of a federal Fourth Amendment exclusionary rule in *Weeks*, competent evidence would be admitted at trial without inquiry into the manner by which it was obtained. Weeks v. United States, 232 U.S. 383, 396 (1914); *see also* 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2183, at 6-7 (McNaughton rev. 1940) (ar-

clusionary rules provide such reasons. For substantive reasons of deterrence,[79] judicial integrity,[80] due process[81] and practical considerations,[82] the Fourth Amendment exclusionary rule may keep the reliable evidence from the fact finder.

When we survey other constitutional exclusionary rules, a further concern arises: the trustworthiness of the evidence. One reason for excluding an involuntary confession is that we distrust its reliability.

> The first rules governing the admissibility of confessions were laid down in the eighteenth and nineteenth centuries, a time when illegal police methods were relevant only insofar as they affected the trustworthiness of the evidence. Whatever the meaning of the elusive terms "involuntary" and "coerced" confessions since 1940, for centuries the rule that a confession was admissible so long as it was "voluntary" was more or less an alternative statement of the rule that a confession was admissible so long as it was free of influence which made it untrustworthy or "probably untrue."[83]

Thus when the courts exclude statements as involuntary, one value they further is the goal of basing verdicts on reliable evidence. In *Miranda v. Arizona*[84] the Court was willing to assume the presence of an inherently

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guing exclusionary rule improper punishment for violation of law without proper procedure of determining culpability for that violation).

This is not to say, however, that the common law would not exclude evidence if it had some prejudicial impact:

> The prejudice rule has ancient roots. Thayer traced its origins back to the thirteenth century, although trials at that time had neither witness testimony nor formal rules of evidence as we know them. Certainly by the late 1600's, a rule was in place permitting the exclusion of relevant evidence likely to confuse the jury, unfairly surprise the opponent who might not be prepared to respond, delay the trial, or arouse the passions of jurors.

Tanford, *supra* note 1, at 834.

79. Mapp v. Ohio, 367 U.S. 643, 648 (1961). Deterrence is the key, if not the only rationale, for the Fourth Amendment exclusionary rule now recognized by the Court. Marsh, *supra* note 21, at 955-61.

80. *Mapp*, 367 U.S. at 659; *see also* Keith C. Monroe, *The Imperative of Judicial Integrity and the Exclusionary Rule*, 4 W. ST. U. L. REV. 1, 2 (1976) (judicial integrity view essentially applies equitable "clean hands" doctrine to criminal law); Fred G. Bennett, Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 UCLA L. REV. 1129, 1133-64 (1973) (emphasizing importance of judicial integrity as rationale for exclusionary rule).

81. *Mapp*, 367 U.S. at 655-56.

82. *Id.* at 657.

83. CLEARY, *supra* note 3, § 226, at 114; KAMISAR et al., *supra* note 43, at 422 (citing generally EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 147 (Edward W. Cleary ed., 3d ed. 1984)); 3 JOHN H. WIGMORE, EVIDENCE § 822, at 329-36 (Chadbourne rev. 1940)).

84. 384 U.S. 436 (1966).

coercive atmosphere whenever a suspect underwent custodial interrogation. This potential coercion necessarily called into question the reliability of any statements made by the defendant in the absence of *Miranda* warnings or an effective waiver of *Miranda* rights.[85] When identification testimony is considered, constitutional error goes to the heart of reliability and reliability is the guiding factor governing admissibility.[86] When Sixth Amendment concerns are considered—either for questions concerning confessions or eyewitness identification—notions of fair play and due process are also at issue. The presence of an attorney can help ensure that the defense counsel can accurately reconstruct the identification procedure at a hearing and at trial.[87] In addition, the presence of an attorney can provide an accused with a strong shield against government interrogation as well as a professional assessment of the case before advising the client to communicate with police.[88]

Is it appropriate to have a differentiated standard for the admissibility of evidence premised on a "hierarchy" of rights? It is unlikely that the founders considered one portion of the Bill of Rights more important than another. If nothing else, however, the more courts are concerned with constitutional questions—wherever they are in the "hierarchy"—the less attention they pay to procedural evidentiary rules. Thus, the importance of evidence law bears an inverse proportion to the complexity of any related questions of admissibility of evidence under doctrines other than the rules of evidence.

V. ONCE THE ADMISSIBILITY OF EVIDENCE IS DETERMINED IN A HEARING ON A MOTION TO SUPPRESS, MAY JURIES RECONSIDER THE CLAIM?

Once a defendant loses a hearing on a motion to suppress, may the constitutional issues surrounding the admissibility of the evidence be represented to and re-argued before the jury, allowing them to re-decide the admissibility question during the guilt adjudication phase? Were the issue simply a procedural evidentiary question, the answer would be no. Yet, suppression issues are often presented and argued before juries, even though the arguments may take on a different emphasis than those focusing solely on guilt or innocence.

85. *Id.* at 445-58, 478-79. Arguably this assertion is weakened by the Rehnquist Court's characterization of *Miranda* as merely a prophylactic rule. New York v. Quarles, 467 U.S. 649, 653 (1984).

86. Neil v. Biggers, 409 U.S. 188, 196-201 (1972).

87. United States v. Wade, 388 U.S. 218, 236-38, 241 (1967).

88. Patterson v. Illinois, 487 U.S. 285, 308-10 (1988) (Stevens, J., dissenting).

If the question is about the voluntariness of a confession, the defendant must be afforded an opportunity to present evidence concerning the details surrounding the giving of the confession.[89] Similarly, the question of whether *Miranda* rights were given and the validity of any waiver of those rights is presented and argued to a jury. Defense counsel would be remiss in failing to argue about the reliability of eyewitness testimony. Even Fourth Amendment claims are presented de facto to the jury after the suppression hearings have been resolved. As Professor Dershowitz has written:

> Several of my clients have gone free because their constitutional rights were violated by agents of the government. In representing criminal defendants—especially guilty ones—it is often necessary to take the offensive against the government: to put the government on trial for *its* misconduct. In law, as in sports, the best defense is a good offense.[90]

Later, he adds: "When a criminal lawyer represents a guilty defendant—and the vast majority of criminal defendants are guilty—his only realistic alternative may sometimes be to put the government on trial. The American legal system is unique in permitting this turnabout."[91] Thus, in each situation the defendant gets a second chance to attempt to convince the fact finder to disregard the evidence in question on the basis of its reliability or the repugnancy of police conduct. This reflects, once again, that in criminal litigation the evidentiary procedural rules will take a back seat to the constitutional concerns.

VI. CONCLUSION

The evidentiary rules are important in hearings on motions to suppress, even though the Federal Rules of Evidence seem to exclude such hearings from the operation of the Rules. But their importance is eclipsed by the constitutional doctrines that they serve. Thus, courts should take care to identify the underlying rationale of the constitutional exclusionary rules and seek to effectuate them, even at the cost of the evidentiary principles.

89. Crane v. Kentucky, 476 U.S. 683, 689-91 (1986).
90. ALAN DERSHOWITZ, THE BEST DEFENSE at xiv (1982).
91. *Id.* at 43.