REDEFINING DISREPUTE: ACKNOWLEDGING SOCIAL INJUSTICE AND JUDICIAL SUBJECTIVITY IN THE CRITICAL REFORM OF SECTION 24(2) OF THE CHARTER

by

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ABSTRACT

On April 17, 1982, the *Canadian Charter of Rights and Freedoms* was proclaimed into force. By including a set of constitutionally entrenched core legal rights (i.e. ss. 8, 9, and 10(b), and a remedial mechanism designed to enforce those rights (i.e. s. 24(2)), the *Charter* had the potential to alter certain repressive elements of the criminal justice system that had endured in Canada for over a century. Despite this potential, both the core legal rights and s. 24(2) were drafted using vague terminology. As a result, the *Charter's* ability to succeed where previous attempts at instituting effective due process protections for Canadians had failed would depend largely on the judiciary's ability to satisfactorily craft such protections out of imprecise statutory language.

This thesis will argue that the Supreme Court of Canada has created a test for the exclusion of unconstitutionally obtained evidence under s. 24(2) that fails to adequately protect the core legal rights of the socially, racially and economically marginalized individuals to whom the Canadian criminal justice system is disproportionately applied. In advancing this argument, the relevant jurisprudence and academic literature will be analyzed according to a methodology inspired by the Critical Legal Studies movement. The issue of exclusion will be examined in its social context, primarily by analyzing the current system of Canadian criminal justice and acknowledging its over-application to the socially disenfranchised. It will be argued that the Supreme Court's test for exclusion has developed as it has because of the judiciary's subconscious tendency to interpret unclear constitutional provisions in keeping with the dominant conservative ideology, a method that favours maintaining the social status quo.

The purpose of this thesis is to set out a framework for a reform of the *Charter's* exclusionary mechanism. This new approach will attempt to situate social context at the forefront of the s. 24(2) decision-making process. It will be argued that the concept of "disrepute" within s. 24(2) must be redefined so that it captures investigatory practices made possible by unjust social, racial and economic divisions that render certain groups powerless, and thus more vulnerable to police surveillance.

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1. Introduction

It is a summer day in Likely, a small town with approximately 300 residents, located in British Columbia's bucolic Cariboo region. One of those 300 residents, 85-year old Frank Boyle, lies dead in his home, brutally bludgeoned to death by an intruder.[1] He has been struck in the head five successive times with an iron bar.[2] Each blow was of sufficient magnitude to cause his death.[3] The assault has left Boyle's blood spattered over much of the interior of his home. Blood drips from the walls, from the furniture. Beer, cigarettes and a small amount of cash are missing from the residence.[4] The deceased's red Datsun pick-up truck is also gone.[5] Based on information from several civilian bystanders, the police venture out into the small, now shattered community to begin their investigation.[6] The hunt for a murderer is on.

The red Datsun rests in a ditch a short distance from Boyle's home, crashed and deserted.[7] A witness informs police that she observed the truck in the ditch at 6:45 am that morning, and that she also saw an individual walking away from the accident scene around the same time. She identifies that person as Michael Feeney.[8] Another witness provides police with information on how to locate Feeney. That witness rents property to Feeney's sister and her common law spouse, and he knows that Feeney resides in a trailer located on that property.[9] The R.C.M.P. attend the rental property and once there, they interview the common law spouse. He informs them that Feeney returned from a night of drinking at 7:00 am that morning, and that he is currently asleep inside his trailer.[10] Armed with this information, the police approach the windowless trailer in which Feeney is sleeping, knock on the front door, and verbally identify themselves as police.[11] They are met with silence. The lead officer draws his gun and enters the residence.[12] Once inside, the police proceed toward Feeney's bed and observe him to be indeed asleep. The lead officer shakes Feeney's leg to awaken him, and then informs him that he wants

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[1] *R. v. Feeney*, [1997] 2 S.C.R. 13 at para. 6, 146 D.L.R. (4th) 609 [*Feeney* cited to S.C.R.].
[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.* at para. 11.
[5] *Ibid.* at para. 7.
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid.* at para. 8.
[11] *Ibid.* at para. 9.
[12] *Ibid.*

to ask him some questions. Feeney is asked to move into the light.[13] When he obliges, the officer notices that his clothes are covered in blood.[14]

The hunt has been a short one. Feeney is arrested and informed of his *Charter* right to contact legal counsel. When the officers ask him whether he understands his rights he retorts, "Of course, do you think I'm illiterate?"[15] He is then transported to the police detachment in nearby Williams Lake, where he makes several unsuccessful attempts to contact his lawyer.[16] Feeney is interviewed by police, and eventually admits to having attacked Boyle, having taken beer, cigarettes and cash from his home, and having stolen his red Datsun pick-up truck.[17] The police obtain a search warrant for Feeney's trailer, where the cigarettes and cash from Boyle's home are later found and seized.[18] Feeney is charged with murder in connection with the killing of Frank Boyle.[19]

Ten years later, on fall day in Toronto, Ontario, two plainclothes police officers are patrolling a notoriously crime-prone neighbourhood in an unmarked police vehicle.[20] As the officers drive past a high school, they notice a young black male, F., leaning against the railing of a path leading toward the school. As the police continue through the area in their car, they notice F glance in the direction of a second black youth, L.B., who is seated on school property and a distance away from F. The two males are separated by a flight of stairs and a fence.[21] The officers turn their vehicle around in order to begin surveillance on the two youths. They notice F cast a number of looks in the general direction of L.B., and observe that the two youths appear to be speaking to one another.[22] The fact that the two young men are positioned in such a manner produces an "uneasy feeling" in the officers.[23] As a result, they decide to speak to the youths in order to determine whether they are engaged in illegal activities. To facilitate this communication, the officers drive their vehicle across several lanes of traffic and park directly in front of F. The police cruiser now rests in the northbound lane, positioned opposite to the natural flow of traffic.[24]

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[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.* at para. 10.
[17] *Ibid.* at para. 11.
[18] *Ibid.*
[19] *Ibid.* at para. 12.
[20] *R. v. L.B.*, 2007 ONCA 596, 86 O.R. (3d) 730 at para. 11 [*L.B.*].
[21] *Ibid.*
[22] *Ibid.* at para. 12.
[23] *Ibid.* at para. 13.
[24] *Ibid.* at para. 14.

The police officers exit their vehicle, verbally identify themselves to F as Toronto police, and display their badges and warrant cards.[25] The officers then observe L.B., who appears to be carrying a black bag in his right hand, rise from his seated position, walk down the flight of stairs and proceed along the sidewalk toward their position.[26] There is nothing threatening about the manner in which L.B. performs these actions. He appears calm, dutifully approaching men in plainclothes who claim to be police. Once he has reached their location, one of the officers engages L.B. in casual conversation. The other officer proceeds to speak with F.[27] L.B. is questioned about his reasons for being at the school. He informs the first officer that he is a new student there, and that he is not currently in class because he has a free period.[28] When the officer asks for L.B.'s name and date of birth, the young man complies.[29]

Both officers know that at this time, they have no legal right to detain either L.B. or F.[30] Nevertheless, the officers use the police computer to inquire into the statuses of the two young men. While doing so, one officer notices that L.B. is no longer carrying the black bag he appeared to have had in his hand while he was seated at the top of the stairs. The officer proceeds to that area, eventually locates the bag and questions the two youths as to whom it belongs. F does not respond and L.B. suggests that it does not belong to him.[31] The officer therefore treats the bag as "abandoned", opens it and discovers schoolwork bearing L.B.'s name and a loaded .22 caliber handgun.[32] Through a series of shouts, the officer verbally alerts his partner about the presence of a gun on the scene. L.B. and F. are arrested at gunpoint.[33] L.B. is later charged with possession of a loaded, restricted firearm as well as seven other firearms-related offences.[34]

These two scenarios are each troubling, but in contrary ways. In the first case, a vulnerable member of a small community is senselessly and brutally murdered in his own home. The immense tragedy of this situation appears to be somewhat abated as the police quickly identify and apprehend a suspect, from whom they eventually obtain a full confession. Conversely, the second situation involves two young black males who attend high school in a low-income neighbourhood in Toronto. For engaging in the seemingly innocuous act of sitting

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[25] *Ibid.* at para. 15.
[26] *Ibid.* at para. 16.
[27] *Ibid.* at para. 18.
[28] *Ibid.* at para. 19.
[29] *Ibid.* at para. 20.
[30] *Ibid.* at para. 21.
[31] *Ibid.* at paras. 24-25.
[32] *Ibid.* at para. 25.
[33] *Ibid.*
[34] *Ibid.* at para. 1.

down near a high school, the youths are placed under surveillance and are eventually questioned by police. This "selectively proactive"[35] policing cannot be justified by the fact that it eventually led to the discovery of a loaded, illegal firearm.

Although the situations are distinguishable on their facts, they also bear an important similarity. Each case highlights the tension between society's interest in safeguarding individual due process protections and its interest in facilitating the efficient prosecution of criminal suspects through the promotion of effective investigatory techniques for police. Both scenarios require an assessment of the propriety of police investigatory procedures in light of the due process rights provided to Feeney and L.B. by the *Canadian Charter of Rights and Freedoms*.[36] The difficulty that courts have in making these assessments is effectively illustrated by the eventual outcomes of *Feeney* and *L.B.* Michael Feeney was initially tried and convicted of second-degree murder for his role in the killing of Frank Boyle.[37] Although his conviction withstood an appeal to the British Columbia Court of Appeal,[38] the majority of the Supreme Court of Canada ultimately decided that the police obtained vital pieces of evidence in a manner that violated the accused's rights under ss. 8 and 10(b), and that admission of that evidence at trial would bring the administration of justice into disrepute.[39] The majority therefore set aside Feeney's conviction, and ordered a new trial.[40] At his second trial two years later, Feeney was convicted of second-degree murder, a charge the Crown was able to substantiate without the illegally obtained evidence that had been successfully impugned at the first trial.[41]

L.B.'s case was resolved in an entirely different manner. At first instance, the trial judge found violations of L.B.'s rights under ss. 9 and 10(b) and excluded the .22 caliber handgun from the proceedings, which resulted in L.B. being acquitted.[42] However, the Ontario Court of Appeal disagreed with the trial judge's decision, finding instead that the police did not detain L.B., and that it was therefore not necessary for them to provide the youth with a reasonable opportunity to retain and instruct counsel.[43] There were thus no *Charter* violations, and the trial judge was therefore wrong to exclude any of the evidence secured against L.B. from his criminal trial.

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[35] *Ibid.* at paras. 58-59. Despite acknowledging that racial profiling or harassment on the part of police could be relevant to the issue of psychological detention in relation to s. 9, the Ontario Court of Appeal opted to leave this issue unresolved in L.B. as the defence did not raise allegations of improper police conduct.
[36] Part I of *The Constitution Act, 1982*, being Schedule B to *The Canada Act 1982 (U.K.)*, 1982, c. 11 [*Charter*].
[37] *Feeney*, *supra* note 1, at para. 12.
[38] *Ibid.* at para. 12.
[39] *Ibid.* at para. 5.
[40] *Ibid.* at para. 85.
[41] See *R. v. Feeney*, 2001 BCCA 113, 152 C.C.C. (3d) 390.
[42] *L.B.*, *supra* note 20, at para. 1-2.
[43] *Ibid.* at para. 72.

Despite finding that the police investigation of L.B. had not infringed the *Charter*, the Court of Appeal further held that even if the officers had violated L.B.'s *Charter* rights, those violations would not have been of sufficient severity to exclude the evidence under s. 24(2). That decision has since been appealed to the Supreme Court of Canada. However, as it stands today, L.B. – guilty of nothing more than conversing with a friend at the time the police happened upon him – was to face the entirety of the evidence produced by the police investigation. On the other hand, Feeney – whom several witnesses had linked to a brutal murder – would not.

One could be forgiven for expecting the court in *Feeney* to have reached the conclusion arrived at by the court in *L.B.*, and *vice versa*. At first glance, it would appear that there is a better argument for admitting the statements, the bloody shirt, the cigarettes and the cash in *Feeney* than there is for admitting the handgun in *L.B.* In the former case, the police merely approached and questioned an individual who had been specifically identified as a suspect in a vicious murder. They did so in what appeared to be a relatively innocuous manner, knocking on Feeney's front door, announcing themselves before entering. In the latter case, the police appear to have approached and questioned an individual based solely on his physical appearance and his geographical location. They appear to have unreasonably taken evasive action, racing an unmarked police across several lanes of traffic to confront a young man who was seated on a bench, not engaged in doing anything in particular. When these outcomes are compared on a basic level, their disparate results appear to be utterly irreconcilable. The disparity of treatment only grows starker with further examination. For instance, the courts found the police action in *Feeney* to have been malicious in nature, while the police in *L.B.* were deemed to have acted in good faith. Certainly then, the jurisprudence driving these two decisions bears further analysis.

At a fundamental level, the decisions in *Feeney* and *L.B.* are expressive of the overarching difficulties that the courts have had – and continue to have – in interpreting the scope of individual rights protections when they come into direct conflict with the criminal justice system's ability to successfully prosecute criminals. Which aim is to prevail? Should the courts ensure that individual rights are paramount in all borderline cases? Or should they ensure that overly expansive due process protections do not unduly curtail police investigations and the subsequent trial and punishment of criminal offenders? Can due process protections ever be satisfactorily reconciled with effective crime control measures? Questions such as these have persisted for more than 25 years. As *Feeney* and *L.B.* demonstrate, the courts have yet to provide any conclusive answers.

The judiciary's various attempts at reconciling these competing values do not represent the only sources from which opinions on the topic are generated. The media and the general public also frequently weigh in on the subject, particularly when individual rights are perceived to be conflicting with society ability to bring criminals to "justice". Neither the decision in *Feeney* nor the ruling in *L.B.* was particularly well received, although for very different reasons. *Feeney* was rejected for allowing what was seen as a "technical" rights violation to frustrate the Crown's ability to efficiently punish a murderer.[44] The *L.B.* ruling was impugned – albeit to a lesser extent – for seemingly ignoring a *Charter* violation simply because of the form of evidence that violation produced.[45] As such, these decisions force the public to face hard questions as well. Should they forego their protection from undue interference by the state in order to ensure criminals are not shielded from punishment? Who do they need more protection from, criminals or government agents? When considered together, then, the decisions in *Feeney* and *L.B.* serve as a microcosmic example of a much larger issue. Each case forces the courts and the public to confront the inherent conflict between two distinct, but undeniably interrelated concepts. What has become clear is that this conflict has the potential to erode both public and judicial respect for individual rights in Canada.

The debate set out in *Feeney* and *L.B.* has been at the centre of Canadian criminal law since the *Charter* was proclaimed into force on April 17, 1982. On that date, the rights and freedoms contained within the document became an integral part of Canada's supreme law,[46] and thus the criminal trial process as well. Since its promulgation, Canada's entrenched bill of rights has generated an immense body of case law, commentary and criticism that is perhaps most pronounced and most controversial in relation to criminal law and the prosecution process. The commentary and criticism in this regard pertains almost entirely to the core legal rights,[47] which represent the heart of the due process protections available in Canada. The *Charter* now plays a role in virtually every criminal trial in Canada, mostly insofar as the core legal rights serve to

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[44] For the media response to *Feeney*, see e.g. Joey Thompson, "Charter for wrongdoers" *The Vancouver Province* (4 July 1997) A14; Rory Leishman, "Feeney judgment needs explanation" *The Montreal Gazette* (3 September 1998) B3; and Jeffrey White, "Getting away with murder: Wrongful releases can be far more harmful than wrongful convictions" *The National Post* (12 November 1999) A14.

[45] For the media response to *L.B.*, see e.g. Tracey Tyler, "Public safety trumps Charter rights" *The Toronto Star* (6 September 2007) A1; and Tracey Tyler, "Will rights be ignored in gun crimes?" *The Toronto Star* (7 September 2007) A19.

[46] See Part VII of *The Constitution Act, 1982*, being Schedule B to *The Canada Act 1982 (U.K.)*, 1982, c. 11 at s. 52 [*Constitution Act, 1982*].

[47] For the purposes of this paper, the term "core legal rights" should be taken to refer to ss. 8, 9, and 10(b) of the *Charter*. See Daniel C. Santoro, "The Unprincipled Use of Originalism and Section 24(2) of the Charter" (2007) 45 Alta. L. Rev. 1 at para. 7 [Santoro].

constrain police procedure in the investigation and arrest of criminal suspects. Although the majority of Canadians value these important personal protections, the respect for individual due process rights is significantly complicated – and often radically diminished – when it is applied to people involved in criminal activity. In this context, popular support for the sanctity of individual rights has a tendency to ebb in deference to the criminal justice system's goal of successfully prosecuting criminals in the name of ensuring community safety.

The clash between individual rights protection and the preservation of effective police investigations reaches its climax in s. 24(2) of the *Charter*.[48] This section vests a court with the power to exclude evidence – regardless of its reliability and probative value – from the criminal trial process if the court is satisfied that the admission of that evidence could cause the administration of justice to be brought into disrepute. It is at the point that such a ruling is made that crime control and due process come into direct contact. The acrimonious relationship between these two concepts has ensured that the *Charter's* exclusionary mechanism has had a turbulent history. As LeBel J. noted in a recent judgment involving s. 24(2):

> [i]t is likely that few Charter provisions have generated so much academic comment, conflicting jurisprudential developments, media rhetoric or just plain uneasiness as s. 24(2). Since the Charter came into force, our Court has returned on many occasions to the interpretation and application of this provision. It has developed and refined methods of analysis and application. Despite all these efforts, doubts and misunderstandings remain.[49]

Although LeBel J. did not specifically identify the root source of the controversy surrounding s. 24(2), it is most likely because the section represents the point at which the abstract ideas contained within the *Charter's* core legal rights take on a directly recognizable impact in society.

When the abstraction of due process becomes the reality of exclusion, the concept of core legal rights becomes vulnerable to attack. Virtually everyone agrees that the police should not be permitted to forcibly gain entry into a private home simply because they want to ensure that no criminal activity is taking place in side. However, there is substantially less agreement regarding whether the evidence gathered as a result of such an illegal intrusion should be used against that home's occupant, especially when that evidence conclusively indicates that he or she is involved in the commission of a criminal offence. Although the rights are acceptable in theory, their practical impact often generates dissent. Frustration mounts when the factually guilty are perceived as being allowed to escape punishment if crucial evidence must be excluded from their trials because the police failed to abide by one of the core legal rights, which by this point in the

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[48] *Charter*, *supra* note 36, at s. 24(2).
[49] *R. v. Orbanski; R. v. Elias*, 2005 SCC 37, [2005] 2 S.C.R. 3 at para. 87 [*Orbanski*].

process are typically characterized as investigatory niceties established by the *Charter* to hinder the police and help criminals. As this controversy suggests, the practical impact of the *Charter's* core legal rights is inextricably linked to judicial interpretation and application of s. 24(2). It is equally as clear that the Supreme Court has thus far been unable to arrive at an interpretation of the section capable of ending the controversy that has surrounded the exclusionary mechanism for the past quarter century.

1.1. Academic justification and methodology

As LeBel J.'s remarks suggest, the Supreme Court of Canada's treatment of s. 24(2) has generated considerable academic commentary and criticism. Most of this criticism – which tends to centre on the Supreme Court's leading rulings on exclusion – has been decidedly negative, and became even more so in the wake of the Court's decision in *R. v. Stillman*.[50] However, prior to the Court's issuance of the first of its landmark pronouncements on the section, the relevant academic writing was essentially limited to introducing the concept of excluding unconstitutionally obtained evidence, providing detailed explanations of each constituent part of s. 24(2), and offering general prognostications as to how the Supreme Court might eventually interpret those parts.[51] Though the volume of this essentially descriptive commentary seems relatively minimal when it is compared to what came later, it has nevertheless had a far-reaching impact on the overall debate, and is often still cited as authoritative on certain points more than two decades after it was first composed.[52]

After the Supreme Court weighed in on the s. 24(2) debate in the mid-1980s,[53] the related commentary acquired a deeply prescriptive tone. Once the section had been interpreted by the nation's highest court, it did not take long for critiques of that interpretation to be launched from a multitude of sources possessing different philosophical and political points of view. Over the

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[50] [1997] 1 S.C.R. 607, 144 D.L.R. (4th) 193 [*Stillman* cited to S.C.R.].

[51] See e.g. A.A. McLellan & B.P. Elman, "The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24" (1983) 24 Alta. L. Rev. 205 [McLellan & Elman]; Dale Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms (Section 24)" in Walter S. Tarnopolsky & Gérald-A. Beaudoin, eds., *Canadian Charter of Rights and Freedoms* (Toronto: The Carswell Company Limited, 1982) 489; and Yves-Marie Morissette, "The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What to Do and What Not to Do" (1984) 29 McGill L.J. 521 [Morissette].

[52] See e.g. *R. v. Collins*, [1987] 1 S.C.R. 265, 38 D.L.R. (4th) 508 at para. 33 [*Collins* cited to S.C.R.] (Lamer J. referring to Morissette in employing the reasonable person test as the method for determine disrepute); and Don Stuart, *Charter Justice in Canadian Criminal Law*, 3d ed. (Scarborough, Ont.: Thomson Canada Limited, 2001) at 454, n. 7 [Stuart, *Charter Justice*] (relying on "heavily" on McLellan & Elman in setting out the legislative history of s. 24).

[53] The Supreme Court did not explicitly rule on s. 24(2) until 1985. Up to that point, the judicial debate concerning the section had taken place primarily amongst the Courts of Appeal of Ontario and British Columbia. See Stuart, *Charter Justice*, *supra* note 52, at 476-480.

next quarter century, the Supreme Court's development of Canada's exclusionary rule was to be subject to frequent academic attacks, many of which are founded on notions of the criminal justice system that adhere closely to the crime control model as set out by Herbert L. Packer.[54] According to Packer, the crime control model is characterized by:

> [t]he proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process. The failure of law enforcement to bring criminal conduct under tight control is viewed as leading to the breakdown of public order and thence to the disappearance of an important condition of human freedom. If the laws go unenforced, which is to say, if it is perceived that there is a high percentage of failure to apprehend and convict in the criminal process, a general disregard for legal controls tends to develop. The law-abiding citizen then becomes the victim of all sorts of unjustifiable invasions of his interests. His security of person and property is sharply diminished and, therefore, so is his liberty to function as a member of society. [55]

In order to ensure that the laws are enforced to the maximum extent possible, the crime control model focuses heavily on increasing the system's ability to efficiently determine guilt and apply punishment.[56] For the purposes of this thesis, s. 24(2) scholarship that bears the hallmarks of the crime control model will be described as crime control or conservative critiques of the Supreme Court of Canada jurisprudence pertaining to exclusion. The word "conservative" is used in this context not in its traditional political sense, but rather to denote a body of thought that exhibits a general resistance to change or innovation, particularly with regard to those alterations that would affect existing social structures and dynamics.

Despite their prevalence, the conservative/crime control commentaries by no means enjoy a monopoly on expressing displeasure with the interpretation and application of s. 24(2). Those who favour more broadly based individual rights protections have also extensively criticized the Supreme Court's handling of the *Charter's* exclusionary mechanism. These accounts are founded to varying degrees on Packer's due process model of criminal justice, which stresses the form of prosecutions to a far greater degree than does the crime control model. In this regard, the due process model is fundamentally concerned with ensuring "[f]ormal, adjudicative, adversary factfinding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him."[57] As a result of this concern, the due process model places far less importance on the goal of efficiency:

> [b]ecause of its potency in subjecting the individual to the coercive power of the state, the criminal process must ... be subjected to controls and safeguards that prevent it from operating with

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[54] Herbert L. Packer, "Two Models of the Criminal Process" (1964) 113 U. Pa. L. Rev. Vol. 1 [Packer].
[55] *Ibid.* at 9-10.
[56] *Ibid.* at 10.
[57] *Ibid.* at 14.

> maximal efficiency. According to this ideology, maximal efficiency means maximal tyranny. And, while no one would assert that minimal efficiency means minimal tyranny, the proponents of the Due Process Model would accept with considerable equanimity a substantial diminution in the efficiency with which the criminal process operates in the interest of preventing official oppression of the individual.[58]

When s. 24(2) commentaries appear driven by the fundamental aspects of the due process model, they will be referred to in this paper as due process, liberal or liberal-minded approaches to the issue of exclusion. The term "liberal" is not intended to refer to any particular form of political policy, but rather as more of a counterpoint to the conservative approaches that register a clear resistance to systemic change. While the more liberal approaches to exclusion do not explicitly advocate for any major changes to the social order, they do recognize the power imbalances that exist between the individual and the state, and that these imbalances are more extreme with regard to marginalized social groups. They are thus more open to jurisprudential shifts that may effect broader social situations.

Taken together, the vast array of s. 24(2) commentaries – conservative and liberal-minded critiques alike – can essentially be categorized into two primary classes. First, there are those who posit that the Supreme Court has interpreted s. 24(2) in a manner that unjustifiably results in the over-exclusion of tangible evidence of guilt.[59] Second, there are those who view the Court's s. 24(2) case law as improperly limiting the range of rights violations to which exclusion will apply.[60] Far fewer in number are the articles that fall outside these groups, such as those that

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[58] *Ibid.* at 16.

[59] See e.g. Carol A. Brewer, "*Stillman* and Section 24(2): Much To-Do about Nothing" (1997) 2 Can. Crim. L.R. 239 [Brewer]; Richard C. Fraser & Jennifer A.I. Addison, "What's Truth Got to Do with It? The Supreme Court of Canada and Section 24(2)" (2004) 29 Queen's L.J. 823 [Fraser & Addison]; David M. Paciocco, "The Judicial Repeal of Section 24(2) and the Development of the Canadian Exclusionary Rule" (1989-90) 32 Crim. L.Q. 326 [Paciocco, "Judicial Repeal"]; David M. Paciocco, "*Stillman*, Disproportion and the Fair Trial Dichotomy under Section 24(2)" (1997) 2 Can. Crim. L.R. 163 [Paciocco, "Disproportion"]; David M. Paciocco, *Getting Away With Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 1999) [Paciocco, *Murder*]; Julianne Parfett, "A Triumph of Liberalism: The Supreme Court of Canada and the Exclusion of Evidence" (2002) 40 Alta. L. Rev. 299 [Parfett]; Steven Penney, "Unreal Distinctions: The Exclusion of Unfairly Obtained Evidence Under S. 24(2) of the *Charter*" (1994) 32 Alta. L. Rev. 782 [Penney, "Unreal"]; Steven Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the Charter" (2003) 49 McGill L.J. 105 [Penney, "Deterrence"]; and J.A.E. Pottow, "Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24, Part II – Section 24(2) in Crisis" (2000) 44 Crim. L.Q. 34 [Pottow].

[60] See e.g. Stephen G. Coughlan, "Good Faith and Exclusion of Evidence Under the Charter" (1992) 11 C.R. (4th) 304 [Coughlan]; Michael Davies, "Alternative Approaches to the Exclusion of Evidence Under s. 24(2) of the Charter" (2002) 46 Crim. L.Q. 21 [Davies]; R.J. Delisle, "Collins: An Unjustified Distinction" (1987) 56 C.R. (3d) 216 [Delisle, "Unjustified"]; R.J. Delisle, "The Exclusion of Evidence Obtained Contrary to the Charter: Where Are We Now?" (1988) 67 C.R. (3d) 288 at 292 [Delisle, "Exclusion"]; Bruce E. Elman, "Collins v. The Queen: Further Jurisprudence on Section 24(2) of the Charter" (1987) 25 Alta L. Rev. 477 [Elman]; Grace Hession, "Is 'Real Evidence' Still a Factor in the Assessment of Trial Fairness under Section 24(2)?" (1999) 41 Crim L.Q. 93; Richard Mahoney, "Problems with the Current Approach to s. 24(2) of the Charter: An Inevitable Discovery" (1999) 42 Crim. L.Q. 443 [Mahoney]; Don Stuart, "Burlingham and Silveira: New Charter Standards to Control Police Manipulation and Exclusion of Evidence" (1995), 38 C.R. (4th) 386 [Stuart, "Police Manipulation"]; Don Stuart,

either tentatively support the current s. 24(2) jurisprudence, or at least attempt to defend it from continued attack.[61] An even more limited number of commentators somewhat straddle both primary groups, attacking the Supreme Court's failure to abide by the intent and language of s. 24(2) on the one hand, while also impugning its unjustifiable, pro-inclusion bifurcation of *Charter* rights on the other.[62]

When considered as a whole, the body of legal writing devoted to the rigorous analysis of s. 24(2) is an undeniably large. This scholarship has been highly influential in the evolution of Canada's exclusionary mechanism. Indeed, early academic contributions as to how the section ought to be interpreted played a direct role in the Supreme Court's majority decision in *Collins*.[63] Similarly, critiques of the Court's subsequent s. 24(2) jurisprudence greatly influenced landmark decisions such as *R. v. Burlingham*,[64] and *Stillman*.[65] The relevant academic contributions have thus served as valuable resources that have been relied upon by the Court when it has attempted to clarify and strengthen its approach to the exclusion of unconstitutionally obtained evidence. The various commentaries have also successfully highlighted several internal inconsistencies in some of the more influential s. 24(2) decisions, and they have carefully documented and analyzed the numerous developments that have occurred in the Supreme Court's interpretation and application of the section.[66] These historical facts are testaments to the indispensable role that the existing s. 24(2) scholarship has played in the Court's development of the *Charter's* exclusionary rule.

The successes achieved by the academic criticisms pertaining to exclusion do not, however, mean that there is not still more that can be accomplished in this area. As the general categories of s. 24(2) scholarship suggest, the overall body of work is characterized by a seemingly broad plurality of philosophical vantage points. Despite this impression, the

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"Questioning the Discoverability Doctrine in Section 24(2) Rulings" (1996), 48 C.R. (4th) 351 [Stuart, "Questioning"]; Don Stuart, "Eight Plus Twenty Four Two Equals Zero" (1998) 13 C.R. (5th) 50 [Stuart, "Eight"]; and Stuart, *Charter Justice*, *supra* note 52.

[61] See e.g. Kent Roach, "Constitutionalizing Disrepute: Exclusion of Evidence After *Therens*" (1986) 44 U.T. Fac. L. Rev. 209; Kent Roach, "The Evolving Fair Trial Test Under Section 24(2) of the Charter" (1996) 1 Can. Crim. L. Rev. 117 at 134 [Roach, "Evolving"]; and Santoro, *supra* note 47.

[62] See e.g. Adam Parachin, "Compromising on the Compromise: The Supreme Court and Section 24(2) of the Charter" (2000) 10 Windsor Rev. Legal Soc. Issues 7 [Parachin].

[63] See *Collins*, *supra* note 52, at para. 33 (citing Morissette, *supra* note 51).

[64] [1995] 2 S.C.R. 206, 124 D.L.R. (4th) 7 at 139 (Sopinka J. citing Paciocco, "Judicial Repeal", *supra* note 59; Morissette, *supra* note 51; Delisle, "Unjustified", *supra* note 60; and Penney, "Unreal", *supra* note 59).

[65] See *Stillman*, supra note 50, at para. 191 (L'Heureux-Dube J. citing Stuart, "Police Manipulation" *supra* note 60, and Stuart, "Questioning", *supra* note 60); at para. 239 (McLachlin J. citing Paciocco, "Judicial Repeal", *supra* note 59).

[66] See e.g. Mahoney, *supra* note 60; Stuart, "Eight", *supra* note 60; and Brewer, *supra* note 59.

methodological approach taken to the study of s. 24(2) thus far does not exhibit a noticeable degree of diversity. As Steven Penney has argued, the entire body of s. 24(2) criticism:

> [h]as been largely void of theory. Commentators have pointed out ambiguities and contradictions in the doctrine and have argued that exclusion should be less or more frequent on the basis of general preferences for truth seeking or rights protection in the criminal justice process. They have also canvassed the various rationales for exclusion and pointed out aspects of the Court's jurisprudence that are consistent or inconsistent with those rationales. But few have attempted to prescribe an exclusionary regime that is tied to and justified by a single, coherent exclusionary theory.[67]

Indeed, the majority of the scholarship devoted to s. 24(2) has been limited by a focus on parsing the details of the Supreme Court's multitudinous rulings on the subject, ascertaining and impugning the various flaws and contradictions in that jurisprudence, and then advocating for a narrowing or broadening of the exclusionary ambit, depending upon whether the author subscribes to the crime control model or the due process model of criminal justice.

Authors such as Penney analyze the Supreme Court's development of the *Charter's* exclusionary mechanism from a more theoretical standpoint. But they do so on a relatively narrow plain. The theoretical bases employed to analyze the subject are essentially limited to three oft-cited rationales for the exclusion of unconstitutionally obtained evidence that is otherwise reliable and probative: (i) the remedial imperative; (ii) the deterrence rationale; and (iii) the imperative of judicial integrity.[68] In the regular course of such analyses, one or another of these rationales is selected, while the others are refuted, usually through appeal to the supposed intentions underlying the language of s. 24(2), by reference to the admittedly limited empirical studies undertaken on the effects of excluding evidence for constitutional violations, or through some combination of both methods. There is inevitably one rationale left standing, and it is first used to refute the current exclusionary rule jurisprudence, and to then chart a new path for the interpretation and application of s. 24(2), one that is more logically and practically appealing to the author by whom it is advanced. If adopted by the Court, the suggested route of reform is then promised to more appropriately respect the spirit and intent of the section, and to be more logically defensible against critical attack.

Despite earnest efforts at moving the s. 24(2) scholarship from the criticism of various aspects of the undeniably complex Supreme Court jurisprudence and on to suggestions for wholesale reform, these more theoretical approaches remain somewhat limited by their adherence to the dominant discursive ideology. More specifically, mainstream s. 24(2) thought

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[67] Penney, "Deterrance", *supra* note 59, at 108.
[68] Paciocco, "Judicial Repeal", *supra* note 59, at 330-333.

appears to suggest that the "right" answer to the dilemma of exclusion can be found by engaging in a limited analysis, focusing primarily on the text of the *Charter*. Robert Unger has argued that this "formalist" approach to legal thought relies in part on:

> [a] commitment to, and therefore also a belief in the possibility of, a method of legal justification that contrasts with open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical or visionary. Such conflicts fall far short of the closely guarded canon of inference and argument that the formalist claims for legal analysis. This formalism holds impersonal purposes, policies, and principles to be indispensable components of legal reasoning.[69]

By this definition, all forms of s. 24(2) scholarship – the theory-based assessments included – are to a degree constrained by formalism. They employ a narrow, purportedly value-neutral range of theories in order to assess the various intricacies established in individual s. 24(2) determinations. However, they do not go as far as assessing the underlying rationale behind the judicial decision-making processes that produce each individual ruling. Further, they judge the Supreme Court's mediation of the conflict between the protection of individual rights and the maintenance of effective crime control mechanisms without also judging the socio-legal environment in which that conflict exists. As a result, the exclusion of evidence under s. 24(2) is commonly analyzed in the absence of its social and adjudicative contexts, as though it exists within a textbook, utopian version of criminal justice.

This limited scope helps to explain why commentators with purportedly disparate philosophical outlooks consistently reach similar conclusions in their analysis of s. 24(2). The academic condemnation of the Supreme Court of Canada's leading rulings on exclusion is near universal. Although the reasoning process employed in crime control and due process critiques often differs, they navigate essentially the same path through the relevant jurisprudence, and then either impugn the Court's creation of an anti-inclusionary rule for some forms of evidence, or its creation of an anti-exclusionary rule for other forms of evidence. Such criticisms implicitly suggest that the context in which these decisions are rendered is fundamentally acceptable, and that it is simply in the interpretation of a particular word or phrase that the real problems exist. Although the deeper issues are clearly visible below the surface, they do not drive the analysis.

In this way, the two seemingly divergent branches of academic scholarship can be viewed as essentially agreeing with one another regarding the fundamental issues at play in the process of exclusion. This phenomenon is certainly not unique to the legal thought related to s. 24(2). As Alan Hutchinson has observed:

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[69] Roberto M. Unger, *The Critical Legal Studies Movement* (Cambridge: Harvard University Press, 1986) at 1 [Unger, *CLS*].

> [m]odern jurisprudence is an intellectual battleground in which internecine struggle is commonplace and seems to represent its natural condition. Vast intellectual energies are spent in hair-splitting exercises, and minor disagreements are allowed (or encouraged) to mushroom into full-blown intellectual wars. But the divergence of opinion is more apparent than real. Behind the theoretical clamor and personal antagonism is a not-so-surprising homogeneity of philosophical interest and political affiliation.[70]

The s. 24(2) scholarship, then, favours recommendations for the making of minor changes to the case law, or the reversal of particularly "unfavorable" decisions rather than calling for a radical overhaul of the interpretive approach to the section. As Hutchinson further argues, this result is to be expected when it is acknowledged that at the root of all mainstream legal debates, "[t]here exists a tacitly shared agenda of issues to be confronted, and their attempted resolution proceeds on the basis of joint assumptions about the availability and acceptability of certain methods or answers."[71]

None of this is to say that this body of criticism has been of no – or only a very limited – utility. As has been indicated, the intensive scrutiny to which s. 24(2) has been subjected has significantly impacted the development of Canada's exclusionary rule. What is missing from this scholarship, however, is a critical analysis of the societal superstructures into which the *Charter* and s. 24(2) have been inserted. Without injecting this additional layer of analysis, s. 24(2) scholarship cannot progress beyond what it has already accomplished, and will necessarily devolve into nothing more than idle repetition of what has come before. Worse still, by ignoring the social context in which s. 24(2) operates, the related scholarship could begin to obscure the social elements of the judicial decision-making process that has driven the development of the section up to this point. As Duncan Kennedy has observed, legal thought's dismissal of larger, society-wide issues allows for the scholarly work pertaining to a particular point to assist in the maintenance of the legal status quo. By excluding analysis of the overarching social structures, legal thought comes to suggest that all that is needed to remedy complex problems are the "[m]inor adjustments of a legal regime that is basically sound, and needs only a little tinkering to make it perfect."[72]

One reason the s. 24(2) commentary has advocated only minor, legalistic changes, is because it has largely employed what Kennedy refers to as "the natural law approach" to legal analysis. This process involves analyzing the results of past cases for their relative correctness or

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[70] Alan C. Hutchinson, "Introduction" in Alan C. Hutchinson, ed. *Critical Legal Studies* (Totowa, New Jersey: Rowman & Littlefield Publishers Inc., 1989) 1 at 2 [Hutchinson, "Introduction"].
[71] *Ibid.*
[72] Duncan Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buff. L. Rev. 205 at 212 [Kennedy, "Blackstone"].

incorrectness, and proposing and defending different results when the conclusions that were actually reached by the courts are deemed rationally unacceptable.[73] What this process generally neglects to do, however, is to look beyond the limits of the case law when engaged in the process of canvassing specific individual decisions for rationality and logical propriety. The s. 24(2) scholarship does not generally assess the Supreme Court's rulings on additional levels, for instance by reference to the prevailing social conditions in which those rulings are made, and how those conditions influence the process of judging that is taking place. As a result, the fact that police investigations are disproportionately directed at racially and economically marginalized people, for example, plays no explicit role in the s. 24(2) analysis.

This situation is problematic as this disproportionality is clearly relevant to the issue of exclusion. As the mechanism of policing is more often applied to socially disadvantaged groups, individual members of these groups are subjected to greater degrees of police surveillance than others. This in turn means that they will be investigated more often, that the police will more frequently detect their crimes, and that their *Charter* rights will be violated with greater regularity in the course of the ensuing investigations. If the police routinely stop and search individuals living in one neighborhood more often than those who live elsewhere, more of the former group's crime will be detected than the latter's. Likewise, if police disproportionately investigate racial and ethnic minorities, more of the offences committed by those groups will be uncovered. Increased investigations and arrests will also inevitably lead to increased *Charter* violations, and therefore more instances on which incriminating evidence is obtained in an unconstitutional manner. These realities mean that s. 24(2) is triggered on a more frequent basis insofar as it applies to the core legal rights of the socially marginalized.

However, this does not mean that all of the crimes committed by these over-policed groups will be detected equally. Police surveillance more efficiently deals with relatively high-visibility crimes such as drug and firearms offences. The investigation of these offences focuses on searching for tangible evidence of guilt, which makes the successful charging and prosecution of these crimes easier than it is for lower visibility offences such as sexual assault and domestic violence, which depend primarily upon the investigator's ability to secure the cooperation of witnesses. Thus, police surveillance is routinely centred on the poor and the racially marginalized, and most often detects the highly visible and easily investigable crimes committed by these individuals. This means that most *Charter* violations occur in this context, and that as

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[73] *Ibid.* at 219.

such, s. 24(2) is disproportionately applicable to these individuals and to the admission of tangible evidence of guilt. It is therefore necessary for the current interpretation and application of s. 24(2) to be analyzed with these circumstances firmly in mind. If s. 24(2) cannot give effect to the core legal rights in the context in which it most often operates, those rights unavoidably lose a large portion of their practical impact, reducing both their functionality and their overall meaning. However, notions of disproportionality have been largely absent from the critiques of Canada's exclusionary rule because incorporating such notions would require rethinking not only s. 24(2) itself, but also the legal system in which it operates. As Duncan Kennedy has stated, "[t]he people doing legal thought have always been members of a ruling class. Implicit loyalty oaths have always been a condition of admission to the inner circles of legality."[74]

In order to assess the Supreme Court's current s. 24(2) jurisprudence in a manner that differs from the existing work, it is necessary to take a more holistically critical approach. This analysis draws from approaches inspired by the Critical Legal Studies movement (CLS). Hutchinson – a noted CLS scholar – describes the movement as "[t]he most sustained and serious attempt to date by leftist lawyers to expose the political dimensions of the adjudicative and legal process."[75] The principle idea driving CLS is its acknowledgment of law's tendency to legitimize otherwise illegitimate means of social organization. Rather than approaching legal issues in a manner that serves to reinforce law's legitimizing effects, CLS scholars seek to directly confront the illegitimacy of the very institutions that mainstream legal thought strives to maintain. As Hutchinson suggests, CLS proponents view "[t]he Rule of Law [as] a mask that lends to existing social structures the appearance of legitimacy and inevitability; it transforms the contingency of social history into a fixed set of structural arrangements and ideological commitments."[76] To this end, CLS seeks to demonstrate "[t]hat the status quo and its intellectual footings, far from being built on the hard rock of historical necessity, are actually sited on the shifting sands of social contingency ...".[77] This form critical analysis is particularly relevant to the discussion of s. 24(2) as it requires more than the mere examination of particular Supreme Court rulings. It demands a confrontation with the motives that underlie those rulings – be they conscious or subconscious. It requires that the assessment of those rulings take place in their proper social-structural setting, rather than in an artificial, contextless vacuum.

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[74] *Ibid.* at 218.
[75] Hutchinson, "Introduction", *supra* note 70, at 2.
[76] *Ibid.* at 3.
[77] *Ibid.*

Although CLS was originally conceived as a radical counterpoint to mainstream legal scholarship and judicial reasoning produced in the United States, its role in expanding the interpretative and directional scope of legal thought need not be limited solely to American sources. As Hutchinson explains, CLS's "[p]olitical and legal project is firmly anchored in concrete American conditions. Its very shape and life history, short as it is, can be fully comprehended only in terms of the history and practice of the American legal, academic, and political establishments."[78] However, CLS is clearly applicable to the Canadian legal establishment as well. Indeed, many of the characteristics of the American regime on which CLS is based are arguably present to a significant extent in Canada. According to Hutchinson, CLS is conceptually linked to the United States because of that country's:

> [l]ack of any established or sizeable left tradition in popular politics; the isolation and victimization of left intellectuals in the universities; the male monopoly on legal and political power; the legacy of institutional racism; the thoroughly professional orientation of legal education; the neo-formalists' domestication of realism's radical message; and the centrality of the Supreme Court in the American constitutional scheme and national psyche.[79]

Hutchinson himself linked the CLS movement directly to the "Anglo-Canadian" experience,[80] and would in later years embark on critical analysis of the effects that formalist liberalism and the *Charter* have on Canadian society.[81] As such, despite being grounded in American values, CLS is clearly appropriate for the critical analysis of Canadian legal regimes.

While CLS clearly applies within the Canadian context and has been used to advance general theories of *Charter* adjudication, only a limited number of Canadian commentators have explicitly considered whether the CLS critique is directly applicable to the core legal rights. In one such instance, James Stribopoulos commented on the doctrine's application to the arrest process in Canada, ultimately rejecting it as being based on a "faulty foundation."[82] In this regard, Stribopoulos notes that:

> [i]t proceeds from the assumption that absent the *Charter* and the judicial law-making that it ushered in, problems relating to police accountability would have found their solutions through the democratic process. What this thesis ignores, to its peril, is that long before the *Charter* Canada had a mature democracy. Nevertheless, despite the fact that numerous government-sponsored commissions and inquiries had found serious wrongdoing on the part of various Canadian police forces, the democratic process *alone* had not yet yielded meaningful reforms.[83]

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[78] *Ibid.* at 6.
[79] *Ibid.*
[80] *Ibid.* at 10, n. 8.
[81] See Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) [Hutchinson, *Coraf*].
[82] James Stribopoulos, *A Theory of the Supreme Court of Canada, Police Powers, and the Canadian Charter of Rights and Freedoms* (J.S.D. Thesis, Columbia University School of Law, 2007) at 8 [Stribopoulos, *Theory*].
[83] *Ibid.*

Stribopoulos contends that the *Charter* was the true catalyst for the reforms that have occurred, arguing that litigation of the core legal rights helped publicize police misconduct, thereby instigating an otherwise uninterested political branch to initiate a legislative reform of the arrest process.[84] As a result, he concludes that "[a]lthough the CLS thesis does a very good job of pointing out the limitations of our judicial process, it fails to acknowledge those limitations that are also somewhat inherent in our political process."[85]

Stated simply, Stribopoulos' argument is that without the *Charter*, the frailties of Canada's arrest process would never have fully come to light and that, as such, the *Charter* itself cannot be to blame for the increased repressiveness of the Canadian criminal justice system. What he does not discuss at any length, however, is how s. 24(2) has impacted upon the practical effectiveness of the core legal rights that have been interpreted and applied by the Supreme Court. While it is undeniable that the Court has developed enhanced due process protections during the *Charter* era, and that these enhancements could not have occurred in absence of the document's proclamation, it is much less clear whether these protections serve as anything more than the means through which illegitimate arrest procedures are satisfactorily legitimized. It is not enough to posit that the *Charter* has brought changes to the criminal justice process. What must be determined is whether these changes are superficial or significant. Without an effective remedial mechanism, the Court's development of due process protections can have largely no effect on the nature of police misconduct. If admission is the result regardless of whether or not the police transgress due process rules, the *Charter's* oversight of the arrest process simply maintains the perception that Canada's supreme law regulates that process, and therefore makes it legitimate. Rather than assuming that the *Charter's* impact is significant and progressive, CLS requires a deeper analysis of the social context in which the core legal rights and s. 24(2) exist. As such, it is a particularly apt methodology for the analysis of the *Charter's* legitimizing role.

While CLS is applicable to the Supreme Court's development of s. 24(2), the doctrine is not monolithic. To the contrary, CLS critiques exist in a wide variety of forms and are leveled from a number of distinct critical perspectives. Nevertheless, they share a fundamental commonality of approach, which can be accurately divided into two related methodological categories: (i) the internal operation of CLS; and (ii) the external operation of CLS.[86] In discussing the core elements of the internal approach, Hutchinson explains that it:

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[84] *Ibid.* at 8-9.
[85] *Ibid.* at 10.
[86] Hutchinson, "Introduction", *supra* note 70, at 3-4.

> [t]akes seriously conventional writing, both scholarly and judicial. CLS engages jurists and judges on their own turf and shows how they fail to live up to their vaunted standards of rationality and coherence: they cannot withstand the debilitating force of their own critical apparatus. The main target of CLS has been the crucial distinction between law and politics or, to be more precise, the alleged contrast between the open ideological nature of political debate and the bounded objectivity of legal reasoning. CLS rejects this axiomatic premise of traditional lawyering.[87]

The internal operation, then, is intended to reveal "[t]he established and irrepressible presence of incoherence and contradiction [which] delegitimates and demystifies the authority of law in constructing and maintaining social reality."[88] This approach is distinguished from CLS's external operation, which is devoted to the discrediting and dismantling of "[t]he whole tradition of rationalist epistemology ...".[89] As Hutchinson succinctly observes, the external operation of CLS "[d]oes not simply contest the practical policies yielded by traditional legal theorizing; it rejects the very basis of contemporary legal theorizing."[90]

The implications of the external operation of CLS are undeniably radical. Rather than striving for the direct confrontational engagement of dominant legal theory on specific fronts, proponents of this view aim toward the complete dismantling and reconfiguration of legal thought and in turn, the state and all current systems of social interaction. Roberto Unger's analysis falls into this category, advancing as it does the reorganization of government, the economy, and the overarching system of rights.[91] In order to accomplish these aims, Unger calls for a form of "political and cultural revolution" that involves remaking "[a]ll direct personal connections – such as those between superiors and subordinates or men and women – by emancipating them from a background plan of social division and hierarchy."[92] In Unger's view, this plan must be systematically broken down and ultimately eliminated by the overall reinvention of the democratic notion.[93] At its core, the new conception democracy involves radically reorienting the concept so that it is principally concerned with establishing "[a] social order all of whose basic features are directly or indirectly chosen by equal citizens and rights-holders rather than imposed by irresponsible privilege or blind tradition."[94]

Although the critical study of the *Charter*, individual rights, and Canadian criminal justice is certainly amenable to analysis using the more radical external operation of CLS, the

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[87] *Ibid.* at 4.
[88] *Ibid.* at 5.
[89] *Ibid.*
[90] *Ibid.*
[91] Unger, *CLS*, *supra* note 69, at 25.
[92] *Ibid.* at 26.
[93] *Ibid.* at 28.
[94] *Ibid.* at 30.

movement's internal operation is more directly applicable to the Supreme Court's development of the s. 24(2) jurisprudence. In fact, the internal operation of CLS appears to be the most optimal method of analysis in this context, as the *Charter's* exclusionary rule is entirely judge-made. Rather than treating judicial decision-making as merely peripheral to the actual decisions that are rendered, the internal operation of CLS deals with this foundational issue directly, positing that "[t]he esoteric and convoluted nature of legal doctrine is an accommodating screen to obscure its indeterminacy and the inescapable element of judicial choice."[95] Once this is acknowledged, it is misleading to analyze the judicial development of Canada's exclusionary rule by dissecting the process through which such judicial development occurs. As Hutchinson has argued, CLS takes the position that "[t]here exists doctrinal indeterminacy with an ideological slant. The judicial emperor, clothed and coifed in appropriately legitimate and voguish garb by the scholarly rag trade, chooses and acts to protect and preserve the propertied interest of vested white and male power."[96] The necessary confrontation with the Canadian judiciary's ideological slant, as well as the acknowledgement of the contingent historical structures encouraging this collective mentality, are elements that mainstream legal thought pertaining to the *Charter's* exclusionary mechanism has thus far steadfastly avoided.

The current s. 24(2) scholarship's tendency to leave the social-structural issues related to the section unaddressed does not render those issues moot. They continue to exist, and they continue to affect the practical context in which Canada's exclusionary mechanism operates, and thus the context in which its relative effectiveness or ineffectiveness must ultimately be assessed. Therefore, the analysis and argument offered here will attempt to critically assess the Supreme Court of Canada's development of the *Charter's* exclusionary rule by taking into account the fundamental nature of the social structures and institutions most immediately relevant to s. 24(2): (i) the Canadian criminal justice system; and (ii) the Canadian judiciary's process constitutional interpretation. To this end, it will first be argued that Canada's criminal justice system was originally structured as a means of social control whereby the economically and racially disadvantaged segments of society were subjected to disproportionate police attention in an effort to maintain existing social and economic power arrangements. It will also be contended that the system has not progressed much beyond these origins, and that it instead continues to maintain the societal status quo.

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[95] *Ibid.* at 4.
[96] *Ibid.*

Second, this thesis will assert that the composition of the Canadian judiciary renders it susceptible to arguments that favour the interests of dominant social groups. As the judiciary is overwhelmingly selected from society's dominant social classes, judges tend to identify with the collective ideals and goals of these groups. This in turn means that when the judiciary is inevitably called upon to employ its subjective beliefs in the interpretation of unclear constitutional provisions, the resulting jurisprudence is both consciously and subconsciously informed by the ideals and goals of the most powerful segments of society. As the administration of criminal justice is typically directed toward the socially marginalized, the ideals of the powerful routinely conflict with the ideals of the powerless. It will be argued that the judicial subjectivity pervading the current process of *Charter* interpretation has led to the development of a s. 24(2) jurisprudence that serves to limit the overall practical impact of the *Charter's* core legal rights. This situation undeniably has a disproportionately negative impact on the marginalized social groups to whom the criminal justice system is currently over-applied.

Approaching the issue of exclusion of evidence under the *Charter* in a critical manner requires the search for answers to questions that might otherwise be seen as irrelevant in the s. 24(2) analysis. For example, in the context of *L.B.*, it requires a serious inquiry into the officers' motivation for their initial decision to observe and eventually interrogate two young black males who appeared to being doing nothing more than sitting near a high school in a lower income neighbourhood when they first came to the attention of the police. Under a critical approach to s. 24(2), this form of police investigatory conduct cannot be justified by the fact that it ultimately led to the discovery of a firearm. Instead, the CLS critique mandates that an account be taken of all those instances in which searches of visible minorities are conducted under similar pretenses but do not produce tangible evidence of criminal wrongdoing. Under the critical assessment, the reality of such occurrences cannot be ignored. Similarly, applying the critical approach to *Feeney* would shift the focus away from the crime allegedly committed by the accused and onto the investigatory conduct of the police. If the reformed approach is used, the fact that the officers honestly and reasonably believed that they were investigating the correct person would not diminish the fact that they acted with little regard for his *Charter* rights, or for the procedures put in place to ensure the propriety of police investigations. Moreover, the new test would not overly emphasize those aspects of a rights violation – such as the fact that it involved an illegal search of a private home – that tend to favour the interests of society's dominant groups. In this way, the CLS approach to s. 24(2) ensures that the social realities of policing are not ignored when investigatory misconduct is formally litigated. To the contrary, when the critical approach is

employed in the context of exclusion, these social realities necessarily play a central role in the eventual outcome of every case.

Because the analytical focus of this thesis will be broadened to include an assessment of the social structures relevant to the exclusionary mechanism, no attempt will be made to take account of every s. 24(2) ruling that has been formally issued to date. Indeed, even with a narrower focus, such an endeavor would be far beyond the scope of this project.[97] Instead, the case-based analysis will be limited to a critique of each of the three leading Supreme Court of Canada rulings on the exclusion of evidence obtained contrary to the *Charter*. Several additional noteworthy Supreme Court decisions related to s. 24(2) and the *Therens/Collins/Stillman* regime will also be addressed, as will several decisions from various provincial courts of appeal that are particularly representative of recent trends in the related jurisprudence. Although limited in scope, this case analysis will provide a sufficient basis for the ensuing critical analysis of the Supreme Court's decision-making process in the s. 24(2) context.

The exclusionary regime created by *Therens/Collins/Stillman* will then be critically examined in an effort to shift the debate away from its current focus on whether the rule results in either the over exclusion or under exclusion of unconstitutionally obtained evidence. This focus unduly limits the range of options for reform. As Hutchinson has argued, "[t]he discursive categories of the law are neither determinative nor dispositive. Although they do not sanction and produce a detailed set of social prescriptions and consequences, they do stake out the venue, weapons and strategies for political struggle. As such, law is a formidable obstacle to any real social change ...".[98] In an effort to remedy this situation in the s. 24(2) context, the Supreme Court's leading s. 24(2) jurisprudence will be assessed by reference to the repressive features of the Canadian criminal justice system, both as it was initially conceived, and in its modern legacy. The legal reasoning employed in these cases will also be critiqued in an attempt to explain the methodology used by judges when they must interpret unclear constitutional provisions. It will be argued that as judges continue to be selected from society's privileged groups, and that they

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[97] The three leading Supreme Court rulings on s. 24(2) are generally accepted to be *R.v. Therens*, [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655 [*Therens* cited to S.C.R.]. *Collins*, *supra* note 52, and *Stillman*, *supra* note 50. The subsequent judicial treatment of these three rulings is vast. As of the date of writing, the decision in *Therens* has been followed 209 times, questioned once, distinguished 45 times, explained 144 times, and mentioned 1177 times. *Collins* has been followed 920 times, questioned once, distinguished 13 times, explained 148 times, and mentioned 1981 times. Additionally, *Stillman* has been followed 279 times, questioned once, distinguished 22 times, explained 99 times, and mentioned on 1099 occasions. Even allowing for the inevitable overlap between the judicial treatments of these three cases, it would be all but impossible to take account of all – or even most – of the relevant decisions.

[98] Allan C. Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Toronto: The Carswell Company Limited, 1988) at 21 [Hutchinson, *Dwelling*].

tend to render decisions in keeping with the ideals and values commonly exhibited by members of those groups. As a result, unclear provisions are often interpreted in a manner that ensures either only small-scale changes are permitted, or that the status quo is maintained altogether. In an attempt to confront this issue, problems that flow from this form of judicial analysis will also be documented.

These examinations will provide a broad based foundation on which the propriety of the *Therens/Collins/Stillman* regime can be accurately assessed. Rather than being limited to judging whether or not the relevant jurisprudence is internally consistent, this thesis will draw conclusions based on additional analysis of the social superstructures that necessarily play a role in the interpretation and application of s. 24(2). This will demonstrate that the current interpretation of s. 24(2) has transformed the *Charter's* exclusionary rule into a rights limiting mechanism, one that threatens to render the core legal rights substantially less effective in their principal practical application. By reducing the practical effectiveness of the constitutionalized due process protections, the current s. 24(2) simultaneously allows the core legal rights to legitimize the negative features of the criminal justice system – namely its over-application to the socially disenfranchised – that play a significant role in maintaining existing social inequalities.

When viewed in this context, it is obvious that a reform of Canada's exclusionary rule is needed. In order for that reform to be effective, the current approach must be changed so that it adequately responds to the social realities within which s. 24(2) operates. I argue that this reform ought to be based on a reconfiguration of the concept of "disrepute" as it is employed within s. 24(2). Rather than adopting an interpretation through which only the most egregious and obvious *Charter* violations are deemed capable of necessitating exclusion, the Supreme Court must expand the notion of disrepute so that it captures police investigatory practices that arise as a result of the unjust social, racial and economic divisions that render certain groups powerless, and thus more vulnerable to police surveillance. The fact that certain social groups are over-policed while other, more powerful groups are left to pursue illegal activities with no – or at least considerably less – police interference must be recognized in the interpretation of the exclusionary rule. Briefly stated, s. 24(2) cannot be structured so that only responds to the type of rights violations that occur only rarely. Rather, all police investigatory practices that disproportionately victimize the disenfranchised members of society must be acknowledged as bringing the administration of justice into disrepute. The conclusion to this thesis considers how such a model might work, and applies it to some existing cases that have generated controversy over whether illegally obtained evidence ought to have been admitted or excluded.

1.2. Organization of research and analysis

The ultimate purpose of this thesis is to set out a prescriptive framework for a reform of the judicial interpretation of the *Charter's* exclusionary mechanism. In order to accomplish this goal, it is necessary to engage in a number of preliminary – and somewhat more descriptive – analyses of the context in which s. 24(2) exists, and of the various elements that come together to inform its interpretation and application. To this end, Chapter 1 will engage in a predominantly descriptive analysis of the criminal justice context into which the *Charter's* core legal rights and s. 24(2) were inserted. It will also examine current policing practices in Canada by exploring the topic from a sociological point of view. Chapter 2 will then examine the history and development of the exclusion of evidence in Canada. It will briefly discuss the pre-*Charter* approach to illegally obtained evidence and will set out the process by which the current wording of s. 24(2) was chosen. This chapter will primarily detail the major Supreme Court of Canada rulings pertaining to s. 24(2), beginning with the *Therens* decision from 1985, and ending with the *Stillman* ruling delivered in 1997.

Chapter 3 will address several theories of how the adjudicative process unfolds in the constitutional context, specifically focusing on those theories that attempt to explain how Canadian courts have interpreted the vague provisions of the *Charter*. These theories will be applied to the Supreme Court's leading s. 24(2) rulings in an attempt to determine the nature of the Court's approach to the development of Canada's exclusionary rule. This will demonstrate that the current s. 24(2) jurisprudence is influenced by restrictive notions of the extent to which the core legal rights are properly extended to individuals involved in crime. Chapter 4 will identify the major problems inherent in this approach, and the repercussions that flow from those problems. In particular, the fact that the current case law tends to leave the core legal rights of those individuals who are targeted by police for increased investigations and arrests without effective remedies will be examined, as will the current jurisprudence's susceptibility to misuse in times of moral panic. Moreover, the fact that the current exclusionary rule allows police to continue to use unconstitutional investigatory practices without fear of practical repercussions will also be examined.

Using the foregoing analysis as a foundation, Chapter 5 will attempt to articulate a new approach to the interpretation and application of s. 24(2). This reformed exclusionary methodology will argue for situating social context at the forefront of the s. 24(2) decision-making process, primarily to account for the practical role played by the core legal rights in the current criminal prosecution process. In setting the stage for a reform of the *Charter's*

exclusionary rule, the "original intentions" approach to constitutional interpretation will be refuted for the purposes of s. 24(2). Moreover, the exclusionary remedy's proper place amongst constitutional provisions such as ss. 1 and 33 will be established. The chapter will conclude by setting out a framework for the progressive reinterpretation of s. 24(2). That framework will then be applied to the fact scenarios from several controversial Supreme Court of Canada decisions regarding s. 24(2) – including both *Feeney* and *L.B.* – in an attempt to demonstrate how the new approach might apply in practice.

Chapter 2. A History of Canadian Criminal Justice and its Relationship to s. 24(2)

The *Charter's* entrance onto the Canadian constitutional scene in the early 1980s prompted *Charter* enthusiasts to predict the fundamental overhaul of the country's criminal trial process. The newly created individual rights[99] were promised to provide all citizens with access to effective protections against procedural abuses perpetrated by the state's investigatory branch.[100] Optimism abounded in large part because the *Charter* also contained what appeared to be a broadly applicable enforcement section.[101] Through the operation of this relatively unique tool,[102] rights violations perpetrated during the investigation and arrest process could be remedied through recourse to an expansive set of constitutionally mandated remedies, including the potential exclusion of illegally obtained evidence. The *Charter* was thus hailed as the key to the alteration of certain repressive elements of the criminal investigation, arrest and prosecution processes that had endured in Canada since before confederation. However, explanations of the nature of those repressive elements did not figure prominently in the publicity leading up to April 17, 1982. Although support for the *Charter* was high, it was often based on imprecise polling questions designed to elicit the responses they eventually received.[103] Canadians were clearly aware that the *Charter* would provide them with enhanced protections; exactly what they needed protection from was far less clear.

More than a quarter of a century has now passed since the *Charter's* inception. The remedies available in s. 24 – amongst which the exclusion of unconstitutionally obtained evidence has emerged as the most significant – have since become controversial among members of the public and the legal profession alike. The question now is not whether the *Charter* and s. 24(2) lead to changes in the Canadian criminal justice process, but rather whether those changes constitute anything more than procedural alterations that serve to mainly to legitimize the legal status quo and the broader social structure in which the criminal justice system exists. Legitimization in this regard refers primarily to the use of law in order to reinforce the perception that existing social structures developed as a matter of historical necessity rather than because

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[99] See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, Inc., 1994) at 179 [Mandel, *Legalization*] (the rights were not "new" in the true sense of the word, with most provisions deriving their origins from the *Magna Carta* (1215) or the common law).

[100] See Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 3 [Roach, *Due Process*].

[101] See *Charter*, *supra* note 36, s. 24.

[102] The Bills of Rights of most commonwealth countries do not contain explicit remedial clauses. See e.g. *The Constitution of the United States of America*, U.S. Const. amend. I - X; and *The New Zealand Bill of Rights Act* (1990), Public Act 1990 No. 109.

[103] See Mandel, *Legalization*, *supra* note 99, at 27.

those in positions of power made specific choices to serve their interest. As Allan Hutchinson has argued:

> [m]ore than most languages, law has managed to suppress the contingent character of social history. By institutionalizing an entrenched set of social values, legal discourse has succeeded, at least partially, to contain the dynamism of history-making and, in the process, has persuaded people of the "naturalness" and "necessity" of current social arrangements. However, while the intellectual categories and rhetorical tropes of legal discourse do provide a superficially coherent image of the world, it is so fragile and shallow that it can offer no real repose.[104]

In keeping with this observation, the study of s. 24(2) must begin by examining the socio-legal context into which the *Charter's* exclusionary mechanism – and the core legal rights to which it relates – was inserted. Rather than assuming the pre-*Charter* criminal justice system was nearly perfect, requiring only the official addition of constitutionalized procedural protections to achieve total refinement, it is necessary to analyze the history and nature of that system in order to more accurately understand its overarching purpose and its practical effect on Canadians.

The critical examination into the nature of Canada's criminal justice system will begin by arguing that the system does not function solely to prevent crime or to punish criminal offenders. Instead, one of the system's central foundational purposes is to maintain the larger social structure, which is replete with economic, racial and regional inequalities. The criminal justice system, like many other social institutions, is designed to provide a degree of societal order that would be impossible to achieve in its absence. More specifically, society requires a set of rules that is at least theoretically applicable in a global sense if it is to continue functioning in a consistent manner. Some form of enforcement mechanism designed to ensure at least a minimal degree of compliance must in turn back these rules. Such a system of rules and enforcement mechanisms necessarily takes on a substantial measure of rigidity, as overly fluid rules are incapable of establishing the necessary social consistency. This creates significant issues as the social order has evolved in a manner that has benefited certain groups at the expense of others. As such, insofar as the criminal justice system serves to maintain existing social conditions, it likewise functions to maintain existing social inequalities.

In this criminal justice context, the *Charter's* core legal rights are vulnerable to interpretations that would reduce their practical effectiveness, rendering them mere means of legitimization rather than true mechanisms through which individual rights are protected. In substantiating this argument, several notable historical criticisms of criminal justice will be examined, with particular emphasis placed on the theories of legal scholars writing in the

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[104] Hutchinson, *Dwelling*, *supra* note 98, at 21.

Marxist tradition. These critiques will then be linked to the Canadian context through an examination of the historical origins of Canada's criminal justice system. This examination will itself be based on an analysis of the criminal law that existed in the United Kingdom during the 17th and 18th centuries, which was characterized by a system originally structured to most efficiently maintain the societal status quo. It was this system that was ultimately received in Canada in the mid-1700s, thereby forming the basis of criminal justice in Canada today.

With the historical context of criminal justice as a reference point, it is possible to more effectively assess and criticize the current functioning of the Canadian criminal justice system in general, and Canadian policing in particular. Policing is of direct relevance to s. 24(2) as the actions taken by individual officers while engaged in the process of securing evidence of criminal wrongdoing directly cause violations of the core legal rights, thereby triggering the operation of s. 24(2). It is therefore necessary to examine how officers approach the task of policing, and how their approach affects individuals living in Canadian society. This will demonstrate that certain social groups are over-policed in some ways while under-policed in others. An attempt will then be made to ascertain why disproportional forms of policing occur. Part of the answer lies in the existing police occupational culture, which can emphasize an "ends justify the means" style of law enforcement. This in turn leads to institutional resistance toward *Charter* rulings, and to negative police practices such as perjury and racial profiling.

This analysis will demonstrate that Canada's inherited system of criminal justice is based on one that was originally designed to maintain the social and legal status quo, which were at the time characterized by a radically unequal distribution of wealth and social power. The current Canadian criminal justice system has remained true to its roots in that it continues to have a decidedly unequal impact upon economically and racially marginalized Canadians. This situation is directly relevant to s. 24(2) as it means that certain type of individuals in certain types of circumstances will be disproportionately subjected to police investigations, an in turn, disproportionately exposed to violations of their core legal rights. These social realities must be taken into account when assessing the Supreme Court of Canada's treatment of s. 24(2), and also when attempting to structure a cogent reform of Canada's exclusionary rule.

2.1. Pinning the tail on a donkey: The purpose of Canada's criminal justice system

Criminal justice in Canada is an undoubtedly complex phenomenon. The public, however, tends to push these complexities to the periphery by assuming that the criminal justice system's purpose is to provide them with protection from crime and to punish criminal offenders. David

Paciocco, a noted proponent of crime control in the s. 24(2) context, notes that "[w]e claim that ours is a 'reductivist' system – in other words, a system designed to reduce the amount of crime. Without distinguishing between the various kinds of offences, we promise to reduce crime by the sentences we impose ...".[105] As the tone of Paciocco's comment indicates, the system has largely failed to live up to this promise. Indeed, a brief examination of the relevant statistics indicates that the system neither functions to reduce the overall amount of crime in society, nor to punish criminal as severely as possible.

In the 2006/2007 statistical period, adult criminal courts in Canada processed 372,084 cases involving 1,079,062 charges, numbers that were virtually identical to those recorded during the previous statistical year.[106] Canadian youth courts processed an additional 56,463 cases involving 179,873 charges in 2006/2007, reflecting no noticeable change from the preceding data collection period.[107] Although the national crime rate has decreased by approximately 30% since reaching its all-time apex in 1991, the rate is still nearly three times higher than it was in 1962.[108] Furthermore, there is substantial disagreement regarding whether or not the ebbs and flows in the overall detected crime rate can be conclusively linked to the effectiveness of various criminal justice policies, or even whether the crime rate is itself truly reflective of actual levels of criminal activity in Canada.[109] Regardless of these debates, one thing is certain: crime continues to occur. The 428,574 cases involving 1,258,935 charges that passed through the system in 2006/2007 did so in spite of significant conservative party rhetoric about using the criminal justice system to "tackle" crime.[110] As presently structured, it is clear that the system is incapable of satisfactorily preventing crime. This is not to say that the criminal justice system has no deterrent value whatsoever. Criminal law undoubtedly does prevent the occurrence of some forms of crime. What it does not do, however, is register any noticeable reduction in the types of crime that it undoubtedly focuses on: those that occur in less privileged and marginalized neighbourhoods. The fact that this has not led directly to a radical overhaul of the system suggests that the system

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[105] Paciocco, *Murder*, *supra* note 59, at 22.
[106] See Juristat: Canadian Centre for Justice Statistics, *Adult Criminal Court Statistics, 2006/2007*, vol. 28, no. 5, by Michael Marth (Ottawa: Statistics Canada, 2008) at 2 [Juristat, *Adult Crime, 2006/2007*].
[107] See Juristat: Canadian Centre for Justice Statistics, *Youth Court Statistics, 2006/2007*, vol. 28, no. 4, by Jennifer Thomas (Ottawa: Statistics Canada, 2008) at 2 [Juristat, *Youth Court, 2006/2007*].
[108] See Juristat: Canadian Centre for Justice Statistics, *Canadian Crime Statistics, 2006*, vol. 27, no. 5, by Warren Silver (Ottawa: Statistics Canada, 2007) at 2 [Juristat, *Canadian Crime, 2006*].
[109] See e.g. Valerie Pottie Bunge, Holly Johnson & Thierno A. Baldé, *Exploring Crime Patterns in Canada* (Ottawa, Statistics Canada, 2005) at 45-54 [Bunge, Johnson & Baldé].
[110] See e.g. Conservative Party of Canada, *Stand Up For Canada: Federal Election Platform 2006*, online: <http://www.conservative.ca/EN/2590/>, at 21-28.

is not principally focused on reducing offences in order to create "safe, healthy communities" for all Canadians.[111]

The relevant statistics also indicate that the criminal justice system is not set up to ensure extreme punishments are doled out to individuals convicted of crimes. The system neither hands out such punishments, nor does it appear inclined to do so. Indeed, Paciocco argues that the system's current "credibility crisis" is predominantly caused by the fact that its fails to punish offenders adequately. On this point, he observes:

> [i]n Canada, people are getting away with murder. They are getting away, as well, with countless other atrocities. Every day in the courtrooms of this country, decent people, victims of crimes of brutality and wanton destruction, have to endure the spectacle of their tormentors swaggering out of court, acquitted of crimes they committed. Canadians thumb newspapers with disgust, reading yet again about another charge thrown out, or another sentence that does not reflect the suffering that the self-indulgent or pointless acts of the offender have caused.[112]

The relevant statistics clearly support the notion that criminal sentencing in Canada is anything but purely punitive in nature. During 2004/2005, less than 70% of individuals under the supervision of a correctional service agency were physically in custody, and less than 70% of those were actually serving court-issued sentences. The rest were in custody on remand while awaiting trial, or were subject to some other form of non-sentenced custody.[113] Over the same period of time, 41% of those imprisoned offenders who were serving court-imposed sentences spent 29 days or less in custody, while 68% of all offenders spent less than 90 days in a correctional institution.[114]

The reality of sentencing in Canada has led to suggestions that protection of the community through the reduction of crime is not even a plausibly attainable goal for the criminal justice system as it is presently constituted. As Paciocco has argued:

> [s]entencing offenders, particularly to incarceration, will not reduce crime rates for most offences. Rehabilitation is largely a myth. Specific deterrence does not work. As a general strategy, incapacitation is neither feasible nor effective. And it is only blind faith that supports our contention that punishing offenders can intimidate others into not committing sexual offences, drug offences, and crimes of violence.[115]

As this comment reflects, purely draconian notions of punishment do not drive current sentencing practices. That is certainly not to suggest that they should be. Nor is this fact advanced in an attempt to prove that Canada's system of penal punishment is anything other than

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[111] *Ibid.* at 22.
[112] Paciocco, *Murder*, *supra* note 59, at 4.
[113] See Juristat: Canadian Centre for Justice Statistics, *Adult Correctional Services in Canada, 2004/2005*, vol. 26, no. 5, by Karen Beattie (Ottawa: Statistics Canada, 2006) at 10 [Juristat, *Adult Corrections, 2004/2005*].
[114] *Ibid.*
[115] Paciocco, *Murder*, *supra* note 59, at 34.

deeply repressive in nature.[116] To the contrary, increasing the severity of criminal sanctions generally bears no correlation to decreases in crime rates or actual levels of crime in society. In reality, more severe punishments serve to increase the negative effects that the criminal justice system already has on the social groups to whom it is disproportionately applied.

One need look no further than the system's impact on Canada's Aboriginal population for evidence of this trend. Despite comprising only 3% of the adult population in 2004/2005, Aboriginals "[a]ccounted for 22% of admissions to provincial/territorial sentenced custody, 17% of admissions to federal custody, 17% of admissions to remand, 17% of probation admissions and 19% of admissions to conditional sentence."[117] In addition to being over-represented in new admissions to penal custody, Aboriginals are also severely over-representation in existing adult prison populations throughout the country. For example, in Alberta, Aboriginals represent 4% of the total population and 38% of the prison population. In Ontario, they comprise 1% of the overall adult population, but 9% of the prison population. In Saskatchewan the numbers are 10% versus 77%, while in Manitoba they are 11% versus 70%. In British Columbia, Aboriginals account for only 4% of the total population, and 20% of the prison population.[118] These numbers indicate that Aboriginals across Canada are undeniably subjected to harsh punishments for their criminal offences. Despite this reality, there is no indication that these criminal sanctions have worked to reduce the crime that occurs in their communities. Indeed, the statistics indicate that Aboriginal people:

> [w]ere more likely to have returned to correctional supervision in the two-year period following release in 2002/2003 compared to non-Aboriginal people in all jurisdictions where data were available. Almost half of all Aboriginal adults were re-involved in correctional services within two years following release (45%) compared to less than one-third of non-Aboriginal adults in the same time period (29%). Re-involvement rates for Aboriginal people were highest in Nova Scotia (47%), closely followed by Saskatchewan (45%), while 40% of Aboriginal people released from correctional supervision in New Brunswick returned within two years.[119]

As a result, one of the segments of the Canadian population that is currently subjected to the harsh form of punishment in a clearly disproportionate manner nonetheless continues to commit crimes, thereby causing those individuals to reenter the punishment system in a cyclical fashion.

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[116] The criminal justice system's disproportionate application to Canada's most disenfranchised individuals is significantly exacerbated by the fact that the system appears to be developing in an even more overtly repressive direction. One particularly disturbing trend is the increase in individuals housed in remand custody. In 2004/2005, there were 12,300 prisoners in federal custody, 9,800 in provincial facilities, and 9,600 in various remand centres. Although the number of convicted persons serving sentences in provincial or federal institutions has declined since 1995/1996, the number of individuals housed in remand centres has skyrocketed. See Juristat, *Adult Corrections, 2004/2005*, *supra* note 113, at 4.

[117] *Ibid.* at 15-16.

[118] *Ibid.* at 16.

[119] *Ibid.* at 13.

The Canadian criminal justice system's treatment of Aboriginal people provides strong evidence that handing out increasingly harsh punishments does little to prevent crime, indicating that crime reduction is attainable neither through specific nor general deterrence. Rather, increasing the severity of sentences simply increases the repressive effects that the system has on populations that are already socially marginalized. The existence of these issues, then, leads one to question what the current justice system is actually structured to achieve. Because the administration of Canadian justice is not set up solely to prevent crime, nor to severely punish individuals who are convicted of offences, it is necessary to ascertain what other purposes might be driving the investigation, arrest, and prosecution processes as they exist throughout the country. A logical place to begin this search is by referencing several influential historical treatments of the subject, particularly those that seek to uncover the true nature of criminal laws and penal sanctions. These examinations strongly indicate that criminal justice has long been geared toward the repression and oppression of the underprivileged and disadvantaged segments of the population.

2.2. Marxist conceptions of criminal justice

One possible alternative purpose for the criminal justice system is that it is intended to assist in maintaining the social status quo. Such an argument can be traced back to the writings of Karl Marx, whose work is of particular relevance in this context. Unlike other influential authors who acknowledge the type of crimes that occur in society and then attempt to explain why such patterns exist,[120] Marx's analysis – and the genre of conflict criminology that it inspired – essentially reverse this methodology, looking first at the structural composition of society, and then examining how those structures relate to and produce the crime that occurs within them. This methodology is particularly applicable to the critical assessment of the Canadian criminal justice as it looks beyond the official crime statistics, attempting to explain why those statistics exist rather than assuming they are the inevitable result of the inherent criminal tendencies of the population.

Marx's recorded thoughts on crime and criminal justice are predominately expressed in his early works. The relevant tracts indicate that Marx's analysis of law and crime focused on the notion that "crime" is what society's ruling class says it is, as opposed to being only those acts

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[120] See e.g. Cesare Beccaria, *Essay on Crimes and Punishments* (Edinburgh: J. Donaldson, 1788); John Locke, *Two Treatises of Government* (New Haven, CT: Yale University Press, 2003); and Jeremy Bentham, *The Rationale of Punishment* (London: C. & W. Reynell, 1830).

that are inherently wrong in and of themselves. In a particular discussion concerning this issue, Marx argued that:

> [v]iolations of the law are generally the offspring of economical agencies beyond the control of the legislator, but ... it depends to some degree on official society to stamp certain violations of its rules as crime or as transgressions only. This difference in nomenclature, so far from being indifferent, decides on the fate of thousands of men, and the moral tone of society. Law itself may not only punish crime, but improvise it, and the law of professional lawyers is very apt to work in this direction.[121]

In an article written for the *New York Tribune*, Marx linked the production of crime to the bourgeois segment of society, writing that "[i]f crimes observed on a scale thus show, in their amount and their classification, the regularity of physical phenomena ... is there not a necessity for deeply reflecting upon an alternation of the system that breeds these crimes, instead of glorifying the hangman who executes a lot of criminals to make room only for the supply of new ones ...".[122] As these brief examples show, Marx's early works contend that in societies stratified on the basis of class, the ruling elite and the systems of law they invoke to preserve and enhance those stratifications, play a direct role in both the production of crime and the creation of criminals.

Despite these significant contributions, and regardless of the theories that were later founded upon them, Marx simply did not fully develop his theories of law or criminal justice, instead focusing on the role of class and economics in the development of society. According to Robert Fine:

> Marxist theory of law remains relatively undeveloped in comparison with Marxist critiques of political economy. One reason is that Marx himself never returned to the project he set himself in his youth: to complement his critique of political economy with a critique of jurisprudence ... there is no possibility of discovering a *theory* of law and legal relations ready-made in Marx's work.[123]

As a result, resort to Marx's actual writings is of limited utility when attempting to conclusively ascertain the purposes of modern systems of criminal justice. Later Marxist conceptions of law in general and criminal law in particular are thus largely composed of subsequent authors' extrapolations on the relevant aspects of Marx's other major political and philosophical works.

The first wave of legal scholars writing in the Marxist tradition further impugned the repression and class bias inherent in modern criminal justice systems. In so doing, the

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[121] Karl Marx, *Ireland and the Irish Question* (Moscow: Progress Publishers, 1975) 92-93. See also Paul Phillips, *Marx and Engels on Law and Laws* (Oxford: Martin Robertson, 1980) at 167.

[122] Karl Marx, "Capital Punishment" in James Ledbetter, ed., *Dispatches for the New York Tribune: Selected Journalism of Karl Marx* (Toronto: Penguin Group (Canada), 2007) 119 at 123.

[123] Robert Fine, "Marxism and the Social Theory of Law" in Reza Banakar & Max Travers, eds., *An Introduction to the Law and Social Theory* (Portland: Hart Publishing, 2002) 102 [emphasis in original, footnotes omitted].

argumentative focus shifted from the simple notion of bourgeois crime creation to the idea that the ruling elite used the criminal law to strengthen and enhance their grip on the bulk of society's power and property. This development is particularly evident in the writing of Evgeny Pashukanis, whose active Marxism and "anti-law" theorizing made him an enemy of Joseph Stalin and the Soviet regime, eventually leading to his victimization and murder during one of the many "purges" that infamously occurred in the Soviet Union throughout the 1930s.[124] Prior to his death, Pashukanis was instrumental in developing the embryonic Marxist account of criminal justice.

Pashukanis provides the context for his overall hypothesis regarding the interplay between criminal law and social class by observing that of all the various juridical areas and subject matters, it is the criminal law that has the most palpable and direct effect on the everyday actions of the individual.[125] For Pashukanis, this reality becomes problematic as societies transmute into forms characterized by relatively stable class stratifications. When this metamorphosis occurs, the criminal law becomes a tool utilized by the powerful social strata to perpetuate and intensify their struggle against the weaker elements of society.[126] On this point, he writes that:

> [t]he dissolution of natural economy and the increased exploitation of the peasants which resulted, the evolution of trade and the organisation of the state based on rank and class confront criminal justice with entirely new problems. Criminal justice in this epoch is no longer simply a means for those in power to fill their coffers, but is a means of merciless and relentless suppression ...[127]

Pashukanis further observes that the criminal law is "[m]erely an adjunct of the investigative and police apparatus ...", and argues that "[c]riminal justice in the bourgeois state is organised class terror, which differs only in degree from the so-called emergency measures taken in civil war."[128] Together, then, Pashukanis views the police, the criminal law and the penal system as comprising a formidable weapon that is routinely employed by the socially and economically privileged segments of society in order to secure and defend their positions of relative power against those who would wrest portions of that privilege for themselves.

As these theories indicate, systems of criminal justice have been weighted against the relatively powerless segments of the population throughout history. Marx's limited discussions

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[124] Peter H. Solomon, Jr., *Soviet Criminal Justice Under Stalin* (Cambridge: Cambridge University Press, 1996) at 194.
[125] Evgeny B. Pashukanis, *The General Theory of Law and Marxism* (New Brunswick, NJ: Transaction Publishers, 2002) at 167.
[126] *Ibid.* at 173.
[127] *Ibid.*
[128] *Ibid.*

of crime and law introduced the idea that society's power class created criminal justice systems with a view to defining crime in whatever manner was most beneficial to their interests. Pashukanis furthered this argument by positing that the social and economic elite used criminal justice as a weapon to sustain and expand their grip on property and power while waging a legalized war on the numerically superior underclasses. Historically then, one of the deeply rooted purposes of criminal justice has been to ensure that the divisions of social class and power that have developed over the centuries are satisfactorily maintained. Rather than currently existing as the expressed intention of society's dominant groups, the criminal justice system's tendency to preserve these social injustices arose through an evolutionary process. Because the system itself is highly resistant to change, it works subconsciously to maintain its own compositional roots, including those negative aspects that developed centuries ago. This historical reality is routinely overlooked in contemporary discussions pertaining to individual rights in the criminal law context.

2.3. Not in my backyard: Repressing the repressiveness of Canada's criminal justice system

Popular discussions of the Canadian criminal justice system do not often broach the subject of the system's historical inequalities. To the contrary, many judges, lawyers and mainstream legal academics credit the *Charter* with revolutionizing and equalizing a Canadian criminal justice system that was for the most part just prior to 1982. During a commemoration of the *Charter's* 10th anniversary, Lamer C.J.C. pronounced that "[t]he *Charter* has put Canada on the top of the list of countries watched and emulated by others. It has made the Canadian system of justice the flagship of the Commonwealth, and the Commonwealth countries are now looking more and more to Canada for guidance and inspiration."[129] At the same conference, former *Charter* skeptic Joel Pink described the document's effect on the criminal justice system in the following terms:

> [a]lthough the common law established some fundamental principles to protect an accused, the *Charter* has adopted some principles, expanded others and created new rights. The protections gained have been both procedural and substantive ... During this first decade of implementation of the *Charter*, Canadian courts have diligently advanced the rights therein and have used old and new remedies to protect those rights. The Supreme Court has led this quiet revolution by taking a liberal and purposive approach to Charter interpretation, although in recent decisions, there is some evidence of the pendulum swinging to a much more conservative approach.[130]

The early consensus, then, was that the Canadian courts – especially the Supreme Court of Canada – had done much to increase the safeguards curtailing the arbitrary and improper

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[129] The Honourable Antonio Lamer, "Opening Remarks" in Géreald-A. Beaudoin, ed., *The Charter: Ten Years Later* (Cowansville, QC: Les Éditions Yvon Blais Inc., 1992) 9 at 13.

[130] Joel E. Pink, "The Charter and Criminal Justice: Ten Years Later" in Géreald-A. Beaudoin, ed., *The Charter: Ten Years Later* (Cowansville, QC: Les Éditions Yvon Blais Inc., 1992) 99 at 100.

exercise of the substantial powers vested in the various appendages of the criminal justice system.

Lamer C.J.'s remarks at the 1992 Canadian Bar association conference were not his only extrajudicial extolments of the equalizing effect of the *Charter*. The former Chief Justice would eventually become recognized as perhaps the most celebrated and enthusiastic of the *Charter's* proponents. Shortly before the 10th anniversary, Lamer C.J. was quoting as suggesting that "[t]he introduction of the Charter of Rights and Freedoms a decade ago, on April 17, 1982, has been nothing less than a revolution on the scale of the introduction of the metric system, the great medical discoveries of Louis Pasteur, and the invention of penicillin and the laser ...".[131] In an interview given to Stephen Bindman on the document's 15th anniversary, Lamer C.J. famously opined that "[i]f the Charter were explained to the people and the people realized what's happening in other countries, they would then say, 'Thank God for the Charter' ...".[132] If Lamer C.J.'s comments are accepted as accurately relaying the entirety of the *Charter* story, one would indeed be hard pressed to imagine that the system in which that document exists is based in part on significant historical injustices.

Despite the rhetoric regarding the egalitarian nature of the *Charter* and its beneficial effects on Canadian criminal justice, our system's foundational roots should not be overlooked. In this sense, it is not particularly difficult to associate Canada's current justice system with the "merciless and relentless" repression that characterized the forms of criminal justice analyzed by the Marxist theorists. In fact, historical analysis has extensively documented the repressive, class-based elements of the English criminal justice system, particularly as it existed in the 18th and 19th centuries. This is particularly relevant in the Canadian context, as this English system is the very system of criminal justice that Canada effectively inherited in the mid 1700s. In this way, the issues identified by the Marxists take on a direct relevance to Canada and its current methods of criminal justice and social control.

As legal historian Douglas Hay hypothesizes, the English justice system existed primarily as a means through which the propertied class legitimized radical imbalances in wealth and power. Hay argues that property took on quasi-religious importance in 18th century England, stating that "[o]nce property had been officially deified, it became the measure of all things.

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[131] Jeff Sallot, "Top court becomes supreme player" *The Globe and Mail* (6 April 1992) A1.
[132] Stephen Bindman, "15 years later, chief justice still a fan of the charter" *The Edmonton Journal* (20 April 1997), F2.

Even human life was weighed in the scales of wealth and status ..."[133] No more than 3% of the English population controlled the application of criminal law, a jurisprudence that effectively "[d]efined and maintained the bounds of power and wealth ..."[134] In this context, the wealthy used their criminal law as an ideological shield to protect themselves and their interests from the vast numerical superiority the underclasses. As Hay explains, "[t]he criminal law was extremely important in ensuring ... that 'opinion' prevailed over 'physical strength'. The opinion was that of the ruling class; the law was one of their chief ideological instruments. It combined ... terror ... with ... discretion ... and used both to mould the consciousness by which the many submitted to the few."[135]

Hay contends that the English criminal justice system performed its function of legitimization by employing three distinct but interrelated tactics: (i) majesty; (ii) justice; and (iii) mercy.[136] With regard to majesty, Hay refers to the notion that the law garnered respect for itself and thus the social status quo by performing its everyday functions as rituals replete with sufficiently befuddling pomp and circumstance. As Hay observes, "[c]oupled with wealth, a considered use of imagery, eloquent speech, and the power of death, the antics surrounding the twice-yearly visits of the high-court judges had considerable psychic force."[137] When they were not being dizzied by the regalia of the judges, the spectacle of the proceedings, or the terror of a public execution, the general populace was effectively placated by carefully crafted demonstrations intended to prove the law was just, and that it was indeed equally applicable to all individuals, regardless of their class, property, or degree of social power.[138]

To accomplish this, the 18th century English criminal justice system emphasized its rigorous adherence to the rules of procedure, often allowing well-founded prosecutions to fail simply because of minor irregularities, such as an incorrect date on an indictment.[139] In this way, the underclasses came to view the criminal law as existing independently from its propertied creators. On this point, Hay writes that:

> [t]he punctilious attention to forms, the dispassionate and legalistic exchanges between counsel and the judge, argued that those administering and using the laws submitted to its rules. The law thereby became something more than the creature of the ruling class – it became a power with its own claims, higher than those of prosecutor, lawyers and even the great scarlet robed judge

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[133] Douglas Hay, "Property, Authority and the Criminal Law" in Piers Beirne & Richard Quinney, eds., *Marxism and Law* (New York: John Wiley & Sons, 1982) 103 at 104.
[134] *Ibid.* at 128.
[135] *Ibid.* at 108.
[136] *Ibid.*
[137] *Ibid.*
[138] *Ibid.* at 111.
[139] *Ibid.* at 112.

> himself ... When the ruling class acquitted men on technicalities they helped instil a belief in the disembodied justice of the law in the minds of all those who watched. In short, its very inefficiency, its absurd formalism, was part of its strength as ideology.[140]

The idea that the law applied equally to all was heightened by the purposeful execution of the occasional member of the upper class. As Hay states, "[i]t was part of the lore of politics that in England social class did not preserve a man from even the extreme sanction of death. This was not, of course, true. But the impression made by the execution of a man of property or position was very deep."[141] Use of such tactics allowed the English power elite to successfully "[e]xtend that communal sanction to a criminal law that was nine-tenths concerned with upholding a radical division of property."[142]

The final method through which the 18th century English system of criminal law was utilized by the powerful as ideology involved accentuating notions of its mercy. The main device in this regard was the pardon. It was used to mute the severity of penal statutes that had gradually increased the number of capital offences by over 400% between 1688 and 1820, the majority of which were associated with crimes against property.[143] The pardon allowed the system to at once legitimize itself and demonstrate the inherent benevolence of the wealthy and the powerful. As Hay notes:

> [t]he pardon is important because it often put the principal instrument of legal terror – the gallows – directly in the hands of those who held power. In this it was simply the clearest example of the prevailing custom at all levels of criminal justice. Here was the peculiar genius of the law. It allowed the rulers of England to make the courts a selective instrument of class justice, yet simultaneously to proclaim the law's incorruptible impartiality, and absolute determinacy. Their political and social power was reinforced daily by bonds of obligation on one side and condescension on the other, as prosecutors, gentlemen and peers decided to invoke the law or agreed to how mercy.[144]

Hay concludes that the employment of these rhetorical devices allowed the English criminal justice system to be perceived as something it was not. Rather than being majestic, just and merciful, "[t]he private manipulation of the law by the wealthy and powerful was in truth a ruling-class conspiracy, in the most exact meaning of the word."[145]

While 19th century England enjoyed a reform of the justice system as it had existed in the 18th century, the changes were not deeply rooted to the degree that real alterations occurred. In fact, the reforms adhered closely to the class-based interests of those who controlled the

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[140] *Ibid.*
[141] *Ibid.*
[142] *Ibid.* at 113.
[143] *Ibid.* at 103.
[144] *Ibid.* at 120.
[145] *Ibid.* at 122.

development of the criminal law. As Hay notes, calls for the abolition of the death penalty were largely the product of a growing middle class, whose "[p]roperty was the prey of thieves undeterred by terror."[146] Hay therefore concludes that:

> [a] ruling class organizes its power in the state. The sanction of the state is force, but it is force that is legitimized, however imperfectly, and therefore the state deals also in ideologies. Loyalties do not grow simply in complex societies: they are twisted, invoked and often consciously created. Eighteenth-century England was not a free market of patronage relations. It was a society with a bloody penal code, an astute ruling class who manipulated it to their advantage, and a people schooled in the lessons of Justice, Terror, and Mercy.[147]

Thus, although the exact form of the system may have changed, the substance of the criminal law remained largely the same.

Hay's discussion of the English criminal justice of the 18th and 19th centuries is of particular relevance to contemporary Canada as the substance of that system forms the bedrock of the current Canadian criminal justice system. As Peter Hogg notes, Canada initially received the bulk of its system of law through the reception of English law – and to a lesser extent French law – by the colonies of British North America.[148] Hogg points out that the English common law rules of reception distinguished between settled and conquered colonies:

> [i]n the case of a colony acquired by settlement, the settlers brought with them English law, and this became the initial law of the colony. In the case of a colony acquired by conquest, the law of the conquered people continued in force, except to the extent necessary to establish and operate the governmental institutions of British colonial rule. A colony acquired by cession (that is, by transfer from another country) was treated as acquired by conquest.[149]

The matter of reception was significantly complicated by French claims to specific regions of British North America, which raised issues as to whether the area was properly treated as settled, conquered.[150] There are thus different dates of reception for different regions of Canada, meaning that the English and French laws received on those dates were at differing stages of development.[151]

Although the dates of reception and the law received by pre-confederation Canada were not uniform, the eventual result was the imposition of the English legal tradition into the Canadian context. Although precise dates of reception are essentially impossible to ascertain, "[t]he courts which later had to identify the rules of English law which had been received selected the date of 'the institution of a local legislature in the colony' as the date of

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[146] *Ibid.* at 127.
[147] *Ibid.* at 129.
[148] See Peter Hogg, *Constitutional Law of Canada, Student ed.* 2006 (Scarborough, ON: Thomson Carswell, 2006) at 32-33.
[149] *Ibid.* at 32.
[150] *Ibid.*
[151] *Ibid.* at 33-40.

reception."[152] Using this method, it has been determined that in certain areas – such as the colony of Nova Scotia – the first dates of reception fall as early as 1758.[153] The dates of reception matter less as far as the common law was concerned, which was considered to exist uniformly throughout the British Empire.[154] Thus, the form of law received in Canada was founded on the system described by Douglas Hay. As a result, the origins of Canadian criminal justice can be traced directly back to an 18th century English legal system that was dominated by property interests, and was skillfully manipulated to maintain the social status quo.

2.4. Targeting the socially powerless

The dubious origins of Canada's current criminal justice system manifest themselves in the modern period in a number of important ways. Of particular significance is the fact that the administration of Canadian justice is disproportionately applied to certain segments of the Canadian population. Officially recorded crime is endemic among society's marginalized and relatively powerless economic and racial groups. The relevant statistics indicate that an individual's socioeconomic status has a direct bearing on their likelihood of coming into direct contact with agents of the criminal justice system. As Michael Mandel notes, "[a]mong those charged with criminal offences we find a severe overrepresentation of the poorest and most socially powerless people in Canadian society, characterized by the lowest levels of occupation and the highest levels of unemployment."[155] Furthermore, the vast majority individuals victimized by crime are also culled from society's powerless social strata. On this point, Mandel observes that "[t]he social class effects [are not] as obvious as they might seem from the fact that people charged with crime are overwhelmingly from the underclass or the working poor, because so are their victims."[156] Similarly, Kent Roach observes that traditionally disadvantaged groups are overrepresented in crime victimization statistics, noting that "Aboriginal people in Canada [are] ... overrepresented among both prisoners and victims of crime. Gays and lesbians and the disabled ... were disproportionately victimized by some types of crime."[157] As a result, both the perpetrators and casualties of crime occupy the same economic and social sphere.

What the official crime rates fail to conclusively prove, however, is that these disadvantaged groups are over-represented in criminal justice statistics only because they are

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[152] *Ibid.* at 34.
[153] *Ibid.* at 33, n. 4.
[154] *Ibid.* at 34-35.
[155] Mandel, *Legalization*, *supra* note 99, at 181.
[156] *Ibid.* at 184.
[157] Roach, *Due Process*, *supra* note 100, at 222.

inherently more criminogenic than their more socially powerful counterparts. In fact, there is no reliable evidence that this is the case. Rather, this overrepresentation occurs because the justice system is structured in such a way that it is more efficient at detecting certain forms of the criminal activity engaged in by society's underclasses than it is at detecting those same crimes when they are committed by members of more advantaged, less targeted segments of the population. In this regard, Patricia Gray argues that "[s]ocially marginalized groups are vulnerable to criminalization. What is 'censured' as crime in any society reflects not only its cultural and moral sensibilities, but also its political economy."[158] Similarly, critical criminologist William Chambliss posits that "[c]rime in the ghetto is a self-fulfilling prophesy. Because the police target the urban ghettos for intensive surveillance, it is the residents of the urban ghettos who appear over and over again in the revolving doors of jails, courts and prisons."[159] The criminalization of marginalized communities inevitably means that the individuals who comprise those populations will have more first-hand experience with the criminal justice system, meaning that they are more frequently investigated and more frequently arrested. As a result, members of these groups also have more first-hand experience with violations of their core legal rights as such violations occur only during the investigation and arrest processes.

The fact that underprivileged and socially marginalized groups are subjected to targeted policing does not mean that all of their criminal activities are policed to the same degree. Instead, the policing of these groups tends to focus on crimes that require relatively simple investigations, as well as those that can be substantiated by securing a limited amount of evidence. This means that officers tend to focus primarily on narcotics offences, firearms offences, and property crimes, all which can often be investigated with simple searches of a suspect's person, and substantiated with a small amount of real evidence. Such investigations are not typically complex and thus efficiently produce criminal charges that can be substantiated in court. In discussing the investigation of drug offences, Chambliss points out that "[d]rug arrests are among the easiest to make, convictions not too difficult to obtain, and drug convictions often lead to the longest prison terms."[160] Essentially the same thing can be said for firearms offences. Police are eager to pursue these types of investigations as: "[o]rganizations reward members whose behavior maximizes gains and minimizes strains for the organization. In a class society, the powerless, the

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[158] Patricia Gray, "Deconstructing the Delinquent as a Subject of Class and Cultural Power" (1997) 24 J.L. & Soc'y 526 at 536 [Gray].
[159] William J. Chambliss, *Power, Politics & Crime* (Boulder, Colorado: Westview Press, 1999) at 63 [Chambliss].
[160] *Ibid.* at 77.

poor, and those who fit the public stereotype of 'the criminal' are the human resources needed by law enforcement agencies to maximize gains and minimize strains."[161] In order to minimize operational strains, crimes that are more difficult to detect, investigate and prosecute, such as sexual assault and domestic violence, remain as under-policed in socially disadvantaged neighbourhoods as they are throughout the rest of society.[162]

There are other reasons why modern criminal justice is disproportionately applicable to society's marginalized segments. Sociologists and criminologists suggest that society's powerful classes highlight purported increases in the frequency and severity of crime in order to draw attention away from other societal issues, including poverty, racial bias and gender inequality. Properly confronting these issues would require the institution of fundamental changes to current social and economic arrangement. The individuals who benefit from these arrangements therefore have little incentive in pursuing the amelioration of these problems as doing so essentially runs contrary to their interests. Instead, they attempt to focus the population's attention on high crime rates, and then push for the over-policing of powerless groups in order to show that something is being done to confront criminals. As Chambliss argues, the practice of over-policing effectively creates the impression that earnest attempts are being made to combat crime as:

> [a]rrest is organizationally effective only if the person arrested is relatively powerless. Arrests of white male middle-class offenders ... are guaranteed to cause the organization and the arresting officers strain because people with political influence or money hire attorneys to defend them. Arrests of poor black men, however, result in nothing but gains for the organization and the officer because the cases are quickly processed through the courts, a guilty plea is obtained, and the suspect is sentenced.[163]

While this organizational effectiveness provides clear benefits to police forces and individuals interested in appearing to be "tough on crime", it also has obviously negative repercussions for the individuals who are targeted for over-policing. Focusing the state's arrest power on those who are least able to legally defend themselves creates a false impression of crime patterns and exaggerates the extent of criminal activity in certain areas. It also falsifies the impact of the core legal rights as those rights only have effect if individuals invoke them during the investigation and arrest process, and later enforce them in their interactions with prosecutors and the courts. This usually requires the financial ability to acquire legal representation and to mount a defence, the very things that people who are over-policed are unable to do.

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[161] *Ibid.*
[162] Janine Benedet & Isabel Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues" (2007) 52 McGill L.J. 515 at 517.
[163] Gray, *supra* note 158, at 536.

In further commenting on the practice of over-policing socially marginalized groups in the United States, Chambliss argues that politicians use the general fear of crime to draw the public's attention away from *bona fide* social issues, the resolution of which would erode the traditional hegemonic power bases. The public is easily distracted by this tactic as it appeals to their individual interests. Out of control crime is something that could affect them, their families, and the individuals with whom they associate. They therefore have a vested interest in crime's control and the repression and isolation of criminals. On this point, Chambliss contends that contrary to reality:

> [c]rime has been raised to the level of a national crisis by a coalition of interests ... including: (1) conservative politicians concerned primarily with repressing civil rights activism and political dissent; (2) the media, ever hungry to attract readers and viewers with issues that captivate the imagination and fears of the public; and (3) the law enforcement establishment, with an insatiable appetite for public funds and public approval.[164]

Chambliss argues that these groups have tirelessly produced propaganda designed to ingrain the fear of crime on the psyche of the American people, despite the fact that "[v]ery few Americans are the victims of crime and the vast majority feel that the neighbourhood *where they themselves live* is safe."[165] The "ghettoization" of crime and the concomitant expansion of criminal justice have "[n]ot only siphoned scarce resources away from education, welfare, and other social expenditures. The Wars on Crime and Drugs has also led to the institutionalization of racism by defining the crime problem as a problem of young black men and women."[166]

The creation of a moral panic surrounding crime and criminals has a disproportionately negative effect on the economically and racially marginalized segments of society. As Chambliss observes, "[t]he public image of crime in the United States is not racially neutral. The media and the general public see crime as acts committed by violent, psychopathic, young black males, even though serious crimes occur daily at corporate headquarters, in banks, and on Wall Street."[167] Such misinformation has negative consequences as the perpetuation of "[t]he myth that crime is out of control ... leads inevitably to the arrest and incarceration of the poor. Since African Americans are disproportionately poor in the United States the result is closely akin to 'ethnic cleansing.'"[168]

Similar to what Mandel has observed in the Canadian context, Chambliss suggests that once crime is satisfactorily publicized and sufficiently ghettoized, the people living in those

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[164] Chambliss, *supra* note 159, at 27-28.
[165] *Ibid.* at 28 [emphasis in original].
[166] *Ibid.*
[167] *Ibid.* at 55.
[168] *Ibid.*

ghettos become immediately over-policed, over-arrested and over-incarcerated. Police target such areas because of the relative ease of arrests and the greater certainty of convictions, both of which are important to the advancement of the individual officer's career.[169] Chambliss argues that when these social realities are acknowledged, the ideological claim of equal justice for all is reduced to a fallacy. This effect is further enhanced by the fact that "[t]he middle- and upper-classes' [have the] ability to protect themselves from being closely scrutinized by the police."[170]

The theories advanced by Mandel and Chambliss indicate that administration of contemporary criminal justice is disproportionately applied to individuals belonging to relatively powerless racial and economic groups. Rather than evolving as a matter of historical necessity, the selective application of criminal justice has occurred because politically and economically powerful groups have created moral panics over purportedly high and ever-increasing levels of crime. Instead of existing as true representations of societal conditions, these panics are developed in order to deflect popular concern away from the widening gap between rich and poor, and the continuing social and economic marginalization of minority groups. The disproportionate application of criminal justice to certain groups has a significant impact on the core legal rights of the individuals who compose those groups, particularly when the practices commonly employed by Canadian police are taken into account.

2.5. The nature of Canadian policing[171]

Within the context of a criminal justice system that is disproportionately applied to members of certain social groups, several aspects of the way in which the policing function is carried out in Canada are directly relevant to the practical impact of the *Charter's* core legal rights, and thus in turn, to the interpretation and application of s. 24(2). First, the occupational subculture to which police officers belong encourages the exhibition of negative attitudes towards the individuals being investigated, the rejection of external interference in the day-to-day operations of police forces, and a general resistance to court rulings that enhance individual rights protections at the expense of police powers. Together with the relative impossibility of establishing effective and impartial supervision of individual officers in the field, the police occupational subculture leads to the frequent taking of procedural and investigatory shortcuts at the expense of core legal rights, the *ex post facto* manipulation of testimonial evidence so that police misconduct is

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[169] *Ibid.* at 77.
[170] *Ibid.*
[171] A version of this subsection has been accepted for publication. Hauschildt, Jordan, "Blinded by Faith: The Supreme Court of Canada, s. 24(2) and the Presumption of Good Faith Police Conduct" (2009) Crim. L.Q.

satisfactorily shielded from external scrutiny, and ultimately the over- investigation of certain individuals based on irrelevant and immutable personal characteristics. If s. 24(2) is to ensure the core legal rights serve as more than the means of legitimizing a disproportionately applicable criminal justice system, Canada's exclusionary rule must take into account the manner in which the country's streets, neighbourhoods and peoples are being policed.

2.5.1. "It's us against them": The police worldview

Police officers work in an environment characterized by a distinct occupational subculture.[172] This subculture effectively creates an operational mentality amongst individual officers that has the potential to significantly affect how they perform their day-to-day policing duties. According to criminologist Janet Chan, the concept of "police culture" refers to the "[l]ayer of informal occupational norms and values operating under the apparently rigid hierarchical structure of police organizations."[173] Chan posits that the main features of the police culture include:

> [a] sense of mission about police work, an orientation towards action, a cynical or pessimistic perspective regarding the social environment, an attitude of constant suspicion, an isolated social life coupled with a strong code of solidarity with other police officers, political conservatism, racial prejudice, sexism, and a clear categorization of the public between the rough and respectable. Among these characteristics, the so-called 'siege mentality' and 'code of silence' have often been linked with the concealment and proliferation of police misconduct.[174]

Although Chan's research pertains mainly to police forces in Australia, Canadian scholars have also noted the existence of police occupational subcultures, and have studied how they affect the institution of policing in this country. For example, lawyer and criminologist David MacAlister has examined the applicability of the concept in the Canadian context, and concludes that "[p]olice in Canada, as in other countries, exhibit a clear occupational subculture."[175]

The police are by no means the only profession to have a developed occupational subculture, and both Chan and MacAlister suggest that the police culture is neither entirely static nor purely monolithic.[176] There is evidence, however, that although the police occupational subculture is not totally resistant to change, it does retain a degree of stability over time and across physical borders. In this regard, Chan reports that the "fundamental culture" of policing is similar from police force to police force, from region to region, and from country to country.

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[172] The existence of a police occupational culture has been challenged. See Robert Balch, "The Police Personality: Fact or Fiction?" (1972) 69 Journal of Criminal Law, Criminology & Political Science 106.
[173] Janet Chan, *Changing Police Culture: Policing in a Multicultural Society* (Cambridge: Cambridge University Press, 1997) at 43 [Chan].
[174] *Ibid.* at 43-44 [footnotes omitted].
[175] David MacAlister, "Canadian Police Subculture" in Stephen E. Nancoo, ed., *Contemporary Issues in Canadian Policing* (Mississauga, ON: Canadian Educators' Press, 2004) 157 at 158 [MacAlister].
[176] *Ibid.* at 160; Chan, *supra* note 172, at 44.

Indeed, criminologist Jayne Seagrave argues that aspects of the police culture prevalent in more heavily researched countries such the United States, are also present in Canada. On this point, Seagrave observes that "[s]ubcultural analyses of police organizations have been done in the United States, England and, to a lesser extent, in Canada as a way to conceptualize and understand the activities of the police. Sociological studies of police work in Canada indicate similar patterns to those found in Britain and the US."[177]

The similarities in occupational subculture that exist across regional and territorial boundaries are facilitated by the similarity of the police function across those same boundaries. Policing as a profession is universally characterized by elements such as the significant personal danger to which officers are exposed in the course of their employment, their position of relative authority vis-à-vis ordinary civilians, and their ability to exercise coercive force in the fulfillment of their day-to-day employment responsibilities.[178] Because these universal characteristics drive both the creation and the content of the police occupational subculture, the subculture itself takes on a universality of its own and as such, is not limited to the specific historical or social conditions that exist in a particular region or country.

In addition to the commonality of police culture from country to country, numerous studies have uncovered an unmistakably authoritarian nature common to both the police occupational culture and the way in which policing is actually carried out in society. In this regard, policing is seen as reflective of – and responsive to – the needs and goals of society's dominant classes. On this point, Canadian legal scholar Margaret Beare argues that:

> [t]he police are empowered to enforce the moral, political, economic, and social consensus determined by the legislative and criminal justice systems. Charged with a mission of imposing order on chaos, and mythologizing themselves as the 'thin blue line' protecting the democratic consensus of acceptable behaviour, from those who would seek to challenge it, it is unsurprising that police behaviour seems discriminatory to those who remain outside of the status quo ...[179]

Beare's contention, then, is that the police reproduce the concept of social society that has been established by society's powerful groups and classes. This concept serves to protect the interests of these groups at the expense of other, less powerful individuals. Similarly, John F. Galliher observes that in the United States:

> [m]uch of police behavior seems most easily explained if one considers that whenever there is a conflict of interests between the dominant classes in a society and less powerful groups, the police

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[177] Jayne Seagrave, *Introduction to Policing in Canada* (Scarborough, ON: Prentice-Hall Canada Inc., 1997) at 119 [Seagrave] [references omitted].
[178] Chan, *supra* note 172, at 45.
[179] Margaret Beare, "Steeped in Politics: The Ongoing History of Politics in Policing" in Margaret E. Beare & Tonita Murray, eds., *Police & Government Relations: Who's Calling the Shots?* (Toronto: University of Toronto Press, 2007) 313 at 354.

> protect the interests of the former and regulate the behavior of the latter. The police role attracts authoritarian individuals and increases their authoritarianism once on the job. Perhaps this happens because of the demands made upon the police to suppress economic and racial minorities. Such tasks are most attractive to the authoritarian personality and undoubtedly any of an officer's initial doubts about such activities are lessened by an increasingly authoritarian orientation.[180]

The supposition is that in socially and economically stratified societies, the profession of policing attracts authoritarian-minded individuals willing to protect the status quo. The occupational culture of policing in turn creates patterns of behaviour designed to reinforce the authoritarian views of those attracted to the occupation, while at the same time facilitating methods of practice that allow those views to have a practical effect. As Galliher concludes, "[t]here is some evidence that police subcultures develop in a department both to legitimize and keep secret suppression of economic and racial minorities."[181]

Moreover, critical analysis of police culture commonly indicates that differences exist between the subcultures that prevail at different hierarchical levels of the police bureaucracy. Chan and MacAlister point specifically to the distinction between "street cop culture" and "management cop culture", suggesting that the occupational characteristics operating amongst members of these groups differ substantially.[182] With regard to the latter group, Chan has observed that street cops commonly exhibit "'[c]ontempt for the criminal justice system, disdain for the law and rejection of its application to the police, disregard for the truth, and abuse of authority'."[183] Similarly, MacAlister notes that:

> [p]olice view the other components of the criminal justice system as inefficient, and often working at cross-purposes to police. Judges are viewed as soft on crime. Defence lawyers are despised for vigorous cross examination of police witnesses and complainants. Correctional rehabilitation programs are believed to coddle offenders. Law makers are criticized for liberal approaches to justice issues. Even the police hierarchy is criticized for inefficiency and lack of support for police on the street.[184]

As the occupational subculture of the "street cop" plays the lead role in the majority of officer-suspect interactions, it is this subculture that is most directly relevant to the propriety of police investigatory conduct in the field.

As the descriptions offered by Chan and MacAlister suggest, street cops possess negative occupational characteristics that have the potential to severely impair the ability of police to

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[180] John F. Galliher, "Explanations of Police Behavior: A Critical Review and Analysis" (1971) 12 The Sociological Quarterly 308 at 312-313.
[181] *Ibid.* at 313.
[182] Chan, *supra* note 172, at 44; MacAlister, *supra* note 174, at 160-164 [references omitted]. See also John M. Jermier, *et al.*, "Organizational Subcultures in a Soft Bureaucracy: Resistance Behind the Myth and Facade of an Official Culture" (1991) 2 Organization Science 170.
[183] Chan, *ibid.* at 46.
[184] MacAlister, *supra* note 174, at 171.

investigate individuals fairly and impartially. The police tend to view themselves as the "last line of defence" between a minimally civil society and a Hobbesian state of nature,[185] and therefore view the people whom they police with intense suspicion and often outright disdain. Although the police are undoubtedly subject to intense organizational scrutiny, the day-to-day actions of individual officers are not supervised in any meaningful way. This issue is rendered all the more significant as individual police officers cannot be realistically relied upon to satisfactorily regulate one another.

2.5.2. Policing in the penumbra

The overwhelming majority of police work occurs beyond external scrutiny, in an environment that is only realistically amenable to self-regulation. The practical nature of policing therefore situates the majority of officer-accused interactions beyond the scope of any supervisory body capable of independent oversight. According to Janet Chan, the fact that police forces are typically structured as organized bureaucracies does not lead to effective supervision of individual officers in the field. On this point, Chan observes that "[p]olice officers exercise extremely wide discretion at the street level … with little or no supervision."[186] Moreover, as the Honorable Mr. Justice Warren Burger famously stated:

> [a]fter the passage of many years, and more than thirty years as a lawyer and a judge, I cannot tell you who, under our existing law and institutions, will watch the watchman – the policeman – in the sense of holding him individually accountable when he breaks one law in his effort to enforce another.[187]

This means that only the direct participants – the arrester and the arrestee – are able to observe and report upon what occurs during the investigation and arrest process. In the majority of cases, police witnesses outnumber non-police observers, insuring that the officers' version of events will enjoy a numerical advantage, and often at least some degree of corroboration.[188] The lack of independent external observation ensures that all reviews of officer-accused interactions ultimately depend upon the various versions of events subsequently proffered by the direct participants. This dependence becomes increasingly problematic when the opposing parties relate contradictory and irreconcilable conceptions of what actually occurred on a specific occasion.

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[185] See Thomas Hobbes, "Leviathan" in Stevan M. Cahn, ed., *Classics of Western Philosophy* (Indianapolis: Hackett Publishing Company, 1995) 475 at 490 (Hobbes positing that in the state of nature, the "[l]ife of man [is] solitary, poor, nasty, brutish, and short.").
[186] Chan, *supra* note 172, at 44.
[187] Warren E. Burger, "Who Will Watch the Watchman?" (1964) 14 Am. U. L. Rev. 1 at 2.
[188] See e.g. John Van Maanen, "The Boss: First Line Supervision in an American Police Agency" in M. Punch, ed., *Control in the Police Organization* (Cambridge: M.I.T. Press, 1983) at 277.

There is reason to believe that as technological advances occur, some of the invisibility of police actions in the field will be lessened, if not removed altogether. Advances such as readily available handheld recording devices and in-dash cameras on patrol cars have helped reveal some of the details of officer-accused interactions. Indeed, Canadian scholars Richard V. Ericson and Kevin D. Haggerty suggest that the nature of police work has led to increasing surveillance in recent times. On this point, the authors observe that:

> [t]here is probably no occupation as thoroughly scrutinized as the police. This surveillance arises out of distrust, which is endemic in risk society. There is a belief within the criminal justice system itself that, given the opportunity, police officers will routinely avoid duty, make grave errors, fabricate evidence, and generally operate according to the informal rules of their occupational culture rather than adhering to formal administrative or criminal law rules.[189]

Despite increasing levels of surveillance, the majority of police investigatory actions still remain beyond the purview of external scrutiny.

There is considerable evidence that police engage in misconduct while operating in the relative security of their low-visibility work environment. As Chan explains, the lack of independent external supervision combines with the personalities of individual officers and the particularities of the police occupational subculture in such a way that:

> [t]he reality of police work ... allows a great deal of room for individual officers' discretion in decisions to stop, search or arrest suspects. Such discretion is often informed by stereotypes of what constitutes 'normality' or 'suspiciousness'. The occupational culture, therefore, condones various forms of stereotyping, harassment or even violence against those who are seen to be 'rough' or 'disreputable'. The code of secrecy and solidarity among officers, an integral part of this culture, ensures that deviant practices are either covered up or successfully rationalized.[190]

The day-to-day operation of policing, then, involves largely invisible discretionary decisions made by officers who often hold prejudicial and discriminatory views. Other officers who either share the same views as the decision maker, or who are bound to defer to that officer's decision by virtue of the police occupational culture, are the actors who are in turn called upon to scrutinize this conduct. In these circumstances, the task of bringing police misconduct to light is a difficult one.

James Stribopoulos argues that the low-visibility of police operations routinely leads to unjustified arrests. Stribopoulos has extensively examined arrest powers in Canada, paying specific attention to the Supreme Court's attempt to employ the *Charter* to regulate the police

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[189] Richard V. Ericson & Kevin D. Haggerty, *Policing the Risk Society* (Toronto: University of Toronto Press, 1997) at 60 [Ericson & Haggerty].
[190] Chan, *supra* note 172, at 44.

power of arrest.[191] He discusses the on-the-job difficulties experienced by individual officers when interpreting the judicially imposed "reasonable and probable grounds" standard, now a prerequisite to a lawful arrest. Stribopoulos acknowledges that when interpreting this vague standard, police officers sometimes commit well-intentioned errors, and sometimes engage in intentionally abusive arrests.[192] With respect to the latter, he observes that:

> [w]hile Canadian courts assume that the "reasonable and probable grounds" standard provides an effective safeguard against unjustified arrests, in reality, this vague standard may actually contribute to police error. In addition, there is a real risk that the police may periodically misuse or even abuse their arrest powers. Unfortunately, in any system that vests individual police officers with the authority to take suspects into custody, unjustified arrests are somewhat inevitable. The main problem with the current Canadian regime is not an unusually high risk of unfounded arrests, but the low visibility of police arrest decisions.[193]

Stribopoulos attempts to limit the scope of abusive arrest practices by suggesting that only "some rogue officers" engage in such behaviour.[194] The reality of the situation, however, is that the majority of officer-accused interactions are unobservable by any independent source, and thus the propriety of those interactions can only be presumed.

Rather than simply presuming that police misconduct is limited to distinct pockets of rogue officers, MacAlister challenges that "[t]he police subculture provides police officers with the necessary ideology or mindset for corruption to arise and remain justified."[195] Similarly, Seagrave suggests that police misconduct is prevalent in Canada, and can be categorized under overlapping headings: police misbehavior; police corruption; and police abuse of power.[196] Regardless of how police improprieties are specifically defined, Seagrave argues that such conduct has broad repercussions, stating that "[i]t is important to note that the fallout caused by police deviance extends beyond the department itself. It facilitates criminality, decreases law enforcement, and reduces public confidence in the police, inhibiting citizen cooperation with crime prevention measures."[197]

The work of these authors demonstrates that there is both the opportunity and the occupational willingness for police to engage in significant professional misconduct, and even directly illegal behaviour. Because of the occupational subculture that exists within the police

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[191] See James Stribopoulos, "Unchecked Power: The Constitutional Regulation of Arrest Reconsidered" (2003) 48 McGill L.J. 225 [Stribopoulos, "Power"]; and James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31 Queen's L.J. 1 [Stribopoulos, "Dialogue"].
[192] Stribopoulos, "Power", *ibid.* at 244.
[193] *Ibid.* at 251.
[194] *Ibid.* at 245.
[195] MacAlister, *supra* note 174, at 184.
[196] Seagrave, *supra* note 176, at 184-185.
[197] *Ibid.* at 185 [references omitted].

hierarchy, and because police work occurs in the relative absence of meaningful external criticism, misconduct is not only possible, it is prevalent. The frequency of police misconduct has a decidedly negative impact on the function of policing as well as on the core legal rights of those who are policed. Because the socially powerless are targeted by current police operation practices, the most prevalent forms of police misconduct are capable of remaining invisible provided that they do not routinely impact upon the legitimate interests of the socially powerful.

2.5.3. The police vs. the courts: Implementing "unfavourable" Charter rulings

The relevant evidence indicates that in general, street cops exhibit an occupational resistance to those *Charter* rulings that serve to increase civil liberties protections at the expense of police powers. Although several commentators have concluded that the police do not actively attempt to circumvent court rulings pertaining to the rights of the accused,[198] others suggest that their acceptance of such decisions is far more uniform at the official, managerial level of the police occupational culture than it is amongst the various "street cop" subcultures that exist in police forces throughout the country. The street cop's resistance to *Charter* rulings is of great significance as these officers are ultimately responsible for the practical impact of the Supreme Court's civil liberties rulings. This resistance also serves to render the management culture's acceptance of the decisions purely symbolic, as it is the street cops who retain the ability to negate whatever degree to which there actually is managerial adherence to *Charter* developments.

The purported willingness of the police to implement the Supreme Court's *Charter* rulings is often highlighted by proponents of the deterrence rationale for the exclusion of unconstitutionally obtained evidence.[199] However, the empirical evidence suggests that the actual police response to *Charter* rulings is at best mixed, indicating that individual officers merely adapt to those rulings that they cannot avoid.[200] According to a study undertaken by Kathryn

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[198] See Reginald A. Devonshire, "The Effects of Supreme Court *Charter*-Based Decisions on Policing: More Beneficial than Detrimental" (1994) 31 C.R. (4th) 82; and Katharine Moore, "Police Implementation of Supreme Court of Canada Charter Decisions: An Empirical Study" (1992) 30 Osgoode Hall L.J. 547 [Moore].

[199] See e.g. Penney, "Deterrence", *supra* note 59, at 115-116 (arguing that police officers willingly abide by court rulings that interpret core legal rights, and that they do so primarily because they actively desire to avoid the exclusion of reliable, probative evidence); and Diana Lumba, "Deterring Racial Profiling: Can Section 24(2) of the Charter Realize its Potential?" (2006) 22 Windsor Rev. Legal & Soc. Issues 79 at 91 [Lumba] (arguing that police abide by *Charter* rulings provided that: the impugned conduct is correctable by a responsive departmental policy; the *Charter* judgment clearly and concisely specifies the nature of the invalidated conduct; and the police misconduct at issue is identifiable by defence counsel and easily litigable at trial).

[200] See e.g. David A. Klinger, "Environment and Organization: Reviving a Perspective on the Police" (2004) Annals of the American Academy of Political Science 119 at 129 (detailing the tepid response of U.S. police forces to the ruling in *Miranda v. Arizona*).

Moore, both the Royal Canadian Mounted Police and the municipal police forces examined took steps to implement landmark *Charter* rulings, primarily through the institution of new departmental policies.[201] The study reported that the police generally perceive the *Charter* as a positive development, inculcating Moore to surmise that police "[a]ttitudes are not a significant impediment to implementation ...",[202] and that "[t]he police have managed to cope with new requirements imposed by the *Charter* and have effectively implemented changes to standard procedures."[203]

Despite Moore's conclusion, the study revealed numerous troubling aspects of the police attitude toward *Charter* rulings. Indeed, the very notion that the police have "managed to cope" with the Supreme Court's rights-enhancing decisions suggests that there is a certain institutional resistance to this type of judgment. Such a reaction is hardly supportive of a presumption that the police act in good faith when required to adhere to the dictates of those decisions. More realistically, it suggests that individual officers will begrudgingly abide by whatever policy changes are eventually implemented by police management. However, when no such changes are made, there is no indication whatsoever that police officers attempt to abide by the dictates of court rulings. Indeed, in *R. v. Schedel*,[204] the Vancouver Police Department Drug Squad maintained an official policy in violation of the common law "knock/notice" requirement for search warrant executions. This policy was still in place despite the fact that the Supreme Court's ruling *R. v. Genest*[205] held that evidence obtained in violation of the common law rule was necessarily excluded under s. 24(2),[206] and despite the fact that *Genest* was issued more than ten years before the execution of the search impugned in *Schedel*.

The clear supposition is that individual officers adhere to *Charter* rulings when they have no other choice but to do so. Their lack of choice stems primarily from departmental policies implemented at the management level. In this regard, Moore's study further revealed that "[p]olice officers, in their professional capacity, did not care whether the *Charter* existed or not so long as somebody told them exactly what they had to do in order to comply with its requirements."[207] Officers who do not care about the *Charter* simply cannot be presumed to act in a manner that ensures its provisions are complied with to the greatest extent possible. Moore's

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[201] Moore, *supra* note 197, at 563-565.
[202] *Ibid.* at 572.
[203] *Ibid.* at 577.
[204] 2003 BCCA 364, 175 C.C.C. (3d) 193 [*Schedel*].
[205] [1989] 1 S.C.R. 59, 45 C.C.C. (3d) 385.
[206] *Schedel*, *supra* note 203, at paras. 26-27.
[207] Moore, *supra* note 197, at 571.

study uncovered even more troubling evidence in this regard, reporting first that officers tend to prefer unclear Supreme Court rulings as those decisions leave "police room to manoeuvre."[208] Furthermore, the study found that even individual officers who intend to abide by *Charter* rulings are themselves concerned that ambiguous court decisions create "[t]he possibility that police officers would be able to evade the spirit of particular Supreme Court decisions."[209] The available evidence is therefore highly indicative of a police occupational culture that – at least at the street cop level – is willing to ignore *Charter* rulings issued by the courts whenever it is possible to do so. The fact that police respond to *Charter* decisions with "frustration" and "disgust"[210] renders it unlikely that individual officers exhibiting the characteristics associated with the police occupational subculture willingly adhere to the intricacies of those decisions while operating in their low-visibility work environment.

2.5.4. "Testalying": The practice of police perjury

Not only does the evidence suggest that street level police officers tend to view the legal limitations placed on their investigatory powers as frustrating technical impediments, it also indicates that these officers often fabricate the details of their interactions with members of the public in order to cast their conduct in the most favourable light. Simply stated, there is a general willingness within the street cop occupational subculture to lie whenever doing so is deemed necessary to secure the introduction of incriminating evidence or the conviction of suspects who are believed to be factually guilty. Paciocco links this willingness to lie directly to the Supreme Court's development of s. 24(2), stating that "[t]here is also reason to believe that disproportionate remedies encourage police officers to lie about how evidence was obtained to avoid the loss of what they honestly believe to be valid convictions."[211]

Paciocco's observation in this regard is itself based on evidence of testimonial misconduct by police in the United States. In a debate between the Honorable Harold Rothwax and Allan Dershowitz moderated by Robert Cossack,[212] Dershowitz discussed the effects of the

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[208] *Ibid.* at 572
[209] *Ibid.*
[210] See e.g. Kirk Makin, "The cutting edge of the law: Growing body of rulings has breathed life into Charter" *The Globe and Mail* (13 April 1987) A5 (reporting Niagara Regional Police deputy chief John Shoveller's response to the *Charter*: "We have had some terrible, terrible decisions. I think a lot of people are now totally frustrated and disgusted with the system. And, of course, the criminals love it. If an officer is wrong, he can be held accountable. But to turn a criminal loose doesn't serve justice or the public.").
[211] Paciocco, "Dichotomy", *supra* note 59, at 175.
[212] Robert Cossack, "Are Too Many Guilty Defendants Going Free?" (1995-1996) 33 Am. Crim. L. Rev. 1169.

U.S. exclusionary rule on the veracity of viva voce evidence proffered by police at criminal trials. On this point, Dershowitz argued that the exclusionary rule:

> [c]learly encourages "testalying" and police perjury. Joe McNamara, the former police chief of San Jose and Kansas City [suggests] that in his view, hundreds of thousands of cases of felony police perjury occur in the courts in the United States every year – hundreds of thousands – and he limited that just to drug search and seizure cases. The Police Commissioner for New York, former Police Commissioner of Boston, attested that testifying is a serious problem. It is interesting that when *Mapp* came up, D.A. Hogan of New York wrote a brief, an amicus brief, to the Supreme Court saying, "Please don't enact an exclusionary rule that will encourage police to lie." He was right.[213]

The high rate of police perjury is indicative of an occupational culture willing to secure criminal convictions by any means necessary. Rather than encouraging police to lie, a strong exclusionary mechanism should instead encourage them to abide by the terms of the core legal rights in order to avoid triggering operation of the rule in the first place.

In addition to Dershowitz and Paciocco, other academics have attempted to confront the issue of police perjury. In arguing that judicial regulation of the investigatory powers of police has in large part been nullified by the prevalence of police perjury, Donald Dripps observes that "[c]riminal procedure scholars agree that police perjury is not exotic. Police perjury has been called 'pervasive,' 'an integral feature of urban police work,' and the 'demon in the criminal process.'"[214] Dripps further argues that judges are often forced to choose between the competing statements of fact provided by police officers on the one hand, and the criminally accused on the other. He suggests that these situations are typically resolved in favor of the police, observing that "[t]he police story may be improbable, but police officers must be presumed honest, and the defendant's word is worthless."[215] The officers must be presumed honest as "[t]he trial judge can discredit the police testimony only by branding the police as liars and accepting the word of an apparent felon."[216] Despite the fact that courts are extremely loathe to brand police as liars, the evidence suggests that in many cases, there is simply no other accurate way to describe the subject officers. In discussing the overwhelming presence of police perjury in criminal courtrooms, Dripps observed that "[i]n some ways, the problem is not only too large to ignore, it is too large to address. It would require judges, lawyers, and academics to admit that much of what they attempt to achieve by way of regulating the police is futile and naive."[217]

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[213] *Ibid.* at 1177.
[214] Donald A. Dripps, "Police, Plus Perjury, Equals Polygraphy" (1996) 86 J. Crim. L. & Criminology 693 at 693.
[215] *Ibid.* at 696.
[216] *Ibid.*
[217] *Ibid.* at 701.

Though the issue of police perjury has not been as heavily scrutinized in Canada as it has been in the United States, the problem also appears to be pervasive in this country. Indeed, Dianne Martin, who was known primarily for her dedication to uncovering and rectifying wrongful convictions in Canada, argues that "[w]hen officer self interest, and/or the bond of the 'thin blue line' is challenged, as in a disciplinary proceeding, overt lying is widely recognized as a common occurrence ...".[218] Moreover, Seagrave has argued that there is a real risk that Canadian police will "[t]ell lies in court or to police commissions and inquiries to protect fellow officers."[219] Several recent criminal trials have also documented the willingness of police to lie in order to justify the illegitimate aspects of their investigatory conduct.[220] Additionally, John Epp indicates that the inquiries into wrongful convictions in Canada have uncovered:

> [m]any incidents which call into question the integrity and practices of some police who investigate crime. The disturbing police conduct includes: perjury; the fabrication of evidence; destruction of evidence; negligent, or intentional, inaccuracy in the recording or gathering of evidence; failure to fully investigate other logical suspects; and failure to disclose to the Crown attorney such acts and omissions. This is a familiar inventory; in varying degrees, similar incidents have occurred in investigations carried out by some members of most of the police services in Canada.[221]

Though these examples are largely anecdotal in nature, they are nonetheless indicative of a pattern of behaviour amongst Canadian police that demonstrates police perjury is relatively common. These examples also provide further evidence of the existence of a police occupational subculture that both condones and encourages the practice.

Furthermore, the relevant case law indicates Canadian courts are both unwilling and unable to deal directly with the issue of police perjury. There are few instances in which police officers are prosecuted for fabricating testimony, a fact indicative of the extremely heavy burden placed upon those who attempt to bring examples of police perjury to light.[222] Moreover, even when there are specific judicial findings of police perjury, the practice is often rationalized as engaged in only by a limited number of rogue officers.[223] Such cases indicate that Canadian courts are generally unwilling to acknowledge the systemic nature of police perjury, thereby

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[218] Dianne L. Martin, "Police Lies, Omissions and Tricks: The Construction of Criminality" (2001) [unpublished]. See Betsey Powell & Peter Small, "Perjury: Is it different for cops?" *The Toronto Star* (2 August 2008) A1.
[219] Seagrave, *supra* note 176, at 185.
[220] See e.g. *R. v. Khan*, 244 D.L.R. (4th) 443, 189 C.C.C. (3d) 49 at para. 65 (Ont. Sup. Ct. J.) (Molloy J. ruling that while the accused's version of events was believed, "[t]his is in stark contrast to the evidence of the police officers, which is both inconsistent with the documentary evidence and defies common sense ..."); and *R. v. Fisher*, [2008] O.J. No. 2563 (Sup. Ct. J.) (QL).
[221] John Arnold Epp, "Penetrating Police Investigative Practice Post-Morin" (1997) 31 U.B.C. L. Rev. 95 at para. 3.
[222] See Christine Boyle, *et al.*, "*R. v. R.D.S.*: An Editor's Forum" (1998) 10 Can. J. Women & L. 159 at 194.
[223] See e.g. *R. v. Ghorvei*, (1999), 46 O.R. (3d) 63, 138 C.C.C. (3d) 340 (C.A.) (ruling that the validity of an arresting officer's testimony could not be attacked on the basis that the same officer's credibility had been successfully impeached in an unrelated case.).

ignoring the negative impact that the practice has on the legitimacy of policing. Because the majority of officer-accused interactions are unobserved, only the investigating officers know the true reasons why particular persons are signaled out for investigation. The officers are thus the only sources from which a full understanding of the facts can be generated. If the officers involved in police investigations do not routinely supply reliable information, if police perjury is indeed endemic, it calls into question both the validity of the police function itself, and the validity of the fact-based criminal trial process that is essentially inseparable from the police function.

The practice of testalying clearly has negative repercussions for all criminally accused individuals, but it also has a disproportionately harmful impact on the socially powerless. Because they are over-policed in the first place, the racially and economically marginalized individuals who come before the criminal courts often do so with a record of prior criminal convictions, a notion substantially borne out by the official statistics on criminal recidivism. The presence of a prior criminal record in turn increases the likelihood that the officer will be believed and the accused's version of events will be rejected. That such a scenario will often unfold is well known to the accused in advance of formal criminal proceedings. If they are aware that the officer is going to lie about what transpired during the investigation and arrest process, and that those lies are likely going to be accepted by the courts, the accused is substantially less liable to pursue redress for a violation of their core legal rights. Indeed, the well known fact that police perjury is an accepted testimonial practice likely results in numerous unjustified guilty pleas and charge bargains, a reality that undeniably impacts more negatively upon the social groups to whom the criminal justice system is over-applied. The practice of testalying therefore serves to indirectly reduce the practical effectiveness of the *Charter's* due process protections by creating systemic obstacles to their enforcement.

2.5.5. The practice of racial profiling

It is now a widely accepted fact that the police routinely engage in racial profiling while carrying out their investigatory and patrol functions. The judiciary – normally quite reticent to acknowledge even more innocuous forms of police misconduct – has acquiesced to the reality of

racial profiling.[224] David Tanovich, a noted critic of the practice, defines the problem in the following terms:

> [r]acial profiling occurs when law enforcement or security officials, consciously or unconsciously, subject individuals at any location to heightened scrutiny based solely or in part on race, ethnicity, Aboriginality, place of origin, ancestry, or religion or on stereotypes associated with any of these factors rather than objectively reasonable grounds to suspect that the individual is implicated in criminal activity. Racial profiling operates as a system of surveillance and control. It "creates racial inequalities by denying people of color privacy, identity, place, security, and control over [their] daily life."[225]

Tanovich uses this definition as the basis for his argument that racial profiling arises out of systemic racism prevalent in Canadian society and that as such, it operates on a subconscious as well as a conscious level.[226] Tanovich therefore posits that the problem of racial profiling cannot be rationalized and minimized by suggesting that it results out of the actions of a few racist police officers. Instead, he observes that "[e]ven where an officer claims to be appropriately focusing on suspicious behaviour (the hallmark of good policing), it may be a racialized stereotype that is driving the apprehension of suspicion, and, where this happens, racial profiling has occurred."[227]

Stribopoulos similarly acknowledges that both conscious and subconscious racial profiling occurs, and that it has an appreciable affect on the type of individual whom officers single out for further investigation and possible arrest. On this point, Stribopoulos states that:

> [n]o doubt some police officers hold overtly racist views that may lead them to abuse their arrest powers. Much more likely, however, is the risk that many more police officers subconsciously operate on the basis of stereotypical assumptions regarding visible minorities. An officer's assessment of his or her grounds for arrest may be partially skewed by a belief that certain visible minorities are more likely to commit crimes.[228]

The true danger of racial profiling, then, is the fact that it operates at a subconscious level, and that its purveyors may be unaware that racialized notions of crime and criminality are influencing their decisions to stop, search, and ultimately arrest.

Although courts have acknowledged that racial profiling occurs, there is by no means a general judicial acceptance of the practice's prevalence in Canadian policing. To the contrary, many courts refuse to acknowledge racial profiling, choosing instead to ignore facts that are

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[224] See for example *R. v. Brown* (2003), 64 O.R. (3d) 161, 173 C.C.C. (3d) 23 (C.A.); *R. v. Nguyen*, [2006] 139 C.R.R. (2d) 65 (Ont. Sup. Ct. J.); and *Peart v. Peel Regional Police Services Board* (2006), 217 O.A.C. 269, 43 C.R. (6th) 175 (C.A.).

[225] David M. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law Inc., 2006) at 13 [Tanovich] [footnotes omitted].

[226] *Ibid.* at 13-14.

[227] *Ibid.* at 21.

[228] Stribopoulos, "Power", *supra* note 190, at 244 [footnotes omitted].

strongly indicative of the racial undertones of officer-accused interactions. In *R. v. Grant*,[229] a routine patrol by three police officers – two in plainclothes and one in uniform – of a downtown Toronto neighborhood resulted in the arrest of a young black male for weapons and narcotics offences.[230] As one officer explained, the patrol was initially intended to allow the police to "[k]eep an eye out trying to see what was going on, with the hopes of keeping the environment for students safe."[231] The accused came to the attention of police by walking on a sidewalk, making "unusual" eye contact with the two plainclothes officers, and by fidgeting with his clothing in a way that was "[j]ust kind of a little bit ... suspicious ...".[232] The police eventually stopped and questioned the accused,[233] blocking his path on the sidewalk, leaving him with no direction in which to turn. Once engaged in this questioning, he eventually admitted to possessing a small amount of marijuana and a firearm.[234] The accused was subsequently arrested, charged and eventually convicted of five criminal offences relating to the firearm.[235] The Ontario Court of Appeal held that police had detained the accused, that they had no reasonable and probable grounds for the detention, and that as a result, the accused's rights under s. 9 of the *Charter* had been violated.[236]

The panel then addressed the issues under s. 24(2), holding that the firearm was "'[c]onscriptive real evidence,' whose admission affected the fairness of the appellant's trial."[237] The Court of Appeal additionally ruled that the conscriptive evidence was not independently discoverable.[238] Despite these findings, Laskin J.A. made the following observations:

> [f]irst, the admission of all conscriptive evidence, including derivative evidence, will have some impact on trial fairness. Second, if we do not have an automatic exclusionary rule for conscriptive evidence, then we must recognize that even though the admission of conscriptive evidence compromises trial fairness, its admission will not always bring the administration of justice into disrepute. And third, whether conscriptive evidence should be admitted will depend both on the resulting degree of trial unfairness and on the strength of the other two Collins factors.[239]

Based on his conclusion that not all conscriptive evidence that renders the trial unfair will be excluded under s. 24(2), Laskin J.A. ruled that the criteria to be used when assessing whether the

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[229] (2006), 81 O.R. (3d) 1, 209 C.C.C. (3d) 250 (C.A.), leave to appeal to S.C.C. granted, [2007] S.C.C.A. No. 99 [*Grant* cited to C.C.C.].
[230] *Ibid.* at paras. 4, 17.
[231] *Ibid.* at para. 19.
[232] *Ibid.*
[233] *Ibid.*
[234] *Ibid.*
[235] *Ibid.* at para. 4.
[236] *Ibid.* at para. 30.
[237] *Ibid.* at para. 46.
[238] *Ibid.* at para. 47.
[239] *Ibid.* at para. 52.

conscriptive evidence renders a trial sufficiently unfair include "[t]he potential effect of the state's misconduct on the reliability of the evidence, and the nature of the police's conduct that led to the accused's participation in the production or obtaining of the evidence."[240]

In applying these criteria to the facts of the case before him, the Laskin J.A. held that the evidence was sufficiently reliable,[241] that the police merely "[a]sked a fairly innocuous set of questions ...", and that "[t]hey overstepped the bounds of legitimate questioning, but not grossly so."[242] As a result, Laskin J.A. concluded:

> [t]he reliability of the evidence and the nature of the police's conduct that led to their obtaining the evidence, suggest that though the admission of this evidence would have had some impact on trial fairness, that impact would have been at the less serious end of the scale. Put differently, in my view, the impact would not have been so great that it precludes consideration of the other two Collins factors.[243]

The Justice thus decided that despite the accused's trial being somewhat unfair, it was not sufficiently so to render the evidence excludable on that basis alone. By focusing on the form that the police questioning eventually took, the court was able to ignore the investigatory behaviour that led to the commencement of the questioning in the first place, which was most likely an instance of racial profiling.

The Canadian courts' reluctance to acknowledge the fact that police officers engage in racial profiling takes on enhanced significance when it is acknowledged that the practice occurs across the country, and is applied to a wide variety of ethnic groups. Although the study of racial profiling in the United States has identified African Americans as the primary targets of the practice, the problem has a broader range of victims in Canada, which extends the issue well beyond the confines of greater Toronto and other major urban centres such as Montreal.[244] According to Criminologist Scot Wortley, racial profiling "[i]s not confined to the Toronto area. Indeed, over the past half century, similar 'race/crime' controversies have emerged with respect to the treatment of black people in Nova Scotia and Quebec, the treatment of Asians and South Asians in British Columbia, and the treatment of aboriginal people throughout the country."[245] With respect to the Aboriginal context, Toni Williams and Kim Murray argue that:

> Canada has a long history of treating Aboriginal peoples as 'uncivilized' and in need of assimilation or control ... Policing has played a variety of roles in the processes of dispossession,

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[240] *Ibid.* at para. 53.
[241] *Ibid.* at para. 54.
[242] *Ibid.* at para. 58.
[243] *Ibid.* at para. 59.
[244] For an example of racial profiling from Montreal, see e.g. *R. v. Campbell*, [2005] Q.J. No. 394 (C.Q. crim. & pén.) (QL).
[245] Scot Wortley, "Hidden Intersections: Research on Race, Crime, and Criminal Justice in Canada" (2003) 35 Can. Ethnic Stud. 99 at 100.

> displacement, and resistance that stem from this policy. Through activities such as raiding longhouses, suppressing potlatch ceremonies, enforcing residential school policies, and attempting to contain organized resistance, the Canadian state has consistently deployed policing in attempts to repress Aboriginal peoples' aspirations, cultures and rights.[246]

The historical practice of differentially policing Aboriginals has in modern times led directly to allegations that the police routinely profile native Canadians on the basis of their race. As MacAlister indicates, "[i]n Canada, the police in the prairies have periodically come under fire for alleged racism against Aboriginals ...".[247]

The practice of racial profiling is not limited to the stopping and searching of racialized individuals while they are present in certain neighbourhoods and areas. In reality, the practice encroaches deeply upon other aspects of their everyday lives as well. According to Lorne Sossin:

> [t]hat the police are embedded not just in the criminal justice system but in the fabric of the community is not a controversial claim but has been illustrated dramatically in recent years by the issue of profiling – whether in the form of local police forces engaging in racial profiling when stopping vehicles for inspection, or decisions made at borders and airports to detain members of particular ethnic and religious groups for secondary searches.[248]

Tanovich similarly reports that "[r]acialized stereotypes influence not only who is stopped and questioned but also who is searched, arrested, subjected to police force, or ultimately detained in custody. In some cases the stereotype will lead police to overreact because they have perceived the situation to be far more dangerous than it really is."[249]

In the result, racial profiling occurs throughout all regions of Canada, it affects a wide spectrum of ethnic and racial groups, and it occurs in a wide variety of circumstances. The practice therefore significantly deepens the differential impact that the institution of Canadian policing has on society's racially, economically and socially marginalized communities and individuals. These realities must be taken into account by the Supreme Court of Canada when it is engaged in the interpretation and application of s. 24(2) and the *Charter's* core legal rights.

2.5.6. The social realities of policing in Canada

The relevant evidence suggests that a negative police occupational subculture exists in Canada. When this fact is considered together with the low-visibility setting in which officers' day-to-day

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[246] Toni Williams & Kim Murray, "Shifting the deckchairs on the Titanic once more: A plea for redundancy in the governance of relationships between the police and Aboriginal peoples" in Margaret E. Beare & Tonita Murray, eds., *Police & Government Relations: Who's Calling the Shots?* (Toronto: University of Toronto Press, 2007) 172 at 173.
[247] MacAlister, *supra* note 174, at 172.
[248] Lorne Sossin, "The Oversight of Executive Police Relations in Canada: The Constitution, the Courts, Administrative Processes, and Democratic Governance" in Margaret E. Beare & Tonita Murray, eds., *Police & Government Relations: Who's Calling the Shots?* (Toronto: University of Toronto Press, 2007) 96 at 127.
[249] Tanovich, *supra* note 224, at 24-25.

poling activities occur, the frequency with which individual officers engage in unauthorized or unlawful, the general institutional resistance to court rulings that solidify core legal rights at the expense of police powers, and the willingness with which police lie to cover-up investigatory misconduct, it becomes apparent that the *Charter* right of individuals who come to the attention of the police are in a position of relative peril. This reality is significantly exacerbated by the fact that the entirety of the policing function is disproportionately applied to the socially, racially and economically marginalized segments of Canadian society. As Dianne Martin argued, "[m]ost cases in the criminal justice system involve targeted, racialized, marginalized people who are known to each other, and known to the system, and most of these cases are resolved through plea negotiations. It is fewer than 10-20 per cent of all charges that actually proceed to a contested trial, and of that percentage, a much smaller number involve cases where factual guilt is at issue."[250] As a result, the core legal rights of the individuals who are most likely to invoke them are disproportionately vulnerable to potential violation. This ought to be of great concern to the Supreme Court as these relatively powerless individuals are not in a realistic position to vigorously defend the systematic violation of their rights.

2.6. Conclusion to Chapter 2

Proponents of the Canadian criminal justice process often assume that it provides equal justice for all. Many consider that the *Charter* works to ensure that differential applications of the system are minimized to the greatest extent possible, and that it has all but limited overt biases and prejudices over the course of the past 25 years. The system's most ardent critics often target the *Charter* as the root cause of the system's inability to reduce crime sufficiently or punish offenders adequately. In reality, however, neither of these positions is entirely accurate. First, the criminal justice system is neither constructed solely to decrease crime, nor to harshly punish criminals. Instead, it serves as a mechanism though which maintenance of the social status quo is sought, and to a large extent obtained. This function, which was first identified and critiqued by Marx and Marxist scholars, was at the root of the criminal justice system that Canada inherited from the United Kingdom in the 1700s. In modern times, Canada's system is disproportionately applicable to the socially powerless, the racially marginalize and the economically disadvantaged. Furthermore, the institution of Canadian policing is characterized by features that

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[250] Dianne Martin, "Distorting the Prosecution Process: Informers, Mandatory Minimum Sentences, and Wrongful Convictions" (2001) 39 Osgoode Hall L.J. 513 at 527.

seriously jeopardize the integrity of the core legal rights of individuals who are routinely subjected to investigations, interrogations and searches.

These realities would seem to call for a broad interpretation and application of s. 24(2) in order to ensure the available due process protections have as great a practical impact as possible. However, rather than striking out against the illegitimacy of a system based on a history of repression, the *Charter's* exclusionary mechanism currently acts to legitimize the disproportionality endemic in modern Canadian criminal justice. When critically assessed in light of the criminal justice system's historical legacy, the *Charter's* application in the criminal law context is less concerned with guaranteeing procedural rights for accused persons, and more concerned with ensuring that the system appears legitimate. On this point, Mandel concludes that:

> [t]he Supreme Court's oracle-like pronouncements rendered a decade after the fact can have nothing to do with these concrete goals of procedural rights; in fact, they systematically defeat them. Their only conceivable *raison-d'être* is a legitimation one: to protect the reputation of the system by this *ad hoc, post hoc* purifying mechanism, while at the same time giving the impression of a system concerned with these rights and interests by virtue of engaging in earnest but inconclusive debates about them.[251]

These "earnest" debates have the effect of shifting the focus away from the overall repressive nature of the system and onto to its supposed fairness and equality. Mandel argues that the *Charter's* core legal rights are "[a] whole way of approving or disapproving of punishment in which the freedom of the judiciary is central. Since the rights are merely incidental to legitimation, they are symbolic, discretionary and conditional ... They are meant to protect the system not the public ...".[252] It is in this context, then, that the validity of the Supreme Court's development of the *Charter's* exclusionary mechanism must ultimately be judged.

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[251] Mandel, *Legalization*, *supra* note 99, at 203.
[252] *Ibid.* at 224.

Chapter 3. The Rise of Canada's Exclusionary Rule

Despite the subject matter with which the jurisprudence deals, and the vast amount of academic comment that it has generated, the Supreme Court of Canada's interpretation and application of s. 24(2) of the *Charter* has remained relatively consistent since it was first introduced more than two decades ago. The Supreme Court's treatment of s. 24(2) remains founded on its ruling in *Therens*, specifically set out in *Collins*, and ultimately clarified in *Stillman*, even though the court has issued more than 150 rulings and heard more than 100 applications for leave to appeal involving the section since 1984[253]. An applicant seeking the exclusion of unconstitutionally obtained evidence under the *Charter* must inevitably rely upon the principles set out in these three cases. Therefore, if the decision-making process of the Supreme Court in this subject area is to be critically analyzed in a sufficient manner, these three cases must necessarily provide the basis for that analysis. However, in order to understand the full significance of these rulings, it is first necessary to place them into their proper historical context. This can be accomplished by briefly examining the origins of exclusion and the pre-*Charter* approach to illegally obtained evidence, and by outlining the constitutional drafting process that led s. 24(2)'s inclusion in the *Charter*. The *rationes decidendi* of the three leading decisions will then be examined in detail. This explicatory exercise will provide a sound basis on which to analyze the Supreme Court's adjudicatory process in relation to s. 24(2), and to judge the validity of the Court's development of Canada's exclusionary rule by referencing the nature of the Canadian criminal justice system.

3.1. Origins: Exclusion in the U.S. and pre-Charter Canada

Prior to the proclamation of s. 24(2), the means through which the state obtained evidence of criminal wrongdoing was essentially irrelevant to the issue of admissibility. However, the Supreme Court of Canada's development of the exclusionary mechanism contained in s. 24(2) did not occur in a jurisprudential vacuum. Courts around the world have long grappled with the contentious issues surrounding various forms of the exclusionary rule. In the United States, those issues have been swirling since 1914, when that country's Supreme Court issued its first major decision on exclusion, *Weeks v. United States*.[254] In discussing the proper recourse for a violation of the Fourth Amendment,[255] Day J. ruled:

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[253] As of the date of writing, Quicklaw reports that there are 159 Supreme Court judgments mentioning s. 24(2), and 119 applications for leave to appeal involving the section.
[254] 232 U.S. 383 (1914) [*Weeks*].
[255] U.S. Const. amend. IV. In its entirety, the Fourth Amendment reads: 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

> [t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[256]

Day J. further held that without a meaningful remedy, "[t]he protection of the 4th Amendment, declaring [the individual's] right to be secure against [unlawful] searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."[257]

The United States Supreme Court subsequently extrapolated upon *Weeks* in *Silverthorne Lumber Co. v. United States*,[258] a case in which the federal government admitted that certain papers had been seized from the accused in a manner that constituted an "outrage". The government nevertheless intended to copy the information contained in the illegally obtained documents, and to then use that information against the accused at his trial.[259] In rejecting the validity of this intention, Holmes J. ruled:

> [t]he 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. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.[260]

Holmes J.'s decision thereby rendered all evidence obtained in contravention of the protections set out in the U.S. Constitution automatically inadmissible in federal criminal trials. Two subsequent Supreme Court decisions rendered in the 1960s – *Mapp v. Ohio*[261] and *Miranda v. Arizona*[262] – extended the rule of automatic exclusion to criminal proceedings commenced under state law as well. As a result, the exclusionary mechanism initially set out in *Weeks* continues to play a significantly determinative role in admissibility assessments throughout the entirety of the United States.

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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.

[256] *Weeks*, *supra* note 253, at 392.

[257] *Ibid.* at 393.

[258] 251 U.S. 385 (1920).

[259] *Ibid.* at 391.

[260] *Ibid.* at 392.

[261] 367 U.S. 643 (1961) [*Mapp*].

[262] 384 U.S. 436 (1966) [*Miranda*].

The U.S. Supreme Court's automatic exclusionary rule has generated considerable controversy since its inception.[263] Criticism of its rigidity eventually led the American judiciary to carve out three main exceptions to the general rule.[264] First, according to Paul Marcus, the doctrine of harmless error asserts that "[i]f a violation has occurred under the Fourth, Fifth and Sixth Amendments, generally the conviction of the defendant is not automatically reversed. Instead the question becomes whether the court can conclude that the error in admitting the evidence which should have been excluded is 'harmless beyond a reasonable doubt.'"[265] Only when this threshold is not met will the evidence be excluded. Second, the impact of automatic exclusion can be limited if a specific exclusionary ruling is interpreted as having only a prospective effect, as opposed to having both prospective and retrospective application.[266] Clearly, a ruling with retrospective application will have a far greater impact than one that is only permitted to impact upon future investigatory conduct.

Third, the most significant – and perhaps the most heavily disputed – exception to the rule of automatic exclusion involves determining whether the illegal police conduct is excusable on the basis that the subject officers acted in good faith. The United States Supreme Court first formally recognized[267] a good faith exception to Fourth Amendment violations in *United States v. Leon*.[268] In that case, the police secured judicial authorization for a search warrant primarily by using information received from a confidential informant.[269] Although the search warrant was eventually invalidated for lack of probable cause, it was facially valid at the time of its execution.[270] In deciding that the evidence seized under the impugned warrant was nevertheless admissible at trial, the Supreme Court first reiterated the fact that the purpose of the suppression doctrine is to deter future police misconduct,[271] and then observed that "[s]uppression of

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[263] See e.g. Lane V. Sunderland, "Liberals, Conservatives, and the Exclusionary Rule" (1980) 71 J. Crim. L. & Criminology 343 [Sunderland].
[264] Paul Marcus, "The Exclusion of Evidence in the United States" (1990) 38 Am. J. Comp. L. 595 at 603-604 [Marcus] [footnotes omitted]. See also Brent D. Stratton, "The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic" (1984) 75 J. Crim. L. & Criminology 139 at 140 [Stratton] (noting additional exceptions such as the independent source exception, and the attenuation exception).
[265] *Ibid.* at 603.
[266] *Ibid.* at 604.
[267] The issue of good faith and its relation to the suppression doctrine had long been debated in district and appellate courts throughout the United States. It also generated an enormous degree of academic literature. See Comment, "Rethinking the Good Faith Exception to the Exclusionary Rule" (1980) 130 U. Pa. L. Rev. 1610.
[268] 468 U.S. 897 (1984) [*Leon*].
[269] *Ibid.* at 901.
[270] *Ibid.* at 902-904.
[271] *Ibid.* at 916.

evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule."[272]

Speaking for the majority of the Supreme Court, White J. set out the substance of the good faith exception, ruling that the suppression of evidence obtained under the auspices of what is subsequently determined to be an invalid warrant does not advance the overarching purpose of the exclusionary rule provided that the officer's reliance on the warrant was objectively reasonable.[273] The majority added the caveat of objectivity to it reasonableness requirement in order to avoid countenancing police reliance on warrants that – despite being technically valid at the time of execution – were nevertheless obtained through police deception of the issuing magistrate, through the overt carelessness of the authorizing judge, or that were so facially deficient that any reasonably well-trained officer would not have relied on their validity.[274] In justifying the creation of the good faith exception, White J. observed that:

> [t]he good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time.[275]

In applying the newly created exception to the facts of the case, the majority ruled that although the warrant had been issued improperly, the police had not engaged in misconduct in preparing their affidavit in support of the warrant and that as such, their subsequent reliance on the document in the execution of the search was objectively reasonable and thus in good faith.[276]

The majority's good faith exception received trenchant criticism from the academic community in the United States.[277] Scholars commonly challenged the new rule's validity on the basis that it effectively robbed the Fourth Amendment of its practical effect. In refuting the Supreme Court's argument that suppression should only be invoked if it advances the cause of deterrence, Donald Dripps contends that:

> [t]o a significant degree, the severity of the sanction expresses the importance of the violated norm. Even if the sanction does not deter, the refusal to apply it or anything else expresses the judgment that the underlying norm is of little importance. *Leon* teaches that Fourth Amendment

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[272] *Ibid.* at 918.
[273] *Ibid.* at 922.
[274] *Ibid.* at 923.
[275] *Ibid.* at 924.
[276] *Ibid.* at 926.
[277] See David Clark Esseks, "Errors in Good Faith: The Leon Exception Six Years Later" (1990) 89 Mich. L. Rev. 625 at 625-626 [Esseks].

> violations do not matter. Such an evaluation betrays the fundamental principle of constitutionalism, which is after all that the Constitution states the law.[278]

Despite the arguments against good faith, many levels of court in the United States continue to apply the exception in dismissing suppression applications in Fourth Amendment cases.[279] Thus, the good faith exception to the automatic exclusionary rule for all unconstitutionally obtained evidence continues to influence the outcome of criminal trials throughout the country.

These exceptions to the general rule of automatic exclusion arose in the United States primarily because the U.S. Supreme Court adopted the deterrence rationale to justify the exclusion of illegally obtained evidence. The acceptance of this new ideological outlook represented a significant change from when the rule was first incorporated into the jurisprudence, a time during which little direct attention was paid to the rule's philosophical footings.[280] According to Paciocco, the deterrence rationale suggests that "[t]he purpose behind excluding the ill-gotten gains of unconstitutional acts is to deter such acts in the future. If the evidence will be excluded, there is nothing to be gained on the part of state agents in disregarding the Constitution hence there will be no incentive to do so. Presumably this will reduce the incidence of constitutional violations."[281] However, the deterrent effect of exclusion has never been conclusively proven. As Paciocco notes, "[i]t is difficult if not impossible to prove that the exclusion of evidence actually deters unconstitutional acts. While deterrence cannot be substantiated, the costs of exclusion can be graphically demonstrated through anecdotal evidence."[282] The less likely it is that exclusion can be proved to deter future violations in particular circumstances, the less likely it is that it will be ordered. When this rationale is applied, then, the exclusion of illegally obtained will be rare. The adoption of the deterrence rationale therefore represents the U.S. Supreme Court's clear intention to scale back the exclusionary rule's practical impact.[283]

In pre-*Charter* Canada, the Supreme Court ensured that the U.S. position on exclusion did not encroach into the Canadian jurisprudence. In *R. v. Wray*,[284] a majority of the Court ruled that judges lacked the discretion to exclude otherwise reliable evidence from a criminal trial

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[278] Donald Dripps, "Living with Leon" (1986) 95 Yale L.J. 906 at 936.
[279] Esseks, *supra* note 276, at 633.
[280] Paciocco, "Judicial Repeal", *supra* note 59, at 331.
[281] *Ibid.* at 332 [footnotes omitted].
[282] *Ibid.* at 336 [footnotes omitted].
[283] *Ibid.* [footnotes omitted]. In Paciocco's words, "[t]he weaknesses of the rationale have been exploited to create new exceptions to the exclusionary rule and to confirm, develop and extend old exceptions. It is difficult to resist the conclusion that, like a pack of hungry wolves, Supreme Court justices, unconvinced of the merits of exclusion, separated the most vulnerable rationale from the herd of rationales for the purpose of savaging it."
[284] [1971] S.C.R. 272, 11 D.L.R. (3d) 673 [*Wray* cited to S.C.R.].

simply because it had been obtained illegally or improperly, or even in a way that brought the administration of justice into disrepute.[285] In so ruling, Martland J. relied on the English decision of *Kuruma v. The Queen*,[286] in which the U.K. House of Lords determined that "[t]he test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."[287] In integrating this test into Canadian law, Martland J. ruled:

> [t]he allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the Court is trifling, which can be said to operate unfairly.[288]

Although the facts in *Wray* involved an involuntary confession rather than evidence received through a specific rights violation, the ruling set the standard for subsequent judicial treatment of unconstitutionally obtained evidence under the common law.

The Supreme Court's decision in *R. v. Hogan*[289] solidified the notion that the rule from *Kuruma* was applicable to rights violations occurring in Canada as the Court applied the position taken in *Wray* directly to adjudication under the *Canadian Bill of Rights*. In *Hogan*, the accused sought to quash his conviction on the basis that he was denied his right to counsel during the investigation process. In deciding that this fact was immaterial to the propriety of the conviction, Ritchie J. stated:

> [w]hatever view may be taken of the constitutional impact of the Bill of Rights, and with all respect for those who may have a different opinion, I cannot agree that, wherever there has been a breach of one of the provisions of that Bill, it justifies the adoption of the rule of "absolute exclusion" on the American model which is in derogation of the common law rule long accepted in this country.[290]

The Supreme Court was satisfied that the quasi-constitutional *Bill of Rights* did not alter the common law position regarding the admissibility of illegally obtained evidence. In this regard, the majority held that "[t]he common law rule of admissibility of illegally or improperly obtained evidence rests primarily on the relevancy of that evidence subject only to the discretion of the trial judge to exclude it on the ground of unfairness as that word was interpreted in this Court in [*Wray*]."[291] Therefore, whenever evidence was deemed sufficiently reliable and probative, it

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[285] See McLellan & Elman, *supra* note 51, at 225.
[286] [1955] A.C. 197 [*Kuruma*].
[287] *Ibid.* at 203.
[288] *Wray*, *supra* note 283, at 293.
[289] [1975] 2 S.C.R. 574, 62 D.L.R. (3d) 193 [*Hogan* cited to S.C.R.].
[290] *Ibid.* at 597-598.
[291] *Ibid.* at 582.

would continue to be admissible regardless of whether the accused's rights were violated during the investigatory process.

The Supreme Court's pre-*Charter* reliance on *Kuruma* for its formal position on exclusion is somewhat concerning. That case came before the House of Lords by way of appeal against a decision rendered by the Court of Appeal for Eastern Africa in 1954. The accused – a black African – had been convicted at trial of unlawfully possessing two rounds of ammunition in contravention of Kenyan law, and had been sentenced to death.[292] Previously "a man of good character",[293] he had come to the attention of authorities on the date of the offence in highly suspect circumstances. After receiving a leave of absence from his employer to visit his "reserve", the accused set off on his bicycle down a main thoroughfare on which he knew there was a police roadblock at which he was likely to be searched. He selected this path even though he could easily have taken another route to reach his home, thereby avoiding the roadblock.[294] Upon reaching the roadblock, the accused was stopped as expected, and the validity of his papers was checked. Despite his documentation being in order, the accused was subjected to a pat down search, which the investigating officer later testified raised the suspicion that the accused was in possession of ammunition and a pocketknife.[295] After this initial search, the accused was taken to a police enclosure where two officers performed a more extensive search. This search, which involved removing the accused's shorts, eventually located the incriminating evidence.[296]

The officers were purportedly acting under the authority of a Kenyan law providing police with significant stop and search powers. The applicable regulation provided that "[a]ny police officer of or above the rank of assistant inspector with or without assistance and using force if necessary ... may stop and search ... any individual whether in a public place or not if he suspects that any evidence of the commission of an offence against this regulation is likely to be found on such ... individual and he may seize any evidence so found."[297] Despite the obviously wide ambit of otherwise arbitrary searches legitimized by this regulation, the investigating officers nevertheless overstepped their authority. At the time the search was performed, neither officer occupied a position at or above the rank of assistant inspector.[298] The law did therefore not authorize the warrantless search of the accused. The accused impugned the search as illegal,

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[292] *Kuruma, supra* note 285, at 198.
[293] *Ibid.*
[294] *Ibid.*
[295] *Ibid.* at 198-199.
[296] *Ibid.* at 199.
[297] *Ibid.* at 198.
[298] *Ibid.* at 199.

and argued that the evidence obtained through that illegal search ought to have been inadmissible at his trial.[299] Kuruma denied that he had been in possession of the ammunition or the pocketknife, suggesting instead that the investigating officers had planted any such evidence upon his person.[300]

Despite the suspicious circumstances and serious consequences of this case – or perhaps even because of them – the House of Lords was content to rely on the rule that all reliable evidence was admissible at a criminal trial regardless of how it had been obtained.[301] In coming to this conclusion, their Lordships referred to an earlier English decision in which the presiding judge stated the rule regarding admissibility in the following dubious terms: "[i]t matters not how you get it; if you steal it even, it would be admissible."[302] Even using this wide statement of automatic admissibility of reliable evidence, the facts in *Kuruma* could easily have been interpreted as calling for the exclusion of the ammunition on the basis of unreliability. Though the accused argued that he did not ever possess the evidence, the courts simply preferred the investigating officer's testimony on this point. Their conclusion in this regard appears based simply on the fact that none of the investigating officers officially carried the same type of ammunition. This type of suspect judicial determination was apparently expected by the Crown, which was sufficiently certain that the evidence would be admitted on the basis of the investigating officer's testimony alone that it opted not to call the two other police officers and one civilian who allegedly witnessed the fruitful outcome of the search.[303] This evidentiary lapse warranted nothing more than a mild reprimand from the House of Lords: "[t]heir Lordships think it was most unfortunate, considering the grave character of the offence charged, which carries a capital penalty, that these important witnesses were not called by the prosecution: it was not suggested that they were not available."[304]

The rationale underlying the ruling in *Kuruma* seems highly suspicious. A young African male worker with no prior history of criminal activity is stopped at police roadblock of which he is well aware. Regardless of the fact that his papers are in order, he is searched – illegally – and evidence of a capital offence is uncovered. Despite the fact that the Crown is aware that the police officers were acting beyond the scope of their authority when conducting the search, and

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[299] *Ibid.*
[300] *Ibid.* at 202.
[301] *Ibid.* at 203.
[302] *Ibid.* See *R. v. Leatham* (1861), 8 Cox C.C. 498.
[303] *Ibid.* at 202.
[304] *Ibid.*

that the accused denies possession of the evidence, it elects not to call several available witnesses to corroborate its primary evidence. Nevertheless, the House of Lords was ultimately willing to deem the impugned evidence reliable and therefore admissible regardless of the fact that it was illegally obtained. More troubling still, a majority of the Supreme Court of Canada was willing to incorporate this dubious precedent into the Canadian jurisprudence in *Wray* with little discussion of its problematic factual circumstances. Rather than specifically addressing the issue, Martland J. was content to reiterate the relevant circumstances and characterize them as "unusual".[305] In fact, the dubious nature of the scenario in *Kuruma* was eventually used to justify an excessively narrow interpretation of a judge's residual discretion to exclude evidence that operated unfairly against the accused.[306] Martland J. appears to have reasoned that if such discretion could not have been justifiably exercised in *Kuruma*, then the scope of that residual discretion must be very narrow indeed. In this sense, the Supreme Court's pre-*Charter* position on exclusion was explicitly founded upon the judicial desire to avoid addressing the potentially problematic social-structural circumstances that are often directly related to the issue of criminal investigations.

3.2. Creating s. 24(2): The language of a political compromise

The Supreme Court's pre-*Charter* position on the admissibility of illegally obtained evidence engendered substantial controversy prior to 1982, and was the focal point of the political disagreements that arose during the constitutional drafting process, at least insofar as those disagreements pertained to the potential remedies to be included in the document.[307] This controversy ultimately led the framers of the newly patriated constitution to explicitly include an exclusionary mechanism in the *Charter's* enforcement section. Thus, the highly politicized constitutional drafting process resulted in the striking of a "compromise" between the Canadian common law position and the more expansive American rule. In *R. v. Collins*,[308] Lamer J. commented on this compromise, observing that s. 24(2) was intended to occupy an intermediate position regarding the exclusion of unconstitutionally obtained evidence, rejecting as it did both the American rule of automatic suppression and the common law rule deeming all relevant

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[305] *Wray*, *supra* note 283, at 293.
[306] *Ibid.* at 295.
[307] See McLellan & Elman, *supra* note 51, at 206-208.
[308] *Collins*, *supra* note 52.

evidence admissible, irrespective of how it was secured by the state.[309] However, suggesting that s. 24(2) exists as a compromise somewhat trivializes the process through which it was formed.

The creation of s. 24(2) involved a long and arduous drafting process, the course of which was almost entirely dictated by political disagreements between various interest groups and political parties.[310] The primary point of contention concerned whether the *Charter* would explicitly provide for the exclusion of unconstitutionally obtained evidence, or whether it would simply preserve the common law status quo. One the one hand, organizations such as the Canadian Civil Liberties Association sought to ensure that the *Charter* would contain an effective remedial section lest it rights be reduced to mere symbolism. As Walter Tarnopolsky argued, "[o]rdinarily one would expect that when a Bill of Rights sets out certain rights and freedoms, that a remedy would be presumed. In other words, our Courts would not be moved to assert there is a right unless there is a remedy, but ... you will note that the majority of our Supreme Court has not followed that kind of logical conclusion."[311] On the other hand, groups such as the Canadian Association of the Chiefs of Police opposed the entrenchment of the *Charter* on the grounds that it would unduly limit the fairness and effectiveness of police investigations into criminal behaviour.[312]

The inherently political nature of the s. 24(2) drafting process inevitably resulted in the promulgation of a remedial section composed of a number of extremely vague concepts couched in ambiguous language. In its entirety, the section reads as follows:

> 24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.[313]

As is plain from even a cursory reading of the section, its vague terminology does not specifically dictate when evidence is to be excluded from a criminal trial. Simply stated, the section requires extensive judicial interpretation before it can be applied by any court. The Supreme Court's various attempts at articulating the precise nature of the political compromise

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[309] *Ibid.* at para. 29.

[310] In 1980-81, groups including the Canadian Civil Liberties Association, the Canadian Jewish Congress, the Canadian Bar Association, the Canadian Association of Chiefs of Police, the Canadian Association of Crown Counsels, the Progressive Conservative Party of Canada, and the New Democratic Party of Canada all made oral submissions regarding the eventual form of s. 24(2) to the Special Joint Committee of the House of Commons and Senate on the Constitution. See McLellan & Elman, *supra* note 51; Roach, *Due Process*, *supra* note 100, at 42-50; and Mandel, *Legalization*, *supra* note 99, at 181-185.

[311] *Proceedings of the Special Joint Committee on the Constitution of Canada* (1980-81) No. 7 at 15 [*Joint Committee Proceedings*].

[312] Mandel, *Legalization*, *supra* note 99, at 182.

[313] *Charter*, *supra* note 36, s. 24(2).

that s. 24(2) represents have created the bulk of the controversy associated with exclusionary mechanism. As Peter Hogg has observed, "[g]iven the vague language of s. 24(2), it is not surprising that the Supreme Court of Canada has had difficulty in developing a consistent body of jurisprudence."[314]

3.3. The Supreme Court and Canada's exclusionary rule

The language used to enshrine the remedy contained in s. 24(2) of the *Charter* is imprecise, and therefore open to differential judicial interpretation. Rather than there existing only one clearly correct method of excluding evidence obtained through the breach of a *Charter* right, the particular words selected by the framers in setting out the section renders its interpretation an inexact science. In reality, there are as many possible interpretations for s. 24(2) as there are persons interested in interpreting it. However, the Supreme Court of Canada has settled on a particular reading of the section's language, and has held firmly to that reading for almost a quarter of a century. In essence, the Court's current approach to the exclusion of unconstitutionally obtained evidence can be understood by an examination of the *Therens/Collins/Stillman* regime. It is nevertheless instructive to also briefly examine the route an accused person must taken when applying for the exclusion of evidence under s. 24(2), as well as the alternative route to exclusion under s. 24(1). These explanations will provide additional context for the Supreme Court's authoritative trilogy of decisions pertaining to s. 24(2).

3.3.1. The route to the exclusionary remedy

The route an individual must take in order to receive a remedy under s. 24(2) is not an easy one. Generally speaking, the accused must first provide the Crown with sufficient notice regarding his or her intention to raise *Charter* arguments in an effort to impugn the conduct of the police in the investigation process.[315] Once this notice is filed with the courts and properly served upon the Crown, the accused must prove on a balance of probabilities that his or her rights have been violated.[316] If these substantial hurdles are cleared, the accused must then prove on a balance of probabilities that the remedy he or she seeks is warranted in the circumstances.[317] Given this procedure, if the accused's arguments regarding the appropriateness of exclusion fail, his or her

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[314] Hogg, *Constitutional Law*, *supra* note 148, at 959.
[315] *R. v. Dwernychuk* (1992), 77 C.C.C. (3d) 385, 135 A.R. 31 (C.A.), leave to appeal to S.C.C. refused, [1993] S.C.C.A. No. 30.
[316] *Collins*, *supra* note 52, at para. 21.
[317] See e.g. *Ibid.*; and *R. v. Iraheta*, [2007] O.J. No. 2205.

arguments pertaining to the substantive rights violation will have only a negligible impact on the outcome of the trial, if any impact at all. As a result, s. 24(2) takes on a hugely significant role in relation to the practical impact of the core legal rights.

It follows from this that a restrictive interpretation of s. 24(2) will concomitantly reduce the effectiveness of the *Charter's* core legal rights, rendering them merely incidental to the adjudication of criminal offences. For example, the courts have created a large body of case law pertaining to an individual's right to be free from unreasonable search and seizure under s. 8. However, if no available remedy is capable of sufficiently dealing with violations of s. 8, it becomes impossible to vest that right with meaning insofar as it purportedly protects a person subject to the state's powers of criminal investigation. If in most cases, s. 8 violations have no effect on the outcome of criminal trials, it becomes arguable that the section has little or no practical meaning whatsoever. It cannot even be realistically said to have a deterrent impact as, if violations do not result in exclusion, there is no need for police to bring their behaviour into line with s. 8 requirements. This suggests that if rights are to be taken seriously in even the most minimal sense, judicial interpretation of constitutional remedies ought to be broad and expansive rather than narrow and restrictive. Without a remedy appropriately constructed to properly and adequately compensate the victim of a *Charter* violation, the substantive right becomes nothing more than a procedural guideline for police, one that can be ignored whenever the subjectively apprehended circumstances dictate. In this sense, the adjudication of s. 24(2) touches upon the *Charter's* core legal rights, and its interpretation and application will ultimately determine the practical impact of those rights.

3.3.2. Section 24(1): Canada's "other" exclusionary mechanism

The remedial mechanism contained in s. 24(1) is couched in broad language, and is thus potentially susceptible to as numerous and widely disparate judicial interpretations as s. 24(2). The section reads as follows:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.[318]

The Supreme Court has observed that the specific language of the section has the potential to render the remedy extremely powerful. In *R. v. Mills*,[319] Lamer J. stated in dissent that when interpreting s. 24(1), judges "[s]hould not retreat from the development of imaginative and

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[318] *Charter*, *supra* note 36, s. 24(1).
[319] [1986] 1 S.C.R. 863, 29 D.L.R. (4th) 161 [*Mills* cited to S.C.R.].

innovative remedies when just and appropriate."[320] In the same case, McIntrye J. observed for the majority that "[i]t is to be hoped that trial judges will devise, as the circumstances arise, imaginative remedies to serve the needs of individual cases."[321]

Despite the potential for broad judicial interpretation of the remedies available under s. 24(1), the Supreme Court concluded that a judge's authority to exclude unconstitutionally obtained evidence is derived solely from s. 24(2). In *Therens*[322] Le Dain J. ruled that if exclusion was possible under both subsections "s. 24(2) would become a dead letter. The framers of the Charter could not have intended that the explicit and deliberately adopted limitation in s. 24(2) on the power to exclude evidence because of an infringement or a denial of a guaranteed right or freedom should be undermined or circumvented in such a manner."[323] This seems to be an exceedingly logical and practical interpretation of the interplay between the two subsections of s. 24. Indeed, if it were possible to exclude evidence as an "appropriate and just" remedy, there would be no need to resort to s. 24(2), it being impossible to imagine a situation where exclusion was neither appropriate nor just, yet still necessary to prevent disrepute from flowing to the administration of justice.

Despite this explicit ruling, several more recent cases have indicated that there may in fact be a limited authority for the exclusion of evidence under s. 24(1), provided that exclusion is necessary to ensure the fairness of the trial process.[324] In essence, this limited authority is restricted to evidence obtained either unfairly or illegally, but not in contravention of the *Charter*. In *R. v. Harrer*,[325] the Supreme Court of Canada dealt with the admissibility of evidence collected by United States law enforcement officials against a Canadian accused while she was in custody in the U.S. The accused challenged the admissibility of the evidence as the American law enforcement officials employed investigatory techniques that would have rendered the evidence inadmissible had Canadian police utilized the same methods.[326] Speaking for the majority, La Forest J. stated:

> [t]he appellant does not complain about any improper police action in Canada. Consequently, the only grounds that may be available to the appellant, as her counsel recognized during the oral hearing, is that the admission of the evidence would violate the appellant's liberty interests in a

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[320] *Ibid.* at para. 44.
[321] *Ibid.* at para. 266.
[322] *Therens*, *supra* note 97.
[323] *Ibid.* at para. 60.
[324] Stuart, *Charter Justice*, *supra* note 52, at 456.
[325] [1995] 3 S.C.R. 562, 128 D.L.R. (4th) 98 [*Harrer* cited to S.C.R.].
[326] *Ibid.* at para. 1.

> manner that is not in accordance with the principles of fundamental justice under s. 7 of the Charter, or would violate the guarantee of a fair trial under s. 11(d) of the Charter.[327]

La Forest J. further observed that courts should not assume the evidence would render a trial unfair simply because it was obtained by investigatory techniques that would have violated the *Charter* had they been employed by agents of the Canadian state,[328] and acknowledged that Canada lacked the legal authority to impose its procedural requirements on foreign jurisdictions.[329]

The Justice ultimately concluded that the admission of the statements made by the accused to the U.S. officials did not render her trial unfair, and thus need not have been excluded from the original proceedings.[330] La Forest J. went on to observe in obiter that if the statements had in fact affected the fairness of the trial, he would have had "no difficulty" in rejecting the evidence, not under ss. 24(1) or 24(2), but rather "[o]n the basis of the trial judge's duty, now constitutionalized by the enshrinement of a fair trial in the Charter, to exercise properly his or her judicial discretion to exclude evidence that would result in an unfair trial."[331] Thus, the Justice would have excluded the evidence under the auspices of s. 11(d) of the *Charter*, which, in La Forest J.'s view, has transformed the judge's common law discretionary power to exclude evidence that would render a trial unfair into "[a] constitutional imperative."[332]

In a concurring judgment, McLachlin J. (as she then was) agreed with La Forest J.'s contention that evidence obtained in a manner that did not technically run afoul of the *Charter* could be excluded from proceedings if such a step was necessary to ensure a fair trial. However, rather than employing s. 11(d) to exclude in those circumstances, McLachlin J. would have resorted to s. 24(1). In this regard the Justice ruled:

> [e]vidence not obtained in breach of the Charter but the admission of which may undermine the right to a fair trial may be excluded under s. 24(1), which provides for "such remedy as the court considers appropriate and just in the circumstances" for Charter breaches. Section 24(1) applies to prospective breaches, although its wording refers to "infringe" and "deny" in the past tense . . . It follows that s. 24(1) permits a court to exclude evidence which has not been obtained in violation of the Charter, but which would render the trial unfair contrary to s. 11(d) of the Charter.
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> I conclude that a judge may exclude evidence which was not obtained by Charter breach but which would render the trial unfair either at common law or under s. 24(1) of the Charter. The debate

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[327] *Ibid.* at para. 13.
[328] *Ibid.* at para. 14.
[329] *Ibid.* at para. 15.
[330] *Ibid.* at paras. 19-20.
[331] *Ibid.* at para. 21.
[332] *Ibid.* at para. 24.

> thus shifts to the third premise of the appellant's argument -- that to admit Harrer's second statement would render the trial unfair.[333]

In McLachlin J.'s view, then, the residual authority to exclude evidence in cases where its admission would not specifically trigger s. 24(2) but would nonetheless negatively impact upon the fairness of a trial is derived from s. 24(1) rather than solely from any of the *Charter's* substantive rights sections. McLachlin J.'s opinion in this regard was subsequently endorsed by a majority of the Supreme Court in *R. v. White*.[334] However, it is important to note that the Court has not yet seen fit to extend this residual power to cases where an application to exclude the same evidence under s. 24(2) has failed. The power remains strictly limited to situations in which the regular exclusionary mechanism is inapplicable because no *Charter* violation has been established. Thus, the exclusion of unconstitutionally obtained evidence remains within the sole purview of s. 24(2).

3.4. Excluding evidence under s. 24(2)

The Supreme Court of Canada has clearly established that the exclusion of illegally obtained evidence is to be accomplished primarily by way of application pursuant to s. 24(2) of the *Charter*. Given the significant role played by s. 24(2) in the overall effectiveness of the *Charter's* core legal rights, it is perhaps unsurprising that the section has generated an enormous body of judicial treatment. It did not take long for the inevitable issues surrounding the interpretation and application of the relatively vague evidential exclusionary mechanism to reach the Supreme Court of Canada. The national high court made its first significant pronouncement on the issue only three years after the *Charter* came into force. The stream of cases seeking to further clarify the Supreme Court's various interpretations of the remedial section has continued with only minimal abatement up to the present day. As will be seen, despite the amount of judicial treatment given to s. 24(2), the Supreme Court's reconsiderations of the section have remained relatively consistent with its initial decisions.

It was clear virtually from the date of the *Charter's* proclamation that litigation under s. 24(2) would inevitably lead to controversy. Professor Don Stuart has charted the considerable disagreement that arose between provincial appellate courts regarding the proper role of the new exclusionary mechanism before the Supreme Court of Canada began to develop its s. 24(2) jurisprudence.[335] While the British Columbia Court of Appeal's early decisions attempted to

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[333] *Ibid.* at paras. 42-43 [footnotes omitted].
[334] [1999] 2 S.C.R. 417, 174 D.L.R. (4th) 111.
[335] Stuart, *Charter Justice*, *supra* note 52, at 476-477.

ensure that exclusion would occur only in rare instances,[336] the Ontario Court of Appeal sought to provide the foundation for a broad application of s. 24(2) as a remedial mechanism.[337] The controversy among provincial appellate courts was soon resolved by the Supreme Court in favor of the position then dominant in Ontario,[338] thereby clearing the way for s. 24(2)'s interpretational controversy to be dealt with by the Supreme Court.

3.4.1. R. v. Therens

The decision in *Therens*[339] represented the Supreme Court of Canada's first attempt at creating an overarching methodology for the application of s. 24(2). The case originated out of a traffic accident involving a motor vehicle operated by the accused. When the investigating officer arrived on the scene, he formed the suspicion that the accused had consumed alcohol prior to operating his vehicle and becoming involved in the accident. Having reasonable and probable grounds to do so, the officer issued a demand under s. 235(1)[340] [now s. 254(3)] of the *Criminal Code*[341] instructing the accused to accompany him to a police station to provide two breath samples to a qualified technician.[342] The accused complied with the demand, accompanied the officer to the police station and provided the necessary samples. He was then charged with an offence under s. 236(1)[343] [now s. 253(b)]. At no time during this preliminary investigation did the officer arrest the accused or inform him of his *Charter* right to retain and instruct counsel.[344]

Although this fact scenario is quite common, both the officer's investigation of the accused and the eventual judicial determination of the case were complicated by the relative novelty of *Charter* litigation at the time. When *Therens* was heard, the Supreme Court had yet to establish any foundational rules governing the right to counsel as it existed under the *Charter*. Although there had been significant judicial treatment of the issue under the *Canadian Bill of*

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[336] *Ibid.* at 477.
[337] *Ibid.* at 478.
[338] *Ibid.* at 480.
[339] *Therens*, *supra* note 97.
[340] *Criminal Code*, R.S.C. 1970, c. C-34 at s. 235(1) [*Criminal Code, 1970*].
[341] *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*].
[342] In its entirety, s. 235(1) read: Where a peace officer on reasonable and probable grounds believes that a person is committing, or at any time within the preceding two hours has committed, an offence under section 234 or 236, he may, by demand made to that person forthwith or as soon as practicable, require him to provide then or as soon thereafter as is practicable such samples of his breath as in the opinion of a qualified technician referred to in subsection 237(6) are necessary to enable a proper analysis to be made in order to determine the proportion, if any, of alcohol in his blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.
[343] Under s. 236(1), it is a criminal offence for a person to operate a motor vehicle "while having consumed alcohol in such quantity that the proportion thereof in his blood exceeds 80 milligrams of alcohol in 100 milliliters of blood".
[344] *Therens*, *supra* note 97, at para. 30.

Rights,[345] the advent of s. 10(b) presented the Court with an opportunity to establish a fresh approach to the concept. Thus, the substantial body of pre-*Charter* case law pertaining to the right to counsel did little to clarify the issue. Moreover, the Supreme Court had yet to specifically analyze the treatment of illegally obtained evidence under s. 24(2). *Therens* thus required consideration of several novel legal issues, which remained consistent before both the Court of Appeal and the Supreme Court of Canada.

The Supreme Court's eventual determination of these issues was somewhat complicated by the unusual split amongst the eight justices[346] who participated in the decision. The first issue dealt with by the Court was whether there had been an infringement of the accused's right to counsel. The main point of contention here involved the triggering mechanism contained within s. 10(b).[347] As is clear from the express wording of that section, the *Charter* limits the application of s. 10(b) to individuals who are either under arrest or are being detained by an agent of the state. Although situations involving an "arrest" will be relatively straightforward, the concept of "detention" is far more ambiguous, as can be seen from the convoluted judicial treatment of the term during the pre-*Charter* era.[348] In defining "detention" as it is used in the context of s. 10(b), the Court unanimously held that the investigating officer had detained the accused by issuing the demand under s. 235(1)[349]. Furthermore, the Court ruled that both the officer's failure to provide the accused with an opportunity to contact counsel, and his failure to inform the accused of that right, constituted violations of s. 10(b).[350] The Supreme Court was thus unanimous in determining that the accused's s. 10(b) rights had been engaged and violated.[351]

The panel then turned its collective attention to the remedies available under s. 24 of the *Charter*. Consideration of this section raised two issues. First, the Court disagreed with both the

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[345] S.C. 1960, c. 44 [*Bill of Rights*].

[346] Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson, Le Dain JJ. took part in the written judgment. Although Ritchie J. also heard the appeal, he took no part in the final judgment.

[347] *Charter*, *supra* note 36, s. 10. The relevant portion reads: "Everyone has the right on arrest or detention . . . (b) to retain and instruct counsel without delay and to be informed of that right[.]"

[348] Under the *Bill of Rights*, the Supreme Court of Canada interpreted the concept of "detention" narrowly, holding that it referred to situations of "actual physical restraint" and was tantamount to "held in custody": see *Chomiak v. The Queen*, [1980] 1 S.C.R. 471, 102 D.L.R. (3d) 368.

[349] *Therens*, *supra* note 97, see per Dickson C.J. at para. 1, per Beetz, Estey, Chouinard and Wilson JJ. at para. 6, and per McIntyre, Lamer, and Le Dain JJ. at paras. 14, 17, and 54.

[350] Although the panel unanimously held that the accused's s. 10(b) rights had been violated, the Justices' opinions were split into two equal groups on the issue of exactly how the violation occurred. See *ibid.*, paras. 6-7, 49-50, 53.

[351] *Ibid.* The Court also examined whether s. 1 of the *Charter* could be applied to save the s. 10(b) violation, unanimously ruling that s. 1 was not invoked in the circumstances. Perhaps unsurprisingly, the court disagreed as to the reasons why it was not triggered. See per Dickson C.J. at para. 1, per Beetz, Estey, Chouinard, Wilson and Lamer JJ. at para. 10, per McIntyre and Le Dain JJ. at para. 56.

trial court and the Court of Appeal,[352] and ruled that there is no discretion to exclude evidence under s. 24(1) as a remedy "appropriate and just in the circumstances."[353] This ruling created a second interpretational issue related to s. 24: if the exclusion of illegally obtained evidence is limited to s. 24(2), in what circumstances does that subsection operate? The Court was therefore required to give specific meaning to the broad language of s. 24(2), and to then apply that language to the facts before them. The panel ultimately split 6-2 on the issue, with the majority ruling that the evidence had been properly excluded at trial. The dissent would have allowed the evidence despite the fact that it was obtained in violation of the accused's s. 10(b) rights.

The decision of the six Justice majority was written by Estey J. and agreed upon by Dickson C.J., Beetz, Chouinard, Wilson and Lamer JJ. However, as Estey J. agreed with the bulk of Le Dain J.'s dissenting reasons[354] insofar as they pertained to the interpretation of s. 24(2), the majority reasons dealt with the issue in a relatively brief fashion. As will be seen, although the majority split with the dissenting Justices primarily on the application of s. 24(2) to the facts of the case, they did not disagree with Le Dain J.'s actual explication of the section. Though brief, Estey J.'s opinion is nonetheless important, particularly for its discussion of the fact that the impugned evidence was necessarily excluded under s. 24(2) because the *Charter* violation was "overt". On this point, Estey J. ruled that "[t]o do otherwise than reject this evidence on the facts and circumstances in this appeal would be to invite police officers to disregard Charter rights of the citizen and to do so with an assurance of impunity."[355] Estey J. was therefore primarily concerned with the severity of the rights violation and with the desirability of ensuring that future instances of similar police misconduct would be sufficiently deterred.

Another notable feature of Estey J.'s reasons is his implied assertion that s. 10(b) violations are of inherently greater concern than are violations of the other core legal rights. This assertion is evident from the following passage: "[t]he violation by the police authority of a *fundamental Charter right*, which transpired here, will render this evidence inadmissible. Admitting this evidence under these circumstances would clearly 'bring the administration of justice into disrepute'."[356] This observation could either have been a benign reference to the fact that all Charter rights are important, or it could represent any early manifestation of the Supreme

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[352] *Ibid.* at paras. 32, 58.
[353] *Ibid.* The Court split 6-2 in favour of limiting the exclusion of evidence to s. 24(2). For the majority opinion, see para. 60. For the minority on this point, see per Dickson C.J. at para. 3, and per Lamer J. at para. 25.
[354] *Ibid.* at para. 5.
[355] *Ibid.* at para. 11.
[356] *Ibid.* at para. 12 [emphasis added].

Court's creation of a hierarchy of core legal rights in which s. 10(b) occupies a position of paramount importance. The latter scenario is problematic as Estey J.'s reasons contain no explicit explanation as to why s. 10(b) violations ought to be treated more seriously than violation of other, apparently less fundamental *Charter* rights. As the later Supreme Court jurisprudence on s. 24(2) would soon demonstrate, there would indeed come to be a hierarchy of core legal rights, and s. 10(b) violations would figure prominently in the final ordering.

The bulk of the Court's treatment of s. 24(2) is contained in the dissenting judgment of Le Dain J., with whom McIntyre J. concurred. Although Le Dain J. dissented on the application of s. 24(2) to the specific facts of the case, the majority of the Justices agreed with his interpretation of the exclusionary mechanism. Only Dickson C.J. and Lamer J. specifically disagreed with Le Dain J.'s discussion of s. 24(2)'s language.[357] Thus, the Supreme Court of Canada first treatment of s. 24(2) came in large part through a dissenting judgment. Regardless, Le Dain J. began his opinion with a careful analysis of the wording of s. 24(2), dealing first with the section's triggering mechanism.[358] The language of the section stipulates that before exclusion can be contemplated, the applicant must demonstrate that the impugned evidence was obtained "in a manner" that involved a rights violation. In interpreting this phrase, Le Dain J. ruled that the rights violation need not be the direct source from which the impugned evidence was obtained, holding that it would be sufficient if the violation simply occurred prior to the evidence being acquired, or during the course of the evidence gathering process.[359] Therefore, rather than incorporating a strict "causal" requirement into the s. 24(2) case law, Le Dain J. established that a less onerous "temporal" link would in fact be sufficient.

A unanimous Supreme Court in *R. v. Strachan* later conclusively incorporated the temporal link requirement articulated by Le Dain J. into the s. 24(2) jurisprudence.[360] In that case, Dickson C.J. rejected the argument that a strict causal connection between the rights violation and the actual securing of the evidence was necessary, deciding instead that all that was required to trigger s. 24(2) was a sufficient temporal link. On this point, Dickson C.J. ruled:

> [a] causation requirement ... leads to a narrow view of the relationship between a Charter violation and the discovery of evidence. Requiring a causal link will tend to distort the analysis of the conduct that led to the discovery of evidence. The inquiry will tend to focus narrowly on the actions most directly responsible for the discovery of evidence rather than on the entire course of

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[357] *Ibid.*, see per Dickson C.J. at para. 2, and per Lamer. J. at para. 19.
[358] *Ibid.* at para. 61.
[359] *Ibid.* at para. 62. On the issue of temporal connection, Estey J. stated [at para. 12], "I recognize, however, that in the case of derivative evidence, which is not what is in issue here, some consideration may have to be given in particular cases to the question of relative remoteness."
[360] [1988] 2 S.C.R. 980, 67 C.R. (3d) 87 [*Strachan* cited to S.C.R.].

> events leading to its discovery. This will almost inevitably lead to an intellectual endeavour essentially amounting to "splitting hairs" between conduct that violated the Charter and that which did not.[361]

Dickson C.J. thus concluded that provided that the temporal connection between the violation and the taking of the evidence was not "too remote", s. 24(2) would be triggered and the evidence would be vulnerable to potential exclusion. The exact details of the temporal connection were to be analyzed on a case-by-case basis.[362]

Returning to the decision in *Therens*, Le Dain J.'s judgment moved on from the temporal link issue to consider the meaning of the word "disrepute", deciding first that other expressions or tests should not be substituted for the express wording of s. 24(2).[363] The Justice then provided the context in which s. 24(2) was to be interpreted, stating that:

> [t]he central concern of s. 24(2) would appear to be the maintenance of respect for and confidence in the administration of justice, as that may be affected by the violation of constitutional rights and freedoms. There is clearly, of course, by implication, the other value which must be taken into consideration in the application of s. 24(2) -- that is, the availability of otherwise admissible evidence for the ascertainment of truth in the judicial process, particularly in the administration of the criminal law.[364]

In Le Dain J.'s opinion, then, the primary purpose of s. 24(2) is to protect the administration of justice from the disrepute that may flow from a *Charter* violation. The Justice also acknowledged that use of the exclusionary mechanism to achieve this purpose must be considered in light of the inherent value in allowing the Crown to use all relevant and probative evidence to determine the truth. Le Dain J. ultimately ruled that "[t]he issue under s. 24(2) is the circumstances in which [the truth finding function] must yield to the protection and enforcement of constitutional rights and freedoms by what may be in a particular case the only remedy."[365]

Based on this articulation of s. 24(2)'s overarching purpose, Le Dain J. then set out what was intended to be an instructive, non-exhaustive list of the circumstances and factors that must be considered when applying the section to actual fact scenarios. In relation to s. 8 violations, Le Dain J. established "two principal considerations": the seriousness of the violation and the seriousness of the offence. The Justice stated that the former criteria was to be assessed by determining whether the violation was committed in good faith, inadvertent, or merely technical

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[361] *Ibid.* at para. 40.
[362] *Ibid.* at para. 46.
[363] In *Rothman v. The Queen*, [1981] 1 S.C.R. 640, 121 D.L.R. (3d) 578, Lamer J. referred to the "community shock" test in his discussion of then s. 178.16 of the *Criminal Code*. That section allowed a judge to reject evidence derived from intercepted communications if the admission of that evidence "would bring the administration of justice into disrepute". Lamer J. held that such disrepute would flow from police conduct that shocked the community.
[364] *Therens*, *supra* note 97, at para. 71.
[365] *Ibid.* at para. 71.

in nature, or whether it was deliberate, willful or flagrant. Also relevant to the seriousness of the violation was whether it was committed out of urgency or necessity regarding the need to prevent the loss or destruction of the evidence.[366] These factors were to be balanced with the seriousness of the charge in order to determine whether the admission of the evidence would result in disrepute.[367]

After establishing the basis on which disrepute could be ascertained, Le Dain J. expressly ruled that the necessary balancing of values under s. 24(2) ought to be adjusted in the context of a s. 10(b) violation. On this point, the Justice held:

> [t]he application of these factors to a denial of the right to counsel involves, in my view, a different balance because of the importance of that right in the administration of criminal justice. In my opinion, the right to counsel is of such fundamental importance that its denial in a criminal law context must prima facie discredit the administration of justice.[368]

This opinion is striking similar to that of Estey J. in that it suggests that s. 10(b) is at the upper end of a implicit hierarchy of *Charter* rights. According to Le Dain J.'s, any violation of an accused person's right to counsel automatically brings the administration of justice into disrepute unless the Crown can successfully rebut such a presumption. This clearly differentiates s. 10(b) from other *Charter* rights where the accrual of disrepute is by no means automatic.

Le Dain J. concluded his discussion of s. 24(2) with two additional important rulings, stating first that the repute of the justice system was not to be gauged by reference to public opinion. The Justice made this observation largely because he felt that there was no reliable source from which to obtain accurate information regarding the public's feelings about excluding a particular piece of evidence from a particular criminal trial.[369] Rather, Le Dain J. ruled that the judiciary was in the best position to determine whether the admission of specific evidence would cause the accrual of disrepute.[370] Lastly, Le Dain J. stated that strictly speaking, there was no "discretion" to exclude evidence under s. 24(2). Rather, if the presiding judge was of the opinion that the admission of certain evidence would bring the administration of justice into disrepute, he or she is under a duty to exclude that evidence.[371]

The judgments authored by Estey J. and Le Dain J. ultimately part ways in their assessment of how to apply the s. 24(2) methodology to the specific facts of the case. Whereas Estey J. ruled the evidence had been properly excluded at trial, Le Dain J. decided that the

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[366] *Ibid.* at para. 72.
[367] *Ibid.*
[368] *Ibid.* at para. 73.
[369] *Ibid.* at para. 74.
[370] *Ibid.* at para. 74.
[371] *Ibid.* at para. 74.

evidence was admissible, primarily because of the confusion created by the Supreme Court's pre-*Charter* decisions pertaining to the right to counsel. On this point, Le Dain J. held:

> [t]he police officer in this case was in my opinion entitled to assume in good faith that the respondent did not have a right to counsel on a demand under s. 235(1) of the Criminal Code. Because of this good faith reliance, I am unable to conclude, having regard to all the circumstances, as required by s. 24(2) of the Charter, that the admission of the evidence of the breathalyzer test in this particular case would bring the administration of justice into disrepute.[372]

Thus, despite establishing s. 10(b) as a right of crucial importance in the criminal law context, Le Dain J. was content to admit evidence obtained in flagrant violation of that right as probative of the accused's guilt. It follows from his conclusion that in the Justice's opinion, the seriousness of the *Charter* violation was significantly vitiated by the good faith of the officer involved. This vitiation was persuasive in spite of the fact that, in the Justice's own words, exclusion of evidence may have been the "only remedy" available.

The decision in *Therens* thus established two main points regarding the interpretation and application of s. 24(2): first, illegally obtained evidence can only be excluded under s. 24(2); and second, the section must be interpreted so that it strikes an appropriate balance between the protection of *Charter* rights and the truth-seeking function of the criminal trial process. It also made a number of less obvious points, including the implicit creation of a hierarchy of *Charter* rights in which s. 10(b) was placed in a position of prominence. The decision was somewhat complicated by the fact that only eight of the nine presiding Justices issued reasons and because the Justices who did render decisions split along different lines on different issues. Despite these complexities, the Supreme Court's decision in *Therens* laid the foundation for the subsequent consideration of the test under s. 24(2). Moreover, the divisions and disagreements amongst the Justices shed light on the difficulties that would inevitably occur in future interpretations of the section.

3.4.2. R. v. Collins

Two years after issuing its ruling in *Therens*, the Supreme Court rendered its decision in *Collins*,[373] which is still widely considered the leading interpretation on s. 24(2).[374] The accused in *Collins* impugned a search carried out against her by police officers engaged in surveillance of a known drug exchange site.[375] When the officers arrested the accused's husband after he left the

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[372] *Ibid.* at para. 73.
[373] *Collins*, *supra* note 52.
[374] See e.g. *R. v. Clayton*, 2007 SCC 32, 281 D.L.R. (4th) 1 [*Clayton*].
[375] *Collins*, *supra* note 52, at para. 4.

same location only moments earlier, they discovered narcotics on his person.[376] The officers then returned to the location of the original surveillance and immediately proceeded to arrest the accused. At a "quickened pace", the arresting officer approached the accused, informed her that he was a police officer, grabbed her by the throat to prevent her from swallowing any drugs that may have been in her mouth, and threw her to the ground. Once the accused was on the ground with the officer on top of her, a balloon containing cocaine was located in one of her hands.[377]

At trial, it was determined that the police had violated Collins' rights under s. 8 of the *Charter*, primarily due to the fact that the officer did not have reasonable grounds to believe that she was in possession of narcotics prior to executing the search. However, the trial judge refused to exclude the evidence under s. 24(2) after determining that its admission at trial would not shock the community's conscience.[378] The Court of Appeal agreed with the trial judge's conclusion regarding the appropriate treatment of the evidence, and therefore refused the accused's appeal.[379] On further appeal to the Supreme Court of Canada, Lamer J. agreed that the record contained no evidence regarding the reasonableness of the officer's belief that the accused was in possession of narcotics. Writing for a majority of the Court, the Justice therefore endorsed the decision of the lower courts that there had in fact been a violation of s. 8.[380]

Lamer J. then discussed the application of s. 24(2), and in so doing created what is essentially still the benchmark tripartite test for the application of the *Charter's* exclusionary mechanism. He began his discussion of the issue by acknowledging that s. 24(2) was intended to take an intermediate position with regard to the exclusion of illegally obtained evidence, rejecting both the Canadian common law position of what was tantamount to automatic inclusion, and the American position of automatic exclusion.[381] Lamer J. also clarified that the accused bears the "burden of persuasion" on a balance of probabilities with regard to proving that exclusion of the evidence is necessary to prevent the administration of justice from being potentially brought into disrepute.[382] The Justice further ruled that s. 24(2) was not intended to remedy illegal investigative steps taken by the police, even if those steps actually brought the

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[376] *Ibid.* at para. 5.
[377] *Ibid.* at para. 6.
[378] *Ibid.* at paras. 11-12.
[379] *Ibid.* at paras. 15-16.
[380] *Ibid.* at paras. 25-27. On this point, Lamer J. ruled that the record was deficient because of an improper objection by defence counsel regarding the use of hearsay evidence to establish reasonable grounds for the search. Lamer J. also observed that the record was deficient on how the trial judge ruled on the objection. As a result of these deficiencies, the majority would have ordered a new trial. Lamer J. nevertheless went on to analyze the lower courts' treatment of s. 24(2).
[381] *Ibid.* at para. 29.
[382] *Ibid.* at para. 30.

administration of justice into disrepute. Instead, Lamer J. held that s. 24(2) was solely concerned with the "further" disrepute flowing from the admission at trial of the end product of those illegal steps.[383]

Picking up on a notion articulated by Le Dain J. in *Therens,* Lamer J. adopted the "reasonable person" test when instructing judges on how to measure the repute of the administration of justice. Although Lamer J. acknowledged that public opinion necessarily plays some role in the concept of disrepute, he rejected the idea that such views ought to be determinative of an application pursuant to s. 24(2), stating "[t]he Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority."[384] Instead, the Justice ruled that in applying s. 24(2), judges must determine whether the admission of evidence would bring the administration of justice into disrepute "[i]n the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case."[385] Lamer J. further observed that the "[r]easonable person is usually the average person in the community, but only when that community's current mood is reasonable."[386]

It is also important to note that Lamer J. also established that the accused need not prove that admission of the evidence "would" bring the administration of justice into disrepute, but merely that it "could" have that effect. The Justice reached this conclusion by comparing the English and French versions of s. 24(2), and concluding that "[a]s one of the purposes of s. 24(2) is to protect the right to a fair trial, I would favour the interpretation of s. 24(2) which better protects that right, the less onerous French text."[387] Thus the English version of the section was essentially "read down" to lower the persuasive burden resting with the accused. The Supreme Court arguably had no choice but to do so as requiring the accused to prove that the administration of justice "would" be brought into disrepute by the admission of certain evidence would be all but impossible in the overwhelming majority of cases. Thus, to prevent the utility of s. 24(2) from being significantly reduced, the Court was stepped in to fix what may have been simply a error in drafting.

The heart of the judgment in *Collins* is comprised of Lamer J.'s interpretation of the phrase "having regard to all the circumstances" as it is employed in the text of s. 24(2). In

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[383] *Ibid.* at para. 31.
[384] *Ibid.* at para. 32.
[385] *Ibid.* at para. 33.
[386] *Ibid.* at paras 33-34. Lamer J. specifically adopted the version of the test suggested by Yves-Marie Morissette. See Morissette, *supra* note 51, at 538.
[387] *Collins*, *ibid.* at para. 43.

defining the term, Lamer J. set out a non-exhaustive list[388] of factors for judges to consider, and then grouped those factors into three broad categories. Despite initially being described as a set of guidelines,[389] Lamer J.'s categorization of factors has been subsequently interpreted as establishing the authoritative methodology for all s. 24(2) applications. The three categories are: (i) factors that affect trial fairness;[390] (ii) those that relate to the seriousness of the violation;[391] and (iii) factors relating to the effects of excluding the evidence.[392] With regard to the first category, Lamer J. ruled:

> [t]he trial is a key part of the administration of justice, and the fairness of Canadian trials is a major source of the repute of the system and is now a right guaranteed by s. 11(d) of the Charter. If the admission of the evidence in some way affects the fairness of the trial, then the admission of the evidence would tend to bring the administration of justice into disrepute and, subject to a consideration of the other factors, the evidence generally should be excluded.[393]

Lamer J. then distinguished between "real" and conscriptive evidence, concluding that admission of the former would rarely affect trial fairness, while admission of the latter would almost always do so, primarily because the accused does not play the same role in creating real evidence as they do in creating conscriptive evidence.[394] The Justice also noted "[i]t may also be relevant, in certain circumstances, that the evidence would have been obtained in any event without the violation of the Charter."[395] The Justice also ruled that if trial fairness is negatively affected by admission of certain evidence, that evidence can never be deemed admissible merely because of the seriousness of the offence to which it relates.[396]

The second category outlined by Lamer J. deals with the seriousness of the *Charter* violation alleged against the police, and therefore "[t]he disrepute that will result from judicial acceptance of evidence obtained through that violation."[397] In this regard, the relevant criteria include: (i) whether the violation was committed in good faith, was inadvertent, or was technical in nature; (ii) whether the violation was deliberate, willful or flagrant; (iii) whether the action constituting the violation was motivated by urgency or necessity in preventing the loss or destruction of evidence; and (iv) whether other non-violative investigatory techniques could have

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[388] *Ibid.* at para. 35.
[389] *Ibid.* at para. 41.
[390] *Ibid.* at para. 36.
[391] *Ibid.* at para. 38.
[392] *Ibid.* at para. 39.
[393] *Ibid.* at para. 36.
[394] *Ibid.* at para. 37.
[395] *Ibid.*
[396] *Ibid.* at para. 39.
[397] *Ibid.* at para. 38.

been employed to obtain the evidence.[398] Lamer J. specifically acknowledged that the availability of non-violative techniques would be a factor in favour of exclusion as it would indicate the police proceeded with "[a] blatant disregard for the Charter ...".[399]

The third category of factors deals with the effect that exclusion of the evidence would have on the repute of the justice system. Lamer J. found that the determination under this category has to do with ascertaining "[w]hether the system's repute will be better served by the admission or the exclusion of the evidence ...".[400] More specifically, the Justice held that exclusion of evidence would tend to result in disrepute if the evidence is integral to the prosecution and the breach by which it was obtained was trivial. Lamer J. also noted that in these circumstances, the disrepute associated with exclusion would tend to increase in proportion to the seriousness of the offence, and that exclusion would be more common in relation to less serious instances.[401]

Despite its relative brevity, the 6-2 majority decision in *Collins* answered a number of important questions regarding s. 24(2) raised in the aftermath of *Therens*. It was established that disrepute is to be judged through the employment of the "reasonable person" test. Further, Lamer J. ruled that in order to be successful on a s. 24(2) application, the accused need not show that the admission of the impugned evidence *would* result in disrepute, but only that it *could* result in disrepute. Although many of the rulings in *Collins* continue to be of importance, the core of the decision remains the tripartite categorization of factors relevant to the admissibility assessment under s. 24(2). These include factors that relate to trial fairness, those that involve the seriousness of the violation, and factors that manifest themselves in the effects of exclusion. Lamer J.'s three categories now constitute the standard methodology employed in determining all s. 24(2) applications.

3.4.3. R. v. Stillman

Despite the Supreme Court's significant clarification of the relevant jurisprudence in *Collins*, Lamer J.'s test for the application s. 24(2) was differentially interpreted and applied over the course of the next ten ears. Writing for a majority of the Court in *Stillman*,[402] Cory J. observed that:

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[398] *Ibid.*
[399] *Ibid.*
[400] *Ibid.* at para. 39.
[401] *Ibid.*
[402] *Stillman*, *supra* note 50.

> [t]here can be no question that the Collins decision was the pathfinder that first charted the route that courts should follow when considering the application of s. 24(2). However, subsequent decisions of this Court and their interpretations by the courts below indicate that a further plotting of the course for courts to follow is required, while maintaining the basic principles outlined in Collins.[403]

With this statement, the *Stillman* majority clearly identified its intention to further clarify s. 24(2) by explaining how to properly apply *Collins*. The Court did not intend to overrule or replace the *Collins* test.

Stillman involved the sexual assault and murder of a 14-year old girl, a crime committed sometime after a gathering of young people during which drugs and alcohol were consumed. The 17-year old male accused and the victim were seen leaving the party together.[404] The victim's body was found six days later, and a least one eyewitness placed the accused near where the body was found on the night of the murder.[405] An autopsy later indicated that the victim had been sexually assaulted and bitten on the abdomen, and that the cause of death was blunt force trauma to the head.[406] The accused was subsequently arrested and brought to police headquarters for questioning. Before he was interviewed, the accused's lawyers indicated in writing that he did not consent to giving a statement, bodily samples or dental impressions.[407] However, after the accused's lawyers left, the police took samples of the accused's hair and impressions of his teeth under threat of force.[408] The accused was also subjected to an hour-long interview during which the accused "sobbed" constantly. He did not, however, make a statement. At one point during questioning, he was permitted to use the bathroom, where he blew his nose into a tissue, which was then discarded in a waste bin. The police seized the tissue and used it to secure a DNA sample from the accused.[409] Despite these actions, the Crown prosecutors' office decided that there was insufficient evidence on which to base a murder charge, and the accused was therefore released.[410] When the police received the DNA results and the dental impressions, the accused was re-arrested, and the police attempted to secure more conclusive dental impressions by subjecting him to a 2-hour long dental procedure to which the accused did not consent. The police took further hair samples, and also secured a saliva sample and buccal swabs.[411]

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[403] *Ibid.* at para. 71.
[404] *Ibid.* at para. 2.
[405] *Ibid.* at para. 3.
[406] *Ibid.* at para. 4.
[407] *Ibid.* at para. 5.
[408] *Ibid.* at para. 6.
[409] *Ibid.* at para. 7.
[410] *Ibid.* at para. 8.
[411] *Ibid.* at para. 9.

The evidence obtained by police was eventually deemed admissible by the trial judge, and the accused was convicted of first-degree murder.[412] The trial judge found that although some of the evidence was obtained in violation of the accused's *Charter* rights under s. 8, it was nevertheless admissible under s. 24(2) as it was real evidence that did not impact the fairness of the trial.[413] A majority of the New Brunswick Court of Appeal dismissed the accused's appeal, holding that although portions of the evidence were taken in violation of the accused's s. 8 rights, its obtainment involved only a minimal affront to his dignity, it was not secured using undue force, and the investigatory techniques were reasonable in light of the seriousness of the charge.[414] The dissenting Justice ruled that all of the impugned evidence was secured in violation of the accused's *Charter* rights, and that it should have been excluded under s. 24(2) due to the seriousness of the violations, the fact that the police effectively compelled the accused into incriminating himself, and because the evidence could have been obtained in an alternative manner that would not have violated the *Charter*.[415] The accused appealed the Court of Appeal's majority ruling to the Supreme Court of Canada.

There were two central issues before the Supreme Court: (i) whether the police violated the accused's *Charter* rights in obtaining the evidence; and if so (ii) whether the evidence obtained in violation of the *Charter* ought to have been excluded under s. 24(2).[416] With regard to the first issue, the majority ruled through Cory J. that although the arrest of the accused was lawful,[417] the warrantless seizure of his hair samples, dental impressions and buccal swabs could not be justified by the common law power of search incidental to arrest,[418] and that as a result, the accused's rights under ss. 7 and 8 were "very seriously" violated.[419] The majority also decided that because the accused did not "abandon" the tissue that he discarded while in police custody[420] and did not consent to its being seized,[421] the police obtained the tissue in violation of s. 8.[422]

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[412] *Ibid.* at paras. 10-11.
[413] *Ibid.* at paras. 12-14.
[414] *Ibid.* at paras. 16-18.
[415] *Ibid.* at paras. 19-22.
[416] *Ibid.* at para. 24.
[417] *Ibid.* at para. 32.
[418] *Ibid.* at paras. 47-49.
[419] *Ibid.* at paras. 50-51.
[420] *Ibid.* at para. 58.
[421] *Ibid.* at paras. 60-61.
[422] *Ibid.* at para. 63.

The majority[423] then turned its attention to the issue of admissibility under s. 24(2), dealing first with the hair samples, dental impressions and buccal swabs. In so doing, Cory J. first endorsed the categorical approach taken by Lamer J. in *Collins*,[424] and then attempted to clarify the analysis to be undertaken at each step. With regard to the initial set of factors, i.e. those relating to the fairness of the trial, Cory J. ruled that if a judge determines that the admission of certain evidence would render a trial unfair, it becomes unnecessary to consider the remaining *Collins* factors.[425] Thus, the trial fairness analysis is integral to the adjudication process under s. 24(2). In discussing the importance of the trial fairness category, the majority observed that:

> [t]he primary aim and purpose of considering the trial fairness factor in the s. 24(2) analysis is to prevent an accused person whose Charter rights have been infringed from being forced or conscripted to provide evidence in the form of statements or bodily samples for the benefit of the state. It is because the accused is compelled as a result of a Charter breach to participate in the creation or discovery of self-incriminating evidence in the form of confessions, statements or the provision of bodily samples, that the admission of that evidence would generally tend to render the trial unfair. That general rule, like all rules, may be subject to rare exceptions.[426]

As a result, Cory J. indicated that the first step in the trial fairness analysis ought to be the classification of the evidence as either conscriptive or non-conscriptive. If the evidence is defined as conscriptive, it generally affects trial fairness, and thus the s. 24(2) analysis comes to an end. Conversely, if the evidence is classified as non-conscriptive, the judge should consider the other *Collins* factors.[427] Therefore, the characterization of the evidence is of crucial significance to admissibility.

In defining the two types of evidence, Cory J. ruled that "[i]f the accused was not compelled to participate in the creation or discovery of the evidence (i.e., the evidence existed independently of the Charter breach in a form useable by the state), the evidence will be classified as non-conscriptive. The admission of evidence falling into this category will, as suggested in Collins, ... rarely operate to render the trial unfair."[428] Though this aspect of the ruling represented nothing new, Cory J. went on to state that "real" evidence is not always properly defined as non-conscriptive. On this point, the Justice ruled:

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[423] The majority judgment was accompanied by four additional opinions, two of which were lengthy dissents by L'Heureux-Dube and McLachlin JJ. Gonthier and Major JJ. also wrote short opinions. See *Stillman*, *ibid.*, per L'Heureux-Dube J. at paras. 130; McLachlin J. at para. 194; Gonthier J. at para. 193; and per Major J. at para. 273.
[424] *Ibid.* at para. 69.
[425] *Ibid.* at para. 72.
[426] *Ibid.* at para. 73.
[427] *Ibid.* at para. 74.
[428] *Ibid.* at para. 75.

> [t]here is on occasion a misconception that "real" evidence, referring to anything which is tangible and exists as an independent entity, is always admissible. It is for this reason that blood, hair samples or the identity of the accused are often readily, yet incorrectly, classified as "real evidence existing independently of the Charter breach". It is true that all of these examples "exist" quite independently of a Charter breach. *Yet, it is key to their classification that they do not necessarily exist in a useable form.* For example, in the absence of a valid statutory authority or the accused's consent to take bodily samples, the independent existence of the bodily evidence is of no use to the prosecution since there is no lawful means of obtaining it.[429]

Cory J. therefore determined that the conscriptive/non-conscriptive distinction does not depend on whether evidence is "real", but rather on "[w]hether the accused was compelled to make a statement or provide a bodily substance in violation of the Charter."[430]

The Justice then specifically distinguished the concept of conscriptive evidence from that of non-conscriptive evidence, observing that:

> [e]vidence will be conscriptive when an accused, in violation of his Charter rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples. The traditional and most frequently encountered example of this type of evidence is a self-incriminating statement made by the accused following a violation of his right to counsel as guaranteed by s. 10(b) of the Charter. The other example is the compelled taking and use of the body or of bodily substances of the accused, such as blood, which lead to self-incrimination.[431]

Cory J. then dismissed the contention that bodily samples ought to be treated differently than incriminating statements, ruling that the focus should be on the role played by the accused in the creation or collection of the evidence, not the fact that the evidence actually existed prior to the *Charter* violation.[432]

In concluding his discussion of the proper categorization of evidence under the trial fairness heading, Cory J. briefly addressed the concept of derivative evidence, i.e. real evidence discovered as a result of illegally obtained conscriptive evidence.[433] In noting that such evidence generally falls within the conscriptive category, the Justice observed that derivative evidence "[s]hould not be treated as 'real' evidence 'which will rarely render the trial unfair', but rather, it should be viewed as conscriptive or self-incriminating evidence discovered as a result of the accused being conscripted to provide the evidence following a breach of his Charter rights."[434]

The majority then discussed the second step in the trial fairness category, namely whether the illegally obtained evidence was "discoverable". The Court acknowledged that in circumstances where the discovery of evidence properly classified as conscriptive would have

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[429] *Ibid.* at para. 76 [emphasis added].
[430] *Ibid.* at para. 77.
[431] *Ibid.* at para. 80.
[432] *Ibid.* at paras. 83, 86-89.
[433] *Ibid.* at para. 99.
[434] *Ibid.* at para. 100.

occurred irrespective of the accused's forced participation in the process, the admission of that evidence will not render the trial unfair.[435] The majority indicated that evidence would be discoverable in two instances, the first of which involves the existence of an independent source.[436] On this point, Cory J. held that generally speaking, "[w]here an alternative non-conscriptive means exists and the Crown has established on a balance of probabilities that the police would have availed themselves of it, the admission of the evidence would not effect [sic] the fairness of the trial."[437] The majority further ruled that conscriptive evidence may not affect trial fairness if its discovery was inevitable: "[w]here it is established that either a non-conscriptive means existed through which the evidence would have been discovered or that its discovery was inevitable, then the evidence was discoverable; it would have been discovered in the absence of the unlawful conscription of the accused."[438] Cory J. thus concluded "[t]hat in situations where the evidence would not have been discovered in the absence of the conscription of the accused in violation of the Charter, its admission would render the trial unfair."[439]

When the majority applied this analysis to the facts of the case before it, it concluded that the hair samples, dental impressions and buccal swabs were conscriptive evidence,[440] that this evidence was not independently or inevitably discoverable, and that its admission would therefore render the trial unfair.[441] Furthermore, Cory J. ruled that the *Charter* violations perpetrated to obtain this evidence were "of a very serious nature",[442] and that the administration of justice would be better served by exclusion of the evidence.[443] Therefore, the majority concluded that the hair samples, dental impressions and buccal swabs ought to have been excluded at trial pursuant to s. 24(2).[444]

Cory J. then ruled that the discarded tissue was properly admitted at trial due solely to the fact that it was discoverable.[445] On this point, the Justice stated:

> [t]he police did not force, or even request, a mucous sample from the appellant. He blew his nose of his own accord. The police acted surreptitiously in disregard for the appellant's explicit refusal to provide them with bodily samples. However, the violation of the appellant's Charter rights with

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[435] *Ibid.* at para. 102.
[436] *Ibid.* at para. 103.
[437] *Ibid.*
[438] *Ibid.* at para. 107.
[439] *Ibid.* at para. 110.
[440] *Ibid.* at para. 120.
[441] *Ibid.* at para. 122.
[442] *Ibid.* at para. 123.
[443] *Ibid.* at para. 126-127.
[444] *Ibid.* at para. 127.
[445] *Ibid.* For a dissenting opinion on this point, see per Major J. at paras. 273-277. Major J. concluded that the accused's s. 8 rights were not violated in the taking of the tissue and that as a result, it was unnecessary to classify the evidence.

> respect to the tissue was not serious. The seizure did not interfere with the appellant's bodily integrity, nor cause him any loss of dignity. In any event, the police could and would have obtained the discarded tissue. They would have had reasonable and probable grounds to believe that the tissue would provide evidence in their investigation and therefore would have sealed the garbage container and obtained a search warrant in order to recover its contents. Quite simply, it was discoverable.[446]

The ruling on the admissibility of the tissue, which is contained within one paragraph of Cory J.'s 129-paragraph reasons for judgment, seems largely devoid of the reasoning expressed in the remainder of the decision. Clearly, the accused could have done nothing to avoid the police "discovering" the tissue as he was in custody at the time the evidence was "created". While it is true that the accused blew his nose "of his own accord", he did so because of a police interrogation undertaken with blatant disregard for the accused's expressed desire to exercise his *Charter* rights. It is not clear why the admission of such evidence would not bring the administration into disrepute.

Despite indicating its willingness to reassess the s. 24(2) jurisprudence,[447] the majority of the Supreme Court in *Stillman* left the *Collins* methodology almost entirely intact. Rather than recasting the existing test, the majority merely clarified the definitions of conscriptive and non-conscriptive evidence, highlighted the necessity of properly classifying the evidence, discussed the means through which conscriptive evidence is discoverable, and accentuated the fact that evidence classified as non-discoverable conscriptive evidence renders the trial unfair. The Court also noted that when evidence falls into this category, it becomes unnecessary to consider the remaining *Collins* factors and such evidence should always be excluded.[448] The majority's ruling did little to expand upon or clarify the categories of factors from *Collins* that pertain to the seriousness of the violation or the effect of exclusion. Thus, the bulk of the reasoning in *Collins*, for better or for worse, withstood the majority judgment in *Stillman.*

3.4.4. The s. 24(2) test after Stillman

The Supreme Court's decision in *Stillman* established that the s. 24(2) test was henceforth to be composed of elements that first appeared in *Therens*, that were later refined and categorized in *Collins*, and that were further subtly revised in *Stillman.* The latter decision clearly stressed the importance of the trial fairness category from *Collins* and the concomitant evidentiary

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[446] *Ibid.* at para. 128.
[447] *Ibid.* at para. 234. The Supreme Court adjourned the appeal's first hearing and scheduled as second sitting in order to ensure that a full bench could be present if it was deemed necessary to readdress the decision in *Collins.*
[448] *Ibid.* See Cory J.'s summary of the trial fairness category, at para. 119.

classification process. Cory J.'s judgment itself includes a summary of the s. 24(2) test that suggests judges should proceed according to the following steps:

> 1. Classify the evidence as conscriptive or non-conscriptive based upon the manner in which the evidence was obtained. If the evidence is non-conscriptive, its admission will not render the trial unfair and the court will proceed to consider the seriousness of the breach and the effect of exclusion on the repute of the administration of justice.
> 2. If the evidence is conscriptive and the Crown fails to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means, then its admission will render the trial unfair. The Court, as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. This must be the result since an unfair trial would necessarily bring the administration of justice into disrepute.
> 3. If the evidence is found to be conscriptive and the Crown demonstrates on a balance of probabilities that it would have been discovered by alternative non-conscriptive means, then its admission will generally not render the trial unfair. However, the seriousness of the Charter breach and the effect of exclusion on the repute of the administration of justice will have to be considered.[449]

The steps as set out in *Stillman* have been only minimally altered in subsequent years, despite being exposed to extensive – and often virulent – criticism by virtually every author who has critiqued the judgment.

That is not to say that judicial interest in s. 24(2) has dissipated since *Stillman.* To the contrary, the Supreme Court has justified and applied its test for exclusion in numerous cases.[450] In one particularly noteworthy example, *Orbanski,*[451] LeBel J. used a concurring opinion to attempt to dismiss "concerns" that had arisen regarding *Stillman's* apparent creation of an automatic exclusionary rule for conscriptive, non-discoverable evidence.[452] In rejecting this criticism, LeBel J. stated:

> [o]ur Court has remained mindful of the principle that the Charter did not establish a pure exclusionary rule. It attaches considerable importance to the nature of the evidence. It is constantly concerned about the potential impact of the admission of conscriptive evidence obtained in breach of a Charter right on the fairness of a criminal trial. Nevertheless, while this part of the analysis is often determinative of the outcome, our Court has not suggested that the presence of conscriptive evidence that has been obtained illegally is always the end of the matter and that the other stages and factors of the process become irrelevant.[453]

In concluding that *Stillman* did not create an auto-exclusionary rule, LeBel J. held "[t]he purpose of [s. 24(2)] is to safeguard the integrity of the justice system, which requires a strong emphasis

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[449] *Ibid.* at 119.
[450] See e.g. *R. v. Belnavis*, [1997] 3 S.C.R. 341, 151 D.L.R. (4th) 443; *R. v. Caslake*, [1998] 1 S.C.R. 51, 155 D.L.R. (4th) 19; *R. v. M.R.M.*, [1998] 3 S.C.R. 393, 166 D.L.R. (4th) 261; *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227; and *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631.
[451] *Orbanski, supra* note 49.
[452] *Ibid.* at para. 92.
[453] *Ibid.* at para. 93.

on assuring the fairness of the criminal trial. At the same time, the concept of fairness should not be reduced to a ritual incantation that spares judges from any further thought once the word is said."[454] To prove that this was in fact the case, LeBel J. admitted a statement provided to police after a violation of the accused's right to counsel, primarily because the Justice ruled that police had "in good faith" carried out "some of the duties" imposed upon them.[455] However, rather than substantively changing the *Stillman* test, *Orbanski* serves merely as an example of the "non-automatic" nature of the exclusionary rule for non-discoverable conscriptive evidence. As a result, the principles deduced from the trilogy of *Therens*, *Collins*, and *Stillman* continue to represent the current state of the law regarding the interpretation and application of s. 24(2).

3.5. Conclusion to Chapter 3

The Supreme Court of Canada has an extended history of conservatism in relation to the exclusion of relevant and reliable evidence from criminal proceedings simply because that evidence was obtained illegally or in violation of due process rights. In the pre-*Charter* era, the Supreme Court adopted the English common law position of including all reliable evidence regardless of how it had been obtained, doing so in spite the dubious foundations on which that concept was based. Canadian opposition to this "auto-inclusionary" rule eventually led to the incorporation of s. 24(2) into the final version of the *Charter*. However, rather than ending the judicial, academic and public controversy surrounding the exclusion of relevant and reliable evidence obtained through a rights violation, s. 24(2) only served to constitutionally entrench the disagreement and debate. Though the ensuing 25 years would produce an immense amount of s. 24(2) case law, the core principles of the Supreme Court's interpretation and application of the section can still be found by examining the three leading decisions: *Therens*, *Collins*, and *Stillman*.

The fundamental aspects of the *Therens/Collins/Stillman* trilogy are relatively straightforward. First, the accused bears the burden of persuasion with regard to having a particular item of evidence excluded from their criminal trial. In doing so, he or she must prove that the admission of that evidence could bring the administration of justice into disrepute. Second, to trigger s. 24(2), the obtainment of the evidence must be temporally linked to the *Charter* violation. There is no need to demonstrate a strict causal connection. Third, disrepute is to be gauged by employing the reasonable person test, not through reference to raw data

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[454] *Ibid.* at para. 96.
[455] *Ibid.* at paras. 101-104.

concerning topical public opinion on the subject. Fourth, the factors to consider when ascertaining disrepute under s. 24(2) can be set out in three categories: those that relate to trial fairness, those that involve the seriousness of the rights violation, and those that concern the effects of exclusion on the justice system's reputation. Fifth, the process through which disrepute can be accurately ascertained involves the initial categorization of the evidence as conscriptive or non-conscriptive. If evidence is conscriptive, its admission will generally bring the administration of justice into disrepute unless the Crown can prove that the police would have discovered it using alternative, lawful means. If the evidence is non-conscriptive, it will generally not affect trial fairness, and admission or exclusion will depend on the seriousness of the violation and the effects of exclusion. Sixth, there is no automatic exclusionary rule for conscriptive evidence that tends to affect trial fairness. Though these six steps appear relatively simple and straightforward, their impact on the practical effectiveness of s. 24(2) as a remedial section has been profound.

Chapter 4. Judicial Discretion, Adjudicative Subjectivity, and s. 24(2)

The advent of the *Charter* introduced a variety of novel constitutional concepts into Canadian law that had the potential to fundamentally alter the landscape of the country's criminal trial process. Despite this significant capability, the rights and freedoms contained in the document were expressed using "vague words and phrases", the meaning of which would have "[t]o be determined by the courts."[456] The core legal rights, for example, include broad terms such as "unreasonable",[457] "arbitrary",[458] and "without delay",[459] words which are clearly susceptible to differential interpretations. Perhaps nowhere is the *Charter's* linguistic vagueness more pronounced than in s. 24, which focuses on concepts such as "appropriate and just", and the notion of "disrepute", the latter of which would ultimately prove to be the more significant term.[460] As a result of its wording, the *Charter's* ability to succeed where previous attempts at rights creation and enforcement had failed[461] would depend largely on the judiciary's interpretation of the specific words selected by the document's drafters.

In order to assess how the Supreme Court of Canada has developed and applied s. 24(2), it is instructive to refer to several theories of *Charter* interpretation that have arisen since 1982, including how the Supreme Court itself has explained its own approach to the interpretation of imprecise constitutional provisions, and how that process has been explained by various legal academics and elements of the mainstream media. The salient aspects of the Court's leading decisions on s. 24(2) – the *Therens/Collins/Stillman* trilogy – will then be assessed in light of these theories in an attempt to ascertain the perspective that has actually been used by the Supreme Court in approaching the interpretation and application of the *Charter's* exclusionary mechanism. This analysis will demonstrate that the Court has developed s. 24(2) in a restrictive manner, one that adheres closely to the dominant conservative ideology and the crime control conception of individual rights in the criminal justice context.

The current interpretation and application of s. 24(2) is based primarily on various Supreme Court Justices' subjective beliefs regarding what constitutes fairness in the criminal

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[456] Hogg, *Constitutional Law*, *supra* note 148, at 746.
[457] *Charter*, *supra* note 36, s. 8.
[458] *Ibid.* s. 9.
[459] *Ibid.* s. 10(b).
[460] *Ibid.* at s. 24.
[461] Canada's first attempt at creating individual rights, *The Canadian Bill of Rights*, *supra* note 344, was largely ignored by the Supreme Court. During the 22 years that spanned the passing of the 1960 Bill and the promulgation of the *Charter*, only 35 cases involving rights claims reached the Supreme Court of Canada. In the first 16 years of the *Charter*, 373 such cases reached the national high court. See F.L. Morton & Rainer Knopff, *The Charter Revolution & The Court Party* (Peterborough, Ont.: Broadview Press Ltd., 2000) at 14 [Morton & Knopff].

trial context. The Justices derive their beliefs in a largely subconscious manner, primarily from aspects of their own personal experiences and their perceptions of society and social interaction. As most judges are members of society's dominant classes – wealthy, well-educated and white – the experiences and perceptions common to members of the dominant classes inevitably play a direct role in the Supreme Court's discretionary decision-making process. The result has been the transformation of the *Charter's* remedial section from a potentially rights enhancing mechanism into what exists in practice as essentially a rights limiting tool. The current interpretation of s. 24(2) involves the near automatic admission of illegally obtained evidence in cases involving particular classes of individuals who are accused of particular kinds of crime. Canada's exclusionary rule has been crafted in such a way that it favours individuals involved in circumstances with which judges can personally relate, and disadvantages those individuals who fall outside of this range of circumstances.

4.1. Judging the judges: The judicial interpretation of vague constitutional provisions

The wording of s. 24(2) is undeniably imprecise. Therefore, the method used by judges when interpreting unclear constitutional clauses will have a profound impact on how Canadian courts treat unconstitutionally obtained evidence. Critical legal scholar Michael Mandel, most noted for his opposition to the *Charter's* "legalization" of Canada's democratic process in a manner that favours certain already over-advantaged social groups, has also made the less controversial point that the *Charter's* rights and freedoms are imprecisely worded, and thus susceptible to differential judicial interpretations. On this point, Mandel observes that "[t]he Charter is mostly a collection of vague incantations of lofty but entirely abstract ideals, incapable of either restraining or guiding judges in their application to everyday life."[462] If guidance as to the correct practical application of the *Charter* cannot be found within the document itself, it would necessarily have to be supplied by the judges themselves. The past 25 years of *Charter* interpretation has shed considerable light on how judges would accomplish this task.

Given the significance of judicial interpretation in the constitutional context, many legal commentators – including Supreme Court justices themselves – have attempted to develop theoretical explanations as to how judges reach decisions in unclear constitutional cases. In this regard, several streams of theory have emerged. First, the Supreme Court has attempted to justify its newfound authority to tread into areas previously considered to be within the sole purview of elected officials by stating it acts only as an impartial trustee of the *Charter*, a document that

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[462] Mandel, *Legalization*, *supra* note 99, at 43.

belongs to the Canadian people alone. Critics from academia and the media have largely rejected the Court's characterization of its interpretative role. In the s. 24(2) context, crime control advocates commonly deride the Supreme Court's interpretation the section, claiming that judges have unjustifiably created an exclusionary rule that favours the rights of criminals over the rights of crime victims and the law-abiding public. However, these suggestions do not necessarily relate an accurate description of *Charter* interpretation. Indeed, left-leaning critics have consistently argued that the *Charter's* rights enhancing potential has been either substantially reduced or eradicated altogether because of the nature of the institutions that both initially created the document, and then subsequently assumed responsibility for interpreting its nuances. In order to assess how these theories apply to the Supreme Court's interpretation of s. 24(2), it is necessary to examine each of them in more detail, and to then determine which among them most accurately describes the current exclusionary jurisprudence.

4.1.1. The Supreme Court on the Supreme Court: An interpretational self-analysis

In the early days of *Charter* jurisprudence, the Supreme Court of Canada signaled that it would perform its interpretive role in a progressive manner. In *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*,[463] Dickson J. described the Court's role in constitutional interpretation as follows:

> [t]he task of expounding a constitution is crucially different from that of construing a statute. A statute defined present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. *Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties.* Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. *The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.*[464]

In the spring of 1982, then, the stage was set for the Supreme Court to debut in its role as guardian of the *Charter's* core legal rights. Its success in this regard would depend on a progressive interpretation of the document's vague rights language, as well as the simultaneous development of a broadly applicable and practically effective remedial mechanism.

Because of the significance of judicial interpretation in *Charter* litigation, the Supreme Court of Canada has on many occasions attempted to express its own adjudicatory philosophy as it pertains to constitutional documents. Early on, such expressions sometimes purported to distance the Court altogether from the notion that judges were to play an active role in defining

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[463] [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 [*Southam* cited to S.C.R.].
[464] *Ibid.* at 155 [emphasis added].

the meaning of *Charter* rights. In this regard, the Court argued that its role was to merely apply the law as expressed in the *Charter* in an entirely neutral fashion. For a unanimous Court in *Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd.*,[465] McIntyre J. ruled that it was not possible to "[e]quate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute."[466] In suggesting that the Court's role was to "apply" the *Charter* as "neutral arbiters", McIntyre J. implied that it was indeed possible to accomplish such a task. However, the Court was ultimately forced to abandon the notion of pure judicial neutrality in constitutional decision-making in favour of one that more accurately reflected the reality of adjudication in the *Charter* era.

Eventually, the Supreme Court issued a series of rulings that definitively established the "purposive analysis" initially mentioned in *Southam* as the primary interpretational methodology applicable to the *Charter*. In *R. v. Big M Drug Mart*,[467] the Supreme Court of Canada ruled that the purposive analysis:

> [i]s to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts.[468]

The Court's description of the purposive approach to *Charter* interpretation implies that the particular judge seized with the task of defining the purpose of a particular right will have a significant degree of discretion in so doing. As Peter Hogg observes, the purposive method "[c]annot be anything more than a general approach to interpretation. The actual purpose of a right is usually unknown, and so a court has a good deal of discretion in deciding what the purpose is, and at what level of generality it should be expressed."[469]

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[465] [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [*Dolphin Delivery* cited to S.C.R.].
[466] *Ibid.* at para. 36.
[467] [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [*Big M* cited to S.C.R.].
[468] *Ibid.* at para. 117.
[469] Hogg, *Constitutional Law*, *supra* note 148, at 770.

By the time *Vriend v. Alberta*[470] was decided, the Supreme Court of Canada had explicitly acknowledged the integral role of the judge in the constitutional decision-making process. Writing for the majority in that case, Cory and Iacobucci JJ. ruled that the:

> Charter's introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. *That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design* ... So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen.[471]

The *Vriend* ruling explicitly acknowledged the inevitability of interpretational disputes pertaining to the purpose and extent of specific *Charter* rights in specific circumstances. When such disputes arose, the majority suggested that as the "trustees" of the *Charter*, the courts would have the final say.

Several subsequent Supreme Court rulings further elucidated the judiciary's interpretive role in unclear *Charter* cases by acknowledging that all judicial decisions are to a degree influenced by the judge's personal beliefs. In *R. v. R.D.S.*,[472] the Court was forced to recognize that judges naturally possess personal preferences in favour of certain overarching legal and philosophical positions and, that in some cases, these personal preferences play a role in the decision-making process. *R.D.S.* involved allegations of bias on the part of a trial judge in favor of an accused person and to the detriment of a police witness.[473] At trial, an African-Canadian Youth Court Judge preferred the evidence of an African-Canadian youth to that of a white police constable. In so doing, the judge made comments about the tendency of white police officers to overreact when dealing with black youths.[474] In setting out a test designed to ascertain when a judge has exhibited unacceptable bias, the majority observed that:

> [e]very comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct ... The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes.[475]

Thus, the Court concluded that a judge's role as the neutral "trustee" or "arbiter" of the law does not extend to mandating the absolute mitigation of all personalized elements in the decision-

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[470] [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 [*Vriend* cited to S.C.R.].
[471] *Ibid.* at para. 134-135 [emphasis added].
[472] [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193 [*R.D.S.* cited to S.C.R.]
[473] *Ibid.* at para. 74.
[474] *Ibid.*
[475] *Ibid.* at paras. 118-119.

making process. This exact sentiment was expressed by the Canadian Judicial Council, which noted that the concept of judicial impartiality:

> [d]oes not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.[476]

In the Council's view, then, judges are permitted – and in some cases encouraged – to employ their personal points of view when engaging in the decision-making process. The majority in *R.D.S.* specifically endorsed the Council's opinion in this regard.[477]

As these examples demonstrate, the Supreme Court of Canada has articulated a general approach to the judicial decision-making process that both acknowledges and allows for elements of a judge's personal discretion to encroach upon the specifically mandated purposive analysis applicable to the interpretation of the *Charter*. Although the nature of the document's language renders some interpretive approach inevitable, the decision-making process expounded – and largely adhered to – by the Court has been subjected to criticisms from the media, conservative-minded commentators, and "left-leaning" academics. Individuals from these camps often simultaneously condemn the same Supreme Court decision for at once exhibiting explicitly conservative values and demonstrating overt liberal bias. The situation regarding s. 24(2) is certainly no exception to this contradictory, but near-universal rule.

4.1.2. The crime control critique of exclusion under s. 24(2)

Both the media and the crime control elements of Canadian academia have been quick to condemn the Supreme Court's leading s. 24(2) decisions. Mainstream media coverage of these rulings is often suggestive of an exclusionary rule that frustrates trial court judges, rendering them powerless to punish offenders guilty of even very serious crimes. The reports commonly disapprove of s. 24(2)'s impact on the justice system, which they allege permits overtly guilty criminals to go free because of the trivial procedural mistakes that are inevitably committed by police officers under pressure to perform their duties in a legal manner. The individual officers are in turn depicted as having admirably performed their dangerous duties in an attempt to protect law-abiding Canadians from being victimized by the criminal elements of society. The

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[476] Canadian Judicial Council, *Commentaries on Judicial Conduct* (Cowansville, Quebec: Les Editions Yvon Blais Inc., 1991) at 12.
[477] *Ibid.* at para. 119.

Supreme Court is then cast as soft on crime by ignoring the rights of victims while striving to protect the rights of guilty criminals.

Much of this press coverage appears supportive of the *Charter* and the core legal rights, but implicitly calls for a return to the common law era in the context of exclusion. *Victoria Times-Colonist* reporter Robert S. Gill provides an example of this type of reasoning. In commenting on a high profile case in which improper police procedure and pending exclusion of key evidence led to the withdrawal of charges pertaining to over 1,500 kilograms of marijuana, Gill observed that:

> [m]ost Canadians agree that adopting a written charter in 1982 was a progressive, civilized step. After all, it is important to protect individual rights, including the right to privacy. We do not want those who wield power given to them by the state to be able to abuse that power arbitrarily or for their own purposes. But after 25 years, are we sure our charter as worded does the job we intended it to do? I do not think that the charter was intended to confer upon anyone a right to break the law. It should not overtly enable or protect criminal activity, nor shield wrongdoers from the consequences of their behaviour. It should not be considered an infringement of rights when the state seizes private property in order to detect criminal activity, as long as it is not curtailing or deterring any other, non-criminal, activity.[478]

Opinions such as these suggest that although the *Charter's* core legal rights are laudable and ought to be protected, the necessity of doing so is substantially decreased when rights enforcement would require allowing a clearly guilty party to go free because the police failed to adhere to the *Charter*.

In a similar vein, legal scholar Patrick Monahan appealed to the press in order to condemn the Supreme Court's decision in *Therens* as "[d]isappointing, even troubling."[479] Monahan was particularly troubled by the fact that the Court in *Therens* excluded crucial evidence in circumstances where the officer may have been acting in good faith, a decision that he believed stepped beyond both the spirit and the plain language of s. 24(2). In this regard, Monahan observed that "[t]he court does not indicate why such a sweeping rule, far broader than the current U.S. position, is necessary or desirable. It is difficult to see how this decision protects the integrity of the criminal justice system. Indeed, it may do much to bring 'the administration of justice into disrepute'."[480] Monahan's opinion in this regard questions the validity of excluding reliable evidence capable of conclusively proving that an accused person is in fact guilty simply because their rights were violated during the criminal investigation process in what appears to be a relatively innocuous fashion. This argument is indicative of the frustration exhibited by the press and the public when the Supreme Court's decisions are seen as focusing

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[478] Robert S. Gill, "Perhaps it's time to tweak the charter" *The Victoria Times-Colonist* (4 January 2007) A11.
[479] Patrick Monahan, "A troubling court ruling on evidence" *The Globe and Mail* (5 August 1985) A5.
[480] *Ibid.*

more on legal technicalities than on the likelihood that the accused is factually guilty, and therefore deserving of punishment.

In addition to these criticisms of the *Charter's* practical effect on criminal procedure, there are also media reports that more directly challenge the validity of the core legal rights in general, and s. 24(2) in particular. In rejecting the Supreme Court's reasons for excluding the unconstitutionally obtained evidence in *Feeney*, Joey Thompson of *The Vancouver Province* opined as follows:

> B.C. lifer Michael Feeney strolled out of federal prison yesterday, having been excused from serving the rest of his sentence. The Supreme Court of Canada's wacky rationale for letting the killer go after serving less than half a life term is enough to drive a person to vote Reform. The country's top judges have decreed that investigating police must protect a murder suspect's privacy even if doing so jeopardizes the safety of citizens or leads to the destruction of crucial evidence. The top court also decided that, since police didn't have a warrant to seize Feeney's blood-soaked T-shirt, Canadians would rather the shirt be pitched than used to nail him. I say, where's the citizen who thinks that? What kind of logic says a key murder suspect's privacy is more important than preserving proof that he killed a hapless old man for a pack of smokes and a few dollars? The logic of our top court in interpreting the Charter, that's what.[481]

Thompson's critique of *Feeney* was echoed in large part by Rory Leishman of *The Montreal Gazette*, who took particular issue with the fact that the Supreme Court enforced the rights of a "murderer" over society's legitimate interest in protecting members of the law-abiding community. Leishman specifically impugned the Court's ruling that s. 8 required police to obtain a warrant prior to entering an individual's home by asking "[w]hen did Parliament write this principle into law? The answer is, never. On the pretense of interpreting the charter, the Supreme Court of Canada has decreed on its own that it's better to allow a killer like Feeney to escape justice rather than have him convicted on the basis of evidence obtained by police in violation of a legal technicality of the court's own devising."[482]

Reports of this kind inevitably lead readers to believe that the *Charter's* exclusionary mechanism allows a large number of overtly guilty accused persons to escape legal liability for their criminal offences. In a more direct advancement of this position, Jeffrey White of *The National Post* contends that "wrongful releases" are a far greater blight on society than wrongful convictions.[483] He cites statistics showing increased numbers of repeat offenders in homicide cases and a concomitant tendency toward laying fewer charges on an incident-to-incident basis

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[481] Thompson, "Wrongdoers", *supra* note 44 at A14.
[482] Leishman, "Feeney", *supra* note 44, at B3.
[483] White, "Murder" *supra* note 44 at A14.

in the context of violent crimes.[484] White argues that these developments have been caused by Supreme Court decisions that safeguard the rights of the accused:

> [l]awyers claim the court has cleaned up police behaviour without making prosecutions more difficult. A former Ontario assistant deputy attorney general triumphantly pointed out that B.C. murderer Michael Feeney was convicted a second time in February – after the Supreme Court had thrown out most of the evidence against him. But that conviction may prove just the opposite. "It is almost certain the jury learned of the evidence that had been thrown out and it had to influence them," says David Paciocco, a University of Ottawa law professor. That may not happen in less-publicized cases where evidence is excluded, he adds. We can't be sure that Charter exclusion of evidence is to blame for the drop in the rate of homicide charges and penitentiary admissions. We can't be certain future killers would be deterred by a greater certainty of punishment. But beyond doubt Mirzet Zec and Debra Beaulieu would never have met their accused killer, Robert Chaulk, had the Supreme Court appreciated that wrongful releases can be far more harmful than wrongful convictions.[485]

As these examples indicate, the media routinely disapproves of the legal reasoning employed by the Supreme Court in specific s. 24(2) cases, usually because that reasoning leads directly to rulings with which the authors do not agree. These results are typically seen as the manifestation of the Court's protection of the rights of criminals over the rights of victims.

Academics who favour a crime control model of criminal justice have also expressed disagreement with the Supreme Court's development of s. 24(2), which they view as providing a "windfall" remedy for persons involved in criminal activity. David Paciocco, who has advanced crime control critiques of the s. 24(2) jurisprudence, disagrees with the Supreme Court's "pro-exclusionary"[486] interpretation of s. 24(2) in *Collins*, arguing that the majority effectively changed the wording of the section to reflect its personal views as to when evidence ought to be excluded.[487] In arguing that the Supreme Court has misinterpreted the spirit and intent of s. 24(2), Paciocco states:

> [t]he framers of the Charter were attempting to fashion a cautious exclusionary rule where evidence would be refused only in relatively extreme cases; after all, there were no signs at the time that s. 24(2) was drafted that the administration of justice was suffering disrepute as a result of the long-standing position that the method of obtainment was irrelevant to the admissibility of probative evidence ... Despite this, the Supreme Court of Canada has fashioned what has proved, in at least a wide spectrum of cases, to be an extremely aggressive exclusionary remedy.[488]

Paciocco further criticized the Court's co-option of the concept of "disrepute", suggesting the word was selected for use in s. 24(2) in an effort to ensure that public opinion – rather than judicial opinion – would play a central role in exclusion of evidence.[489] In Paciocco's view,

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[484] *Ibid.*
[485] *Ibid.*
[486] Paciocco, "Judicial Repeal", *supra* note 59, at 365.
[487] *Ibid.* at 330.
[488] *Ibid.* at 341-342.
[489] *Ibid.* at 342-343.

"[t]he real issue is, how inclined should judges be, in exercising their judgment, to exclude evidence. The answer to that question given the language and spirit of the provision should have been, 'not very inclined at all'."[490]

Paciocco similarly disagrees with the Supreme Court's post-*Collins* development of s. 24(2), arguing that the Court's "technical" and "aggressive" exclusionary rule currently exists as the "Achilles' heel" of the criminal justice system, calling its reputation and credibility into question.[491] Paciocco rejects the Court's differential treatment of conscriptive and non-conscriptive evidence, arguing that "[a]utomatic exclusion of conscriptive evidence will never be accepted [by the Canadian public], and never should be. It is an unwarranted *mea culpa* and, in truth, a collective act of self-immolation."[492] In the result, Paciocco concludes that the Supreme Court ought to abandon its current approach to s. 24(2), and instead adopt a position closely akin to its common law position on exclusion. Indeed, Pacciocco suggests that the Supreme Court should have resolved a particularly controversial s. 24(2) ruling involving an accused charged with murder by "[doing] as it did in the *Wray* case some twenty-five years before."[493]

Similarly, lawyers Richard Fraser and Jennifer Addison dismiss Lamer J.'s interpretation of s. 24(2) in *Collins*, calling the Supreme Court's rejection of the utility of public opinion in the disrepute determination "[p]atronizing and intensely elitist ...".[494] In arguing that the current exclusionary rule unjustifiably favours the rights of accused criminals over the interests of law-abiding citizens, the authors conclude that:

> [t]he Supreme Court has all but explicitly deprived the reasonable Canadian of any role in the determination of whether the administration of justice is brought into disrepute. That is unacceptable. The exclusion of highly reliable evidence in ways that allow accused persons to protect their credibility on the witness stand, deal in drugs and get away with murder is also unacceptable. In the cases where that was done, Parliament should have stepped in and corrected the Court, to avoid the unfortunate consequences for our criminal justice system.[495]

As this passage indicates, Fraser and Addison also envision a return to the pre-*Charter* era in which convictions using reliable evidence are not inconvenienced by core legal rights enforced by an exclusionary mechanism. The authors further advocate use of the constitutional override clause contained in s. 33 of the *Charter* to effectively nullify all s. 24(2) decisions deemed to be unfavorable to the effective prosecution of criminal offences.[496]

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[490] *Ibid.* at 344.
[491] Paciocco, *Murder supra* note 59, at 237.
[492] *Ibid.* at 243.
[493] *Ibid.* at 244.
[494] Fraser & Addision, *supra* note 59, at para. 22.
[495] *Ibid.* at para. 69.
[496] *Ibid.* at paras. 66, 71.

The crime control criticism of the Supreme Court's interpretation of s. 24(2) undoubtedly intensified after *Stillman* was rendered. The Court's attempted clarification of its prior rulings encouraged further arguments that the specific language of s. 24(2) has been rendered irrelevant, effectively replaced by an automatic exclusionary rule for non-discoverable conscriptive evidence. In this regard, J.A.E. Pottow questions the validity of the Supreme Court's choice to interpret what was intended to be a flexible remedy as a rigid exclusionary rule that improperly favours the accused.[497] Pottow argues that the current problem-plagued approach to s. 24(2) developed out of a judicial desire to ensure remedies are available for constitutional violations.[498] He contends that *Stillman* represents a "left-shift"[499] in the judicial treatment of the exclusionary mechanism, a remedy which:

> [i]s "doubly" all-or-nothing: first, it appears to be the only remedy contemplated (other than even more drastic relief such as a stay of proceedings) for unconstitutional evidence-gathering; second, when exclusion is invoked all the tainted evidence must be kept out (there is no mechanism for individual tailoring). This absolutist quality leaves courts with only two choices: a hefty remedy or no remedy at all.[500]

Pottow concludes that the interpretational problems culminating in *Stillman* could be resolved by the development of lesser, non-exclusionary remedies under s. 24(1), which would counteract the left-leaning bias with which the Court has interpreted s. 24(2).

Moreover, Crown attorney Julianne Parfett argues that the current s. 24(2) jurisprudence represents liberalism's "triumph" over communitarian principles, a result that unjustifiably narrows the interests upon which decisions regarding exclusion are based.[501] Parfett's attack is founded primarily on the notion that s. 24(2) improperly favours the rights of criminals over the rights of victims. In this regard, she argues that "[i]n its development of the exclusionary rule, the Supreme Court has ensured that individual rights are paramount."[502] Parfett takes the position that this result is unjustified, and contends that:

> [t]he Supreme Court's approach to the enforcement of rights is predicated on its view of the justice system, and that view is based in legal liberalism. Using the exclusionary rule, the Supreme Court has created a justice system in which truth seeking has given way to an examination of police behaviour. The trial becomes not a search for the truth, but instead a process by which it is decided what truth will be admitted in evidence. The justification for this approach is the need to protect the individual against the state. Individual rights are indeed protected, but the price is paid by the victims, not the state.[503]

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[497] Pottow, *supra* note 59, at 58-59.
[498] *Ibid.* at 61.
[499] *Ibid.* at 63.
[500] *Ibid.* at 62.
[501] Parfett, *supra* note 59, at paras. 4-5.
[502] *Ibid.* at para. 61.
[503] *Ibid.* at para. 89.

Thus, Parfett sees the evolution of s. 24(2) as the product of the Supreme Court tendency to protect the rights of the individual against the power of the state. She concludes that the Court's proclivity in this regard effectively ignores the interests of crime victims in the exclusionary calculus.

Other authors submit that the *Charter's* exclusionary mechanism should not be used as a remedy for individual rights violations. According to Steven Penney, the Supreme Court's distinction between conscriptive and non-conscriptive evidence is derived from a misguided interpretation of s. 24(2). He argues that although "[c]riminal procedural rights protect both the innocent and the guilty against investigative abuses ... this does not mean that the latter are as deserving of the state's concern and respect as the former."[504] With this concept as a foundation, Penney argues that any attempt to justify the exclusion of otherwise admissible evidence on grounds of trial fairness alone "[p]erversely values the interests of guilty defendants in avoiding conviction over society's interest in securing it."[505] He therefore posits that "[n]either deterrence not any other rationale supports the automatic exclusion of self-incriminating evidence under s. 24(2) of the Charter ...".[506] and that as such, the current approach to s. 24(2) "[i]s unjustifiable and should be scrapped."[507] Penney argues that the exclusion of relevant and reliable evidence can only be justified if it serves to deter future instances of police misconduct.[508] The actual rights violation and the actual victim are simply of no concern.

Based on this sample of criticism, one would assume that the Supreme Court of Canada had in fact created a very liberal test for the application of s. 24(2), one in which virtually every established *Charter* violation leads to the exclusion of unconstitutionally obtained evidence. However, as Professor Don Stuart has indicated, this is by no means an accurate picture of the current state of the case law. Rather, Canada's exclusionary rule functions to all but preclude the operation of s. 24(2) in response to violations of *Charter* rights such as s. 8, which typically produce evidence classified as non-conscriptive.[509] In such cases, Professor Stuart argues that "[w]hat appears to be a virtually automatic inclusionary rule is reducing the pronouncement of s. 8 standards to meaningless rhetoric."[510] In explaining this point, Professor Stuart contends that:

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[504] Penney, "Deterrence", *supra* note 59, at 112.
[505] *Ibid.* at 130.
[506] *Ibid.* at 132.
[507] *Ibid.* at 132-133.
[508] *Ibid.* at 142.
[509] Stuart, *Charter Justice*, *supra* note 52, at 513.
[510] *Ibid.* at 513-514 [emphasis in original].

> [t]he strong trend not to include non-conscripted evidence after s. 8 violations have been established, especially in drug cases, carries the special freight of making s. 8 rulings empty. It will be little comfort to an accused that he or she has established that the evidence was obtained in violation of a major Charter standard when it will nevertheless be used to convict because the violation wasn't in a home, the police were in good faith ignorance and/or the offence is considered serious.[511]

He thus concludes that "Charter rights will only have bite if there are meaningful remedies" and "[i]f Charter rights are to be taken seriously, there must be a real risk of exclusion of evidence obtained in violation of the Charter, even in serious cases and even at the cost of determining the truth."[512] If this is indeed the case, the current thrust of the s. 24(2) case law must be explainable by means other than simply the "pro-accused" mentality of the Supreme Court. It is thus necessary to look more closely at the analysis of the judicial decision-making process as it relates to the *Charter* in general in an attempt to understand how the s. 24(2) jurisprudence has come to assume its current form.

4.1.3. The liberal/due process critique of Charter interpretation

Despite the Supreme Court's argument that it acts as an effectively impartial trustee of the *Charter*, and the crime control theorists' argument that the Court's s. 24(2) decisions provide a remedial windfall to criminals, the current exclusionary rule appears to have other influences. Many liberal academics have criticized the Court's overall constitutional jurisprudence for exhibiting bias in favour of dominant political ideals and prevailing societal norms. These theorists argue that the judiciary has an inherent tendency to interpret unclear *Charter* sections in a manner that benefits individuals who are already in positions of relative power. They contend that rather than instigating a major reform of Canada's legal and institutional norms, the *Charter* has functioned to maintain and legitimize the legal status quo. Because judges come overwhelmingly from powerful social groups, they tend to render decisions in keeping with the views and ideals that dominate those groups. As a result, this strain of liberal theory suggests that the *Charter* has not been interpreted with a mind to achieving broad changes to existing social arrangements, and that it instead serves to justify current societal conditions.

In commenting on the Canadian courts' unwillingness to depart from the common law status quo in its treatment substantive equality claims, Judy Fudge observed that the "[c]ommentators who initially hailed the *Charter* as an unqualified victory are now having second thoughts regarding its efficacy in the struggle to end the oppression of historically

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[511] *Ibid.* at 516.
[512] *Ibid.* at 518.

disadvantaged groups, women included."[513] In Fudge's view, *Charter* litigation was to be pursued with caution as it necessarily involves "[t]ransferring power away from institutions which are in principle democratic to institutions which are by definition authoritarian."[514] Such caution was required as courts typically exercise their considerable discretionary powers in keeping with prevailing political trends, which at the time were predominantly neo-conservative in nature.[515] This observation coupled with an assessment of the Supreme Court's early s. 15 rulings led Fudge to conclude that "*Charter*-wielding courts will not prove to be the final bastion of individual rights against the encroachments of corporate actors."[516]

In a similar vein, Michael Mandel argues that the *Charter* was born out of dissatisfaction with Canadian-style representative democracy,[517] which prior to 1982 had become increasingly corporatized to the extent that "[w]hile proclaiming the principle of 'one person, one vote,' in practice it was closer to the 'one dollar, one vote' law of the marketplace."[518] Rather than transferring power from politicians to the Canadian people, Mandel argues that the *Charter* transferred power from politicians to the legal profession, a group disproportionately composed of Canadians from high socioeconomic status backgrounds that generally pursue purely monetary goals once they have achieved professional certification.[519] Mandel also impugns the legal profession's ability to adequately safeguard individual rights and liberties, suggesting that "[l]awyers are [not] a group particularly well known for integrity. As a profession, lawyers are a variation on the mercenary soldier or the professional mourner, espousing causes for pay ..."[520] Mandel argues that the "legalization of politics" produced by the *Charter* has served to enhance and empower conservative forces in Canada:

> [t]he Charter has done much more than merely replace the formal democracy of the ballot box with the formalities of the legal system. It has, in fact, weighed in on the side of power and, in both crude and subtle ways, has undermined popular movements as varied as the anti-nuclear movement, the labour movement, the nationalist movement in Québec, the aboriginal peoples' movement and the women's movement. Filtering democratic opposition through the legal system has not only failed to reduce Canada's great social inequalities but has actually strengthened them.[521]

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[513] Judy Fudge, "The Public/Private Distinction: The Possibilities Of and the Limits To the Use of Charter Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485 at 487 [Fudge].
[514] *Ibid.* at 551.
[515] *Ibid.* [footnotes omitted].
[516] *Ibid.* at 553.
[517] Mandel, *Legalization*, *supra* note 99, at 3.
[518] *Ibid.* at 2.
[519] *Ibid.* at 3.
[520] *Ibid.* at 3-4 [footnotes omitted].
[521] *Ibid.* at 4.

Mandel thus views the composition of Canada's constitutionally entrenched bill of rights as a deliberate attempt to insulate "private power" from "popular threats."[522]

In support of his position, Mandel refutes the purportedly liberal bias of constitutional judging, suggesting instead that judicial decision-making reflects not only the views of the politicians who appoint judges,[523] but also the views of the economic class from which judges are selected. As Mandel observes, "[j]udges still have to be lawyers with some prominence in the profession, and the profession is still almost entirely the domain of the white and the upper class."[524] This leads Mandel to contend that although judges may not be conservative in the sense that they are overly deferential to parliament,[525] they are conservative in the sense that they "[c]annot be compelled, by arguments of principle, to reach conclusions they do not want to reach."[526] In essence then, Mandel argues that "[o]ne of the reasons legal discourse remains so conservative is because it remains so much within the control of the judiciary. It cannot be wrested from them and used against their will for progressive ends."[527] Mandel therefore concludes that the *Charter* is "[i]n fact, part of a redefinition of democracy in terms that render it congenial to enormous inequalities in social power."[528]

Joel Bakan also argues that the *Charter* has been ineffective in remedying social injustice in Canada, primarily because its potentially powerful principles and concepts are inevitably interpreted and implemented by a legal institution that remains profoundly conservative and highly resistant to progressive change.[529] The legal system maintains its resistance to social transformations primarily because the status quo is extremely favourable to the dominant players within that system. Bakan contends that contrary to what is commonly suggested by those seeking to legitimize judicial decision-making, constitutional jurisprudence is not a principled process existing on a plain entirely separate from the political sphere. Rather, judicial decision-making under the *Charter* is infused with partisan rhetoric, largely because "[i]n general, the ideals articulated in *Charter* rights and freedoms are highly contentious and political. They are

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[522] *Ibid.* at 5.
[523] *Ibid.* at 47.
[524] *Ibid.* at 48;
[525] *Ibid.* at 63.
[526] *Ibid.* at 64.
[527] *Ibid.* at 65.
[528] *Ibid.* at 70.
[529] Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press Inc., 1997) at 3 [Bakan, *Just Words*].

contested concepts that generate disagreement in the judicial and legal communities, and even more pronounced controversy in the larger society."[530]

Bakan therefore rejects the argument that judges ought to be trusted to act as neutral arbiters of the controversial political issues that arise out of *Charter* interpretation.[531] His position in this regard is based on the observation that:

> [j]udges ... operate at or near the centres of social, economic, and political power and within an institutional framework committed to perpetuating the existing social order. The perspective that they bring to decision making, no matter how sincere their efforts to be neutral and impartial, is invariably shaped by their social and institutional location. They will generally interpret law and facts from the standpoint of dominant groups in society with which their professional discipline has been historically allied.[532]

Due to the sincere but inherently elitist perspective of judges, Professor Bakan questions why socially marginalized groups "[t]hat do not share that perspective should trust and obey decisions that reflect it, particularly when all too often those decisions simply reinforce the very structures of domination, oppression, and exploitation that effect them."[533]

Bakan argues that judges generally have a natural predisposition toward rendering decisions that are in keeping with the political ideologies that dominate Canadian society.[534] In this regard, he posits that although "[m]ost judges sincerely try to apply laws fairly, and do not intend to favour one person, group, or view over another, their unconscious premises and beliefs about what is right, just, normal, and natural still influence their decisions."[535] In Bakan's view, the predisposition of judges toward dominant ideology is derived from the fact that:

> [m]ost judges are white, male, and relatively wealthy, and they are always lawyers. The judiciary is not representative of the Canadian population in terms of class, race, ethnicity, gender, culture, or education. Most appointments to the bench are from the elite strata of private practice, where women, members of visible minorities, and lawyers who practise poverty law, union-side labour law, and other forms of progressive or activist law are under-represented.[536]

The largely homogeneous composition of the judiciary is in turn due in part to the high economic costs associated with acquiring a legal education,[537] and the fact that law schools are deeply conservative institutions offering curricula explicitly tailored to the accommodation of elite corporate law firms.[538] Bakan suggests that "[b]ecause of who they are, where they come from,

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[530] *Ibid.* at 26-27.
[531] *Ibid.* at 31.
[532] *Ibid.*
[533] *Ibid.* at 41.
[534] *Ibid.* at 103.
[535] *Ibid.* at 104.
[536] *Ibid.*
[537] *Ibid.*
[538] *Ibid.* at 105.

and how they are socialized and trained, judges are likely to draw uncritically and unquestioningly, on dominant ideological discourses when interpreting and applying the Charter."[539] Bakan further acknowledges that the lack of total uniformity in dominant discourses:

> [h]elps explain ideological divisions among members of the Court and, in particular, the occasional progressive decision. At the same time, however, the majority of judges are conservative individuals, socially and professionally members of the elite, involved in a fundamentally conservative enterprise. They, and the legal profession in general are about the last group we should expect to act as agents of progressive social change.[540]

As a result, Bakan posits that the inherently conservative nature of the judiciary has dampened – if not nullified altogether – the *Charter's* potential to affect progressive social change in Canadian society.

As the criticisms of commentators such as Fudge, Mandel and Bakan indicate, the position that the Supreme Court has rigorously interpreted the *Charter* in favour of liberal ideals is by no means universal. Indeed, liberal scholars have consistently pointed to the conservative nature and allegiances of the judiciary in highlighting the fact that the *Charter* has failed to affect the systemic changes that might have been possible had its vague sections been developed in a truly liberal fashion. Although these critics do not apply their theories directly to s. 24(2), the remedial section is worded in an undeniably vague manner, rendering its interpretation equally as susceptible to the subjective attitudes of the judges called upon to apply it in practice. Justice as truly substantive equality has been reduced or defeated on many occasions because of the judiciary's inherent ideological resistance to particular aspects of the concept, the development of Canada's exclusionary rule has proceeded according to subjective views of those who have interpreted s. 24(2) over the past 25 years. This argument can be substantiated by examining the leading s. 24(2) case law by reference to the theories set out by Mandel and Bakan.

4.2. Theory in action: The Supreme Court, discretionary decision-making, and s. 24(2)

As has been argued previously, the vagueness of s. 24(2) renders judicial discretion in the interpretation of the section inevitable. Simply stated, the section cannot be applied in practice unless its imprecise concepts are given specific meaning by the judiciary. Because of the absence of precise statutory direction, the Justices' who have interpreted s. 24(2) were forced to rely on their subjective opinions regarding the exclusion of unconstitutionally obtained evidence in order to develop the *Charter's* exclusionary rule. If, as Mandel and Bakan have argued, the Supreme Court has a generally conservative outlook due to its being composed of the leading members of

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[539] *Ibid.* at 112.
[540] *Ibid.* at 113.

a politically and socially conservative profession, the creation of a relatively conservative rule was all but inevitable. When the jurisprudence is viewed with this theory in mind, it becomes possible to see that s. 24(2) has in fact been interpreted in a way that adheres to crime control views, and that as a result tends to minimize individual rights protections in the criminal law context for certain individuals in certain circumstances.

In support of this argument, it is necessary to examine how the average law-abiding Canadian views the exclusion of illegally obtained evidence under the *Charter*. The empirical evidence suggests that in general, the Canadian public is more comfortable with an exclusionary rule that is closer to the Supreme Court's common law position than to its position under s. 24(2). When it is acknowledged that the average Canadian judge is selected from one of the most socially privileged portions of the Canadian population, it starts to become clearer why the current s. 24(2) jurisprudence is characterized more by crime control ideas than by wide due process protections for all individuals. Examinations into the intricacies of the Supreme Court's focus on trial fairness, its development of the discoverability doctrine, and its treatment of illegally obtained business records under s. 24(2), will further indicate that the judiciary's subjective views have played an integral role in the development of Canada's exclusionary rule. This analysis will highlight the conservative opinions and ideals on which the leading s. 24(2) rulings are based. It will also explain how the Court's decisions remain consistent with their foundational values even when they disapproved of by crime control advocates.

4.2.1. A "conservative" court, a "conservative" test

Contrary to the claims made by crime control advocates, the Supreme Court of Canada's current interpretation of s. 24(2) is not based on the Court's intention to depart from the wording of the section in an attempt to produce a decidedly broader exclusionary rule than the one originally intended by the framers of the *Charter*. Rather, the nature and composition of the Supreme Court has ensured that the current s. 24(2) jurisprudence has been guided by a relatively narrow conception of trial fairness in the criminal law context. This conception has significantly limited the practical effectiveness of the core legal rights insofar as they apply to protect individuals involved in crime. As it currently exists, the Supreme Court's s. 24(2) jurisprudence bifurcates the *Charter's* core legal rights into two distinct categories: (i) those that produce conscriptive evidence; and (ii) those that produce non-conscriptive evidence. The manner in which this distinction operates in concert with the remaining elements of the s. 24(2) test effectively renders tangible evidence of guilt automatically admissible, notwithstanding the manner in which it was

obtained. The inherent outlook of the bench has thus resulted in a flawed interpretation of s. 24(2), one that has disproportionately negative effects on those individuals who are already subjected to the disproportionate application of the Canadian criminal justice system.

4.2.1.1. The average law-abiding Canadian

There seems to be little doubt that the average law-abiding Canadian tends to view the exclusion of reliable and relevant evidence with a great deal of suspicion.[541] According to David Paciocco, "[t]he admission of unconstitutionally obtained evidence in the overwhelming majority of cases would have no perceptible adverse affect on how the majority of Canadians feel about the administration of justice and that regard to this fact counsels a niggardly use of the exclusionary rule."[542] Similarly, Steven Penney contends that "[i]n the eyes of most citizens, excluding illegally obtained evidence harms the reputation of the justice system much more often than admitting it does."[543] It appears almost certain, then, that most Canadians would likely exclude evidence only in extreme circumstances, regardless of how it was obtained.

The empirical evidence pertaining to the subject supports this position. An early empirical study designed to ascertain public views on the exclusion of evidence determined that although judges and members of the public generally apply the same criteria in determining whether or not to exclude evidence,[544] the public was more likely to admit illegally obtained evidence across a range of circumstances.[545] The study, which was based on data from a national survey, indicated a disparity between public and judicial opinion of an extent significant enough for the authors to caution the Supreme Court on its "progressive" development of the s. 24(2) jurisprudence.[546] L'Heureux-Dube J. specifically referred to this study in her dissenting opinion in *R. v. Burlingham*,[547] noting that "[a]lthough the Canadian public shares this Court's views as to what factors are important in the exclusion of evidence under s. 24(2), there is a material gap between public opinion and this Court regarding how those factors would be applied."[548] A more recent empirical study conducted in 2000 indicates that more than 66% of Canadians favoured the admission of unconstitutionally obtained evidence in each fact scenario set out for their

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[541] But see Mahoney, *supra* note 60, at 451-452 (suggesting that the Canadian public may not actually seek to secure convictions at any cost to individual liberties).
[542] Paciocco, "Judicial Repeal", *supra* note 59, at 344 [footnotes omitted].
[543] Penney, "Deterrence", supra note 59, at 111 [footnotes omitted].
[544] Alan W. Bryant *et al.*, "Public Attitudes Toward the Exclusion of Evidence: Section 24(2) of the Canadian Charter of Rights and Freedoms" (1990) 69 Can. Bar Rev. 1 at 42 [Bryant].
[545] *Ibid.* at 43.
[546] *Ibid.*
[547] [1995] 2 S.C.R. 206, 124 D.L.R. (4th) 7 [*Burlingham* cited to S.C.R.].
[548] *Ibid.* at para. 74.

consideration. Moreover, the 2000 study reported that the numbers in this regard had remained consistent for over a decade.[549]

The high percentage of individuals in favour of admitting unconstitutionally obtained evidence[550] is likely explainable by the fact that most law-abiding Canadians identify far more with victims of crime than they do with perpetrators of crime. This fact is itself somewhat contrary to reality in that most members of the conservative law-abiding upper classes will never gain first-hand experience of the type of crime they fear the most. As Michael Mandel reports, "[c]rime – at least the sort of crime that is the object of police attention – is basically an *intra-class* phenomenon. Victims of crime come overwhelmingly from the same powerless social classes as those who offend against them."[551] The general identification with victims is partly based on the human tendency to be predominately concerned with one's self, and partly based on the impression created by popular media. David Paciocco suggests that the media sensationalizes crime and accentuates the failures of the justice system, partly because the public is interested in such articles. Paciocco claims this is the case as "[a]ll of us fear being struck from behind when alone in the dark, or seeing the shadow of an intruder at the foot of our bed. On a daily basis we hear more about the failure of the system to protect the public than about its successes; those failures gain larger print, and they leave a greater impression."[552]

In empathizing almost entirely with victims of crime, most individuals come to recognize the intrinsic value of using all available evidence to successfully prosecute the factually guilty. They are thus more likely to view *Charter* rules that suppress such evidence and allow criminals to "escape" punishment as mere "technicalities" unworthy of protection, unless that protection applies to them personally. Lamer J. alluded to this tendency in his ruling in *Collins*. It is therefore reasonable to conclude that the average member of the law-abiding Canadian public possesses views regarding the exclusion of evidence that closely adhere to crime control values, and that when the question is put to them in a concrete form, they will generally favour ensuring that incriminating evidence, legally obtained or otherwise, is available for use at trial over excluding such evidence in order to safeguard the rights of the criminally accused.

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[549] Joseph F. Fletcher & Paul Howe, "Supreme Court Cases and Court Support: The Canadian Public Opinion" (2000) Choices IRPP 6:3 at 34, online: Institute for Research on Public Policy <www.irpp.org/choices/index.htm> [Fletcher & Howe].

[550] See Neil Hall, "Judges not highly respected, poll says" *The Vancouver Sun* (11 May 2001) B4 (quoting political scientist Peter Russell as stating that "[a]bout two-thirds of Canadians don't like decisions that support the rights of the accused").

[551] Mandel, *Legalization*, *supra* note 99, at 184 [emphasis in original].

[552] Paciocco, *Murder*, *supra* note 59, at 6.

4.2.1.2. The average law-abiding Canadian judge

The views of the average law-abiding Canadian concerning the exclusion of evidence take on increased significance when one acknowledges that Supreme Court Justices are selected solely from this societal group. Before becoming the average law-abiding Canadian judge, they enjoy life as the average law-abiding Canadian, or perhaps more accurately, the above-average law-abiding Canada. Judges are of necessity selected from the legal profession, which as Mandel points out, exists as an extremely conservative subset of the increasingly conservative general public. It is thus not at all surprising that judges called upon to craft the *Charter's* exclusionary rule have done so in a manner that in practice favours the admission of tangible evidence of guilt, a position very much in keeping with the values possessed by members of their social strata.

It is also important to recall that the *Charter* specifically requires the courts to create some form of exclusionary rule. The text of s. 24(2) indicates that in at least some circumstances, the admission of unconstitutionally obtained evidence will negatively impact on the repute of the criminal justice system, and therefore must be excluded. This fact is particularly significant as in the pre-*Charter* era, the Supreme Court saw no need to create an exclusionary rule in the absence of a legislative mandate explicitly requiring or recognizing such a remedy. As Joseph Magnet observed, "[t]he *Hogan* case in the Supreme Court of Canada recognized the violation of legal rights under the Diefenbaker Bill of Rights, the court said: Well, we see no remedy clause here, we cannot grant a remedy."[553] Thus, when left to its own devices, the Court was content to avoid exclusion of relevant and reliable evidence altogether. The advent of the *Charter* and s. 24(2) meant that the courts could no longer rely on this fallback position. Nevertheless, the Supreme Court that subsequently embarked upon the development of an exclusionary rule was essentially the same institution that had altogether refused to recognize that remedy prior to 1982. The Court could not be expected to have abandoned its pre-*Charter* ideals literally overnight, and the vague wording of s. 24(2) virtually ensured that those values could be maintained in some form in the now inevitable exclusionary rule.

In *R.D.S.*, the Supreme Court itself conceded that the subjective viewpoints of judges are what qualify the individuals who hold them to be appointed as judges in the first place. Moreover, the skill and dexterity that judges exhibit when incorporating these views into the exercise of their judicial function is what leads to their eventual ascension to the Supreme Court of Canada. Once it is acknowledged that constitutional provisions such as s. 24(2) require

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[553] *Joint Committee Proceedings, supra* note 310, at 99-100.

judicial interpretation to have practical meaning, it becomes necessary for judges to exercise their subjective discretion in determining how unclear provisions are best interpreted and applied. There is no reason to doubt that Supreme Court Justices engage in this decision-making process both honestly and earnestly. However, because of their social station and life experiences, Canada's exclusionary rule has come to be governed by a limited conception of trial fairness in the criminal law context, and thus a limited notion of the extent to which individual rights must be protected insofar as they apply to the factually guilty.

4.2.3. Trial fairness and the conscriptive/non-conscriptive distinction

The crime-control influence exerted by the Justices' subjective viewpoints is particularly evident in the Supreme Court's articulation of the "trial fairness" notion and the related distinction between conscriptive and non-conscriptive evidence. These concepts, which result in the differential treatment of different forms of evidence, comprise the very heart of the test for excluding evidence obtained in violation of the *Charter*. The Court's development of the s. 24(2) case law, particularly after *Stillman*, focuses on purportedly ensuring the fairness of criminal trials. In this regard, the jurisprudence depends almost entirely on the connection between the Court's concept of trial fairness and the classification of evidence as either conscriptive or non-conscriptive. In its most basic sense, the Supreme Court's current conception of s. 24(2) results in the virtually automatic exclusion of non-discoverable self-incriminating evidence, and the virtually automatic inclusion of non-conscriptive real evidence.

The Supreme Court's assumption of this position cannot realistically be traced back to the wording of s. 24(2) itself. In reality, the section envisions neither the automatic exclusion nor the automatic inclusion of any type of evidence, regardless of how it is ultimately classified. The distinction therefore comes directly from the subjective viewpoints of the individual Judges who initially created it. Rather than evolving out of any expressed pro-accused agenda, this aspect of the s. 24(2) test has essentially been developed in accordance with concepts of trial fairness and individual rights protection to which judges subjectively relate. The Court's exclusionary rule is based almost entirely on "common sense" views of individual rights, criminals and crime control, and concomitantly, how illegally obtained evidence ought to be treated in light of those common views. It is equally apparent that the Court's position on these points is derived from a "sense" that is intensely personalized, and almost certainly "common" only to those segments of the Canadian public that exist at a relevant distance from the social conditions commonly related to crime, criminals and victims of crime.

The Supreme Court's concept of trial fairness and its conscriptive/non-conscriptive divide are representative opinions and experiences with which Supreme Court Justices identify. As members of the conservative, wealthy, officially law-abiding legal profession, Justices are generally incapable of identifying with the full ramifications of the life of the average criminal suspect. As Michael Mandel has indicated:

> [d]espite the adversarial nature of the relations between prosecution and defence, and the theoretically impartial detachment of the judge, in terms of social class, crown attorney, defence counsel, and judge have far more in common with each other than they have with the victim or the criminal and vice-versa. The lawyers in the room will have all had the same social background, will have attended the same schools, and will have roughly the same career earnings; many will find themselves in all three legal roles at various times during their careers.[554]

Although judges do not identify with the criminal lifestyle, they do understand the inherent wrongfulness of using self-incriminating evidence that is illegally obtained by police to further the prosecution of a person presumed innocent until proven guilty. Identification on this level comes by virtue of subjective personal experience. Generally speaking, judges can identify with having something they have said in the past used to their detriment at some point in the future. They identify with this scenario primarily because they have experienced such a situation in one form or another at least once over the course of their lives, and thus understand the inherent unfairness of allowing an accuser to use such evidence to their own ends, particularly when that accuser wrongfully obtained the information in the first place.

The average law-abiding person understands and empathizes with this form of unfairness because they can place themselves in similar situations. They can imagine becoming involved in a stressful and intimidating encounter with a party who occupies a position of extreme power relative to them. They can further imagine making a statement or performing an action that could eventually be used to their detriment by that more powerful party while engaged in such an encounter. However, as law-abiding individuals, they cannot identify with actually being guilty of most criminal offences, actually being investigated by police as they go about their daily lives, and actually being in possession of evidence capable of proving their guilt. They thus cannot understand why an accuser would not be permitted to use tangible evidence found in possession of an accused, particularly when that evidence is capable of conclusively proving whether that suspect has actually committed a criminal offence. They do not identify with actually being guilty of the criminal offences that are most frequently investigated by police, and thus cannot see the utility in excluding tangible evidence of guilt except in the most egregious of

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[554] Mandel, *Legalization*, *supra* note 99, at 184.

circumstances. They are far more likely to classify rights violations through which such evidence is obtained as "trivial" or committed by police "accidentally" or with the best of intentions.

Though the Court has expended a great deal of time and effort in attempting to provide persuasive definitions for its two categories of evidence, it has devoted comparatively little space to advancing a cogent explanation of how conscriptive evidence actually serves to compromise trial fairness, and also as to why evidence falling into the non-conscriptive classification generally fails to do so. In essence, the Court's rulings have rested on the simple assertion that evidence rendering a trial unfair must be excluded, that conscriptive evidence renders trials unfair, and that as such, conscriptive evidence must be generally be excluded. As a result of the Court's failure to extrapolate further on the issue, many commentators have attempted to discern the legal and logical impetus for Supreme Court's linking of non-discoverable conscriptive evidence and trial fairness. Most commentators agree that the admission of evidence capable of rendering a trial unfair will ultimately bring the administration of justice into dispute as a result of the unfairness, and thus should be excluded under s. 24(2). David Paciocco has referred to the Court's development and articulation of its trial fairness logic as "impressive" and "[i]ndeed ... irrefutable ...".[555] However, as Paciocco and others[556] have concluded, "[w]hat is not so impervious to rational criticism ... is the more basic notion that the admission of unconstitutionally obtained evidence can render a trial unfair."[557]

The main point advanced by critics of the Court's s. 24(2) decisions in this regard is that there is a lack of logical connection between conscriptive evidence and trial fairness. As Paciocco observes, "[i]t is not readily apparent how the admission of relevant and probative evidence will make unfair a trial that is intended to test the truth of the Crown's allegation that the accused committed an offence."[558] The objection is that the evidence itself cannot render the trial unfair in any conventional sense, as it is both logically probative and reliable. If this kind of evidence is used and the accused is convicted, such a result is fair as the accused is guilty and the evidence reliably proves that fact. Paciocco further rejects the idea that the concept of trial fairness in the s. 24(2) case law is based on the need to avoid forcing the accused to act as a witness against himself at his own trial, observing that this exact result is permissible in other areas of evidence, such as the voluntary confessions rule.[559] Additionally, he notes that the

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[555] Paciocco, "Disproportion", *supra* note 59, at 167.
[556] See e.g. Pottow, *supra* note 59, at 48; Parachin, *supra* note 62, at 42-43.
[557] Paciocco, "Disproportion", *supra* note 59, at 167.
[558] *Ibid.* at 168.
[559] *Ibid.* at 169.

Court's exclusionary rule covers evidence beyond that which can legitimately be linked to the state unfairly conscripting the accused as a witness against himself.[560] Paciocco therefore concludes that "[t]here is no clear or compelling theoretical basis for the fair trial theory. Without a theoretical basis, the truism that we have to exclude evidence where its admission would undermine the fairness of the trial is empty, pointless and irrelevant." [561]

Due process critics have also rejected the Court's differentiation between conscriptive and non-conscriptive evidence. Indeed, the merit of the distinction had been challenged long before *Stillman* was decided. After *Collins*, Ron Delisle argued:

> [w]hether the real evidence existed irrespective of the Charter violation is neither here nor there. The ability of the government to discover the real evidence and to later use it at the accused's trial came about through a breach of the Constitution, just as an incriminating statement might be thereby produced. There is no logical reason why the nature of the evidence should dictate the analysis of admissibility.[562]

In disagreeing with the necessary implications of this distinction, Delisle surmised "[i]f the fairness of the trial will not be affected [by the admission of real evidence], the Charter breach needs to be serious, blatant and deliberate."[563]

It is not surprising that neither the Court nor the interested commentators have been able to ascertain a conclusive theoretical or philosophical link between trial fairness and the conscriptive/non-conscriptive distinction. They have been unable to do so as in reality, this connection is based on elements far more basic than any of the possible theoretical justifications advanced to this point. As Paciocco notes, the Supreme Court's development of its s. 24(2) jurisprudence has largely been "[a] matter of choice, not legal imperative."[564] The relevant case law demonstrates that the choices made by the Court to date have resulted in the creation of a test that strongly reflects prevailing crime control conceptions regarding the proper treatment of criminal evidence, views which are very similar to the pre-*Charter* Canadian position on exclusion, which resulted in the admission of all reliable and relevant evidence.[565]

In this way, the conscriptive/non-conscriptive split cannot be legitimately justified by the judiciary's undoubtedly justified desire to prevent wrongful convictions. It is true that in a sense, conscriptive evidence would not exist but for the *Charter* violation, and that it therefore could potentially play a greater role in an unjustified conviction than would non-conscriptive evidence,

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[560] *Ibid.* at 169-170.
[561] *Ibid.* at 170.
[562] Delisle, "Exclusion", *supra* note 60, at 292.
[563] *Ibid.*
[564] Paciocco, "Disproportion", *supra* note 50, at 169.
[565] See Delisle, "Exclusion", *supra* note 60, at 292 (commenting that conscriptive non-conscriptive distinction is similar to the common law rule).

which technically exists whether it is discovered by police or not. However, the very notion of preventing wrongful convictions relates primarily to the interests of the law-abiding Canadian. While it is certainly extremely important to prevent the factually innocent from being implicated in criminal offences, and while the conscriptive/non-conscriptive divide may indeed have a role to play in this regard, the fact is that the *Charter's* due process protections apply equally the factually guilty as they do to the factually innocent. As such, the Court's structuring of the s. 24(2) test so that it attaches remedial significance only to those rights violations that may result in wrongful convictions is to essentially reduce the core legal rights to the same status as the pre-*Charter* counterparts. Indeed, the conscriptive/non-conscriptive split is merely another way of ensuring that all relevant and reliable evidence is deemed admissible regardless of the manner in which it was obtained. Furthermore, the Court does not always appear as concerned with reducing the probability of wrongful convictions as the distinction between conscriptive and non-conscriptive might suggest. As was argued earlier, there has been little judicial effort directed toward recognizing and rejecting the tendency of police officers to engage in testimonial dishonesty during the prosecution process, a practice that undoubtedly has the effect of producing unjust convictions. In the result, even if the conscriptive/non-conscriptive divide is based on the desire to prevent wrongful convictions, this notion pertains mainly to safeguarding the rights of the average law-abiding Canadian, a goal with which members of the judiciary can subjectively relate.

The Supreme Court has undoubtedly created an elaborate body of case law in relation to s. 24(2), elements of which are at times difficult to reconcile with one another, and with the concept of broad-based individual rights protections. Some such elements, specifically the conscriptive/non-conscriptive distinction and its relationship to the concept of trial fairness, appear to be derived largely from the subjective viewpoints of individual judges. Despite the Court's undoubtedly earnest effort at creating a logical and effective test for the exclusion of illegally obtained evidence, the jurisprudence remains reflective of crime control conceptions of the extent to which legal rights ought to be enforced when the individuals to whom those rights apply are undeniably involved in activity the state has defined as crime. As a result, the current interpretation and application of s. 24(2) applies in practice in a manner that renders virtually all tangible evidence of guilt – evidence that can only be possessed by actual criminals involved in actual criminal activity – generally admissible at trial regardless of whether it is secured through unlawful means. Conversely, evidence that could be compelled from innocent individuals as well

as those involved in crime, namely conscriptive evidence, will generally be excluded whenever it is obtained through unconstitutional means.

4.2.4. The discoverability doctrine

The influence of the crime control mandate on the Supreme Court's s. 24(2) jurisprudence in general – and its conscriptive/non-conscriptive distinction in particular – is further established by the Court's entrenchment of the discoverability doctrine in *Stillman*. The concept of discoverability serves as a strong indication that the Court's view of trial fairness is indeed narrow, and that has little to do with any expressed judicial desire to enhance the core legal rights of criminals at the expense of the rights of victims and potential victims of crime. Though the discoverability doctrine has a relatively lengthy judicial history,[566] it was elevated to the forefront of s. 24(2) applications by the majority's ruling in *Stillman*. In essence, the concept of discoverability renders all self-incriminating conscriptive evidence – as well as evidence derived from it – admissible if the Crown can establish that the evidence would inevitably have been obtained by constitutional means. If the Crown satisfies this burden, the evidence will satisfy the trial fairness inquiry irrespective of the fact that the police actually chose to proceed in an unconstitutional manner.

Numerous scholars have subjected the discoverability doctrine to harsh criticism. Richard Mahoney notes that "[t]he important role assigned to discoverability has generated a fair amount of criticism, which rightly labels the doctrine's *ex post facto* enquiry as speculative and hypothetical."[567] Many commentators have pointed to the fact that the doctrine contradicts the notion set out in the second branch of *Collins* that the availability of non-violative investigative techniques increases the severity of the *Charter* breach. According to Crown prosecutor Carol Brewer, discoverability "[o]perates in a fashion far closer to a 'catch-22.' Although establishing on a balance of probabilities that the evidence would have been discovered will permit the Crown to avoid exclusion at the trial fairness stage, it will also increase the likelihood of exclusion when the seriousness of the violation is being considered."[568] Mahoney refers to the "catch-22" of discoverability as "absurd", observing that "[i]t is surprising that the Supreme Court continues to accept the argument set out [in the second branch of *Collins*] yet employs

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[566] See e.g. *R. v. Mellenthin*, [1992] 3 S.C.R. 173, 76 C.C.C. (3d) 481 [*Mellenthin* cited to S.C.R.]; *R. v. Bartle*, [1994] 3 S.C.R. 173, 118 D.L.R. (4th) 205; and *Burlingham*, *supra* note 546.
[567] Mahoney, *supra* note 60, at 464 [footnotes omitted].
[568] Brewer, *supra* note 59, at 250.

discoverability at each of the other two stages of the *Stillman* analysis to quite the opposite effect."[569]

The inconsistencies and contradictions inherent in the concept of discoverability detract from the Court's position that its general rule of excluding conscriptive evidence is necessary to ensure trial fairness. Discoverability essentially exists as an escape hatch through which the Court can avoid excluding evidence that would normally be captured by its general rule. It circumvents the all-or-nothing definition of conscriptive evidence, rendering tangible proof of guilt admissible on speculation alone, even when it is obtained illegally. It allows the Crown to argue that the police would have taken legal steps to secure the impugned evidence despite the fact that in actuality, they failed to take those steps and instead chose to proceed in an unconstitutional manner. Like the conscriptive/non-conscriptive distinction, the artificiality of discoverability belies the Court's implicit adherence to the crime control mandate. Even those who favour the admission of most unconstitutionally obtained evidence acknowledge the implausibility of the doctrine. As David Paciocco has observed:

> [t]he idea that completely undercuts [the Supreme Court's] fair trial theory ... is the now central notion of 'discoverability.' Discoverability moves the crucial question from whether the accused was made unconstitutionally to participate in the investigation, to whether the evidence that was produced from his enforced participation would have been otherwise available. Discoverability is a prudent criterion, but it is entirely pragmatic and not the least principled. It is born of the realization that to exclude evidence that the police would have had in any event is to give the accused a windfall, and to require the state to overcompensate.[570]

The discoverability doctrine acts as a contrived mechanism that can be employed whenever the Court wants to avoid the unwanted but inevitable implications of the logic underpinning its rule regarding conscriptive evidence.

Though never explicitly acknowledged by the Supreme Court, the case law pertaining to discoverability has demonstrated that absent extraordinary circumstances,[571] only tangible evidence of guilt will be routinely captured by the doctrine. Thus, in the majority of circumstances, only evidence possessed by actual criminals will be rendered admissible through the operation of the doctrine. According to Kent Roach:

> [t]he Court engages in this speculative inquiry into the hypothetical of inevitable discovery in order to ensure that the state is not placed in a worse position than if it had not unconstitutionally

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[569] Mahoney, *supra* note 60, at 464, n. 47 [footnotes omitted].
[570] Paciocco, "Disproportion", *supra* note 59, at 170.
[571] See e.g. *Harper*, [1994] 3 S.C.R. 343, 118 D.L.R. (4th) 312 [*Harper*] (despite a s. 10(b) violation, the accused's statement was deemed discoverable due to his "almost irresistible urge to confess").

> obtained the accused's assistance. This can be defended in the language of corrective justice, but it also implicitly recognizes the state's crime control interests in admitting relevant evidence.[572]

The doctrine therefore functions to avoid the exclusion of tangible evidence of guilt by engaging in purely hypothetical guessing games as to what the police may have done had they not actually violated the accused's *Charter* rights. Discoverability therefore allows the Court to maintain its position regarding the importance of safeguarding innocent individuals from the possibility of self-incrimination while at the same time ensuring that reliable tangible evidence is for the most part available for use against the factually guilty.

4.2.5. Illegally seized corporate documents and s. 24(2)

That the Supreme Court's subjective views are represented in its s. 24(2) jurisprudence is also evident in its treatment of illegally obtained corporate documents.[573] In general, the Court appears to be more willing to exclude improperly seized real evidence in the form of corporate documents than it is to exclude other forms of real evidence, such as narcotics and firearms. In *R. v. Law*,[574] the accused reported a safe stolen following a break and enter at their restaurant. Acting on a tip, the police later discovered the safe abandoned in a field, its door forced open. The safe was subsequently secured and transported to a police exhibit room.[575] While the safe was in police custody, an officer who was not involved in the investigation of the break and enter, and who suspected that the accused had engaged in activities in contravention of the *Excise Tax Act*,[576] seized financial documents found in the safe without a warrant, photocopied them, and then forwarded the copies to Revenue Canada for the purposes of implicating the accused in a criminal offence.[577] As a direct result of these actions, the accused were later charged with offences in relation to GST violations.[578]

At the accused's trial, the documents were deemed to have been obtained in violation of s. 8, and were excluded under s. 24(2). This ruling was upheld at the summary conviction appeal level, but reversed by the Court of Appeal.[579] On further appeal to the Supreme Court of Canada,

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[572] Roach, "Evolving", *supra* note 61, at 134.
[573] In the case of business records that are not illegally obtained, such as those that must be created pursuant to statute, the Supreme Court is generally unwilling to invoke s. 24(2) in relation to related criminal proceedings. See e.g. *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757; and *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, 129 D.L.R. (4th) 129.
[574] *Law*, *supra* note 449.
[575] *Ibid.* at para. 1.
[576] R.S.C. 1985, c. E-15.
[577] *Law*, *supra* note 449, at para. 1.
[578] *Ibid.* at para. 7.
[579] *Ibid.* at para. 7-8.

Bastarache J. ruled that the protection of privacy "[e]xtends not only to our homes and intimately personal items, but to information which we choose, in this case by locking it in a safe, to keep confidential."[580] Although the Court indicated that there may be a greater need to protect personal information than business information, Bastarache J. nevertheless noted that "[a] proprietor's control over confidential business documents implicates his individual autonomy and, in turn, 'has profound significance for the public order.'"[581] The Court therefore held that because of the break and enter, the accused had not abandoned their privacy interests in the contents of the safe,[582] that the police were therefore not authorized to search the stolen property without a warrant for purposes other than those of officer safety or the investigation of the break and enter,[583] and that the search was therefore unreasonable and in violation of s. 8.[584]

The Supreme Court then turned to s. 24(2) to determine whether the illegally obtained records were properly excluded from the trial. In this regard, Bastarache J. held that the challenged evidence was not conscriptive in nature, and that it would therefore not have impacted negatively of the fairness of the trial.[585] The Court then considered the remaining aspects of the *Collins* test, accepting the trial judge's decision that the police actions leading to the illegal obtainment of the impugned evidence was "sufficiently serious" to justify excluding the documents.[586] On this point, Bastarache J. held that the investigating officer:

> [e]ssentially assumed the role of an Excise Tax official, taking regulatory matters into his own hands when he easily could have left that responsibility to the appropriate body. It is highly unlikely that Corporal Desroches misunderstood the scope of his authority. His disregard for established procedures, combined with his failure to proceed properly when that option was available, are factors supporting the trial judge's s. 24(2) ruling.[587]

Bastarache then acknowledged that the documents were crucial to the Crown's ability to substantiate it's prosecution of the accused, and that exclusion would therefore cause some disrepute to flow to the administration of justice.[588] However, the Supreme Court nevertheless excluded the evidence under s. 24(2), ruling that "[t]he resolution of s. 24(2) thus turns on the second Collins factor, namely, whether the violation of s. 8 is so serious that it outweighs the

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[580] *Ibid.* at para. 16.
[581] *Ibid.*
[582] *Ibid.* at para. 18.
[583] *Ibid.* at para. 19-20.
[584] *Ibid.* at para. 30.
[585] *Ibid.* at para. 35.
[586] *Ibid.* at para. 38.
[587] *Ibid.*
[588] *Ibid.* at para. 39.

State's interest in admitting the evidence."[589] The Court was of the opinion that the violation was indeed sufficiently serious, and the documents were resultantly excluded.[590]

Though the decision in *Law* correctly protected individual rights under s. 8, it stands in marked contrast to the ruling in *Stillman* in its treatment of non-conscriptive evidence. It will be recalled that in *Stillman*, the majority invoked the discoverability doctrine to admit evidence in the form of a mucus-filled tissue primarily because the accused had not been forced to create that evidence, and because the police would have taken the proper steps to secure the tissue had they not actually taken the improper steps that they actually took.[591] In *Law,* Bastarache J. refers directly to the *Stillman* tissue, acknowledging that "[c]ourts have, to be sure, recognized situations where it is unreasonable to expect personal property or information to remain private. It has been held that an individual can effectively abandon his own property by relinquishing any privacy interest in it: see Stillman ...".[592] However, in dealing with the s. 24(2) issue in *Law*, Bastarache J. makes no mention of the discoverability analysis that led Cory J. to admit the tissue.

There are undeniably clear distinctions between *Stillman* and *Law*. In the former case, the police were investigating a suspect whom they believed had sexually assaulted and murdered a young girl. As Cory J.'s judgment indicates, the police would therefore have at least had reasonable and probable grounds to believe that the tissue, containing as it did the necessary elements of a D.N.A. sample, was of direct relevance to their investigation. In *Law*, the situation was obviously much different. At the time the evidence was secured, the police were actually investigating a crime committed against the accused, not by them. They would thus have not had any legitimately reasonable belief that there was evidence of criminal wrongdoing contained in the safe. However, the Court's differential treatment of the evidence in the two cases is nonetheless indicative of its tendency to deal more harshly with individuals accused of offences considered more serious in nature, or perhaps more accurately, its tendency to more willingly protect the rights and interests of certain categories of offenders.

The accused in *Law* were alleged to have committed what was essentially a form of white-collar crime, albeit relatively limited in scope and severity. In this context, Bastarache J.'s acknowledgement that the privacy interest residing in corporate documents is of "profound significance" to public order is revealing. Because of this privacy interest, the Court did not

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[589] *Ibid.* at para. 40.
[590] *Ibid.* at para. 41.
[591] See *Stillman, supra* note 50, at para. 128.
[592] *Law, supra* note 449, at para. 17.

consider whether the police would have performed the necessary steps to legally secure the information contained in the safe. It certainly could have done so once the officer who suspected that the accused had committed a crime began investigating the safe. Furthermore, the Court did not address how an accused in police custody can be said to have freely created and discarded a tissue containing his D.N.A., while an accused who reports a safe stolen knowing that it contains information capable of implicating him in a crime can be said to have a continuing privacy interest in that information. This is not to say that the Court ought to have ruled the evidence admissible in *Law*. The fact is that the police did not take the proper steps to secure the evidence; the financial documents in *Law* were therefore rightfully excluded from the trial. One wonders whether the result would have been the same had the safe contained evidence of narcotics or firearms offences. Simply stated, the Supreme Court's reasoning in *Law* is at odds with its reasoning in *Stillman*. The inevitable supposition is that these difference are premised upon the nature of the offences being dealt with, and the degree to which Supreme Court Justices subjectively consider certain classes of crime as less serious than others, and certain categories of criminals are more deserving of punishment than others.

4.3. Reconciling judicial subjectivity, dominant ideologies and the s. 24(2) controversy

Despite the crime control orientation of the current jurisprudence, the Supreme Court of Canada's application of the test under s. 24(2) often generates considerable controversy among crime control advocates and the general public. Mass media outlets have relayed the general consternation exhibited by police, Crown attorneys and average citizens toward purportedly expansive legal rights and an exclusionary rule that is seemingly invoked frequently to permit the guilty to escape punishment. On the *Charter's* fifth anniversary, Kirk Makin reported:

> [i]n the meantime, it is almost axiomatic that every Charter case leaves someone's ox gored. So far, the most unhappy parties are probably the police. "We have had some terrible, terrible decisions," said Niagara Regional Police deputy chief John Shoveller. Each decision gets appealed up the line, he said, leaving the law in limbo. "I think a lot of people are now totally frustrated and disgusted with the system," he said. "And, of course, the criminals love it. If an officer is wrong, he can be held accountable. But to turn a criminal loose doesn't serve justice or the public." Crown lawyers, too, are unhappy about the number of cases that are being thrown out on technical violations, said Bonnie Wein, one of the Ontario Government's chief constitutional experts.[593]

Despite these contentions, the reasoning employed in the majority of even the most controversial s. 24(2) decisions can be traced directly back to relatively conservative legal, social and political perspectives.

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[593] Makin, *supra* note 209, A5.

There are essentially two main methods through which the s. 24(2) controversy can be reconciled with the conservative origins of the test. The first involves judicial acquiescence to the historical treatment of case precedent. Judges create and are bound by prior decisions, and often are forced to follow those precedents through to their logical – but sometimes undesirable – conclusions. In the s. 24(2) context, the fact that judges subjectively identify with the inherent wrongfulness of induced self-incrimination has led to the creation and development of an exclusionary mechanism with a problematic focus on conscriptive evidence. When confronted with certain fact scenarios, this focus can lead to admissibility rulings that are unpalatable to the crime control agenda. However, the fact that judges are bound by the doctrine of *stare decisis* ensures that all lower courts must at least facially respect the Supreme Court's decisions, even when those rulings force a distasteful result. The same principle renders Supreme Court Justices extremely loathe to overtly depart from that Court's prior decisions. The frequent overruling or alteration of such decisions would turn the system of precedent on its head, creating a great deal of uncertainty in Canada's already indefinite legal system. Supreme Court Justices therefore have a vested interest in respecting even those decisions that lead to unwanted consequences.

The general trepidation with which judges tend to approach the changing of one's legal mind is increased in the context of decisions pertaining to s. 24(2). These particular precedents are based on earlier discretionary decisions reached in large part by reference to the subjective beliefs of the judges who rendered them. The Justices responsible for those decisions thus have a personal stake in maintaining the judgments' continuing authority on the subject, primarily to avoid any perception that their original decision may have been flawed. This leads to situations in which the Supreme Court becomes enmeshed in its own subjective logic and is thereby forced to follow it through to its inevitable conclusions, even when those conclusions are not personally attractive to the Justices. In this sense, maintaining the legal life of a Justice's subjective beliefs is the "end" that justifies the "means" of occasionally authoring a controversial, but inevitable decision. As the discoverability doctrine indicates, the Court has established methods of avoiding such situations. Nevertheless, it is not always feasible to accomplish this task, and the result is often a decision from a relatively conservative court that is rejected by the conservative community.

Evidence of the Supreme Court's desire to maintain the authority of prior judicial rulings is also exhibited in the Court's treatment of the second branch of *Collins*, insofar as the seriousness of the *Charter* violation is assessed in light of actual police conduct. To this end, the Court has demonstrated a tendency to treat as more serious those *Charter* violations that are

indicative of the investigating officer's blatant disregard for prior court rulings or the well established and judicially recognized legislative limits on their investigatory authority. For example, in *R. v. Buhay*,[594] the Court exercised its discretion to exclude under s. 24(2) despite the result being the suppression of real evidence of drugs found in a rented locker at a bus depot,[595] a result the Court is usually unwilling to permit. In that case, the police, who were alerted to the presence of the drugs by security guards who had already searched the locker, executed their search without first obtaining a warrant, in part because the officers did not think they had sufficient grounds to secure the necessary judicial authorization.[596] When asked whether he considered applying for a warrant prior to executing the search, the investigating officer responded, "[t]hinking about it, yeah. It's always in the back of your mind, I guess, but ...".[597] The constable explained that ultimately, his decision not to apply for a warrant was partly based on the fact that "[t]here would be lack of grounds, even, to – maybe to get a search warrant at the time."[598] In response, Arbour J. ruled that "[t]he admission of Constable Riddell that he did consider obtaining a warrant but that he thought that he lacked sufficient grounds to get one also suggests blatant disregard for the appellant's rights."[599] Perhaps more importantly in the eyes of the Court was the fact that it showed a blatant disregard for judicial authority. As Michael Mandel has noted, in considering the second branch of *Collins*, "[g]ood faith seems mainly to apply where the authorities have shown the proper respect for the Charter, in other words the proper respect for the Court itself ...".[600]

The Supreme Court undoubtedly renders decisions intended to maintain the veracity of its prior rulings, particularly when those rulings are based on the subjective discretionary decisions of particular Justices. This tendency is of course vulnerable to changes in the composition of the Court, a reality reflected in the fact that Justices who either disagreed with the initial s. 24(2) decisions, or who were appointed after those decisions were rendered are the Justices who are currently most likely to depart from the original precedents. As Professor Don Stuart has indicated, "[a]lthough the majority stuck to its guns in *Stillman*, the composition of the Supreme Court is now radically altered. Only two justices of the Stillman majority remain but the three dissenters are still on the Court. It seems on the cards that there will be a further reconsideration

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[594] *Buhay, supra* note 449.
[595] *Ibid.* at paras. 2-5.
[596] *Ibid.* at para. 6.
[597] *Ibid.* at para. 58.
[598] *Ibid.*
[599] *Ibid.* at para. 60.
[600] Mandel, *Legalization, supra* note 99, at 194.

of s. 24(2) principles."[601] Of the three *Stillman* dissenters who continue to preside on the Supreme Court, it is notable that McLachlin C.J.C., who disagreed vigorously with Cory J.'s majority judgment in *Stillman*, now occupies a position of power relative to the other Justices.

Nevertheless, the departures from the core test that have been made in majority decisions to date are relatively minor. Despite more than a decade of criticism, the test derived from *Therens*, *Collins*, and *Stillman* continues to form the basis of the Court's treatment of s. 24(2). The most significant change made to this test was accomplished by Lebel J. in a concurring opinion in *Orbanski*, a Justice who was not a party to any of the earlier decisions. Though some lower courts, such as the Ontario Court of Appeal, have extrapolated upon this "change", it could more accurately be described as a mere acknowledgement that there is no automatic exclusion under s. 24(2). The continued judicial acceptance of the s. 24(2) test is due to the exclusionary mechanism's conceptual foundations, which the Justices of the Supreme Court continue to personally identify with and adhere to.

The second manner in which the Supreme Court's controversial s. 24(2) decisions reflect crime control values is attributable directly to the subjective viewpoints of the Justices themselves. The most controversial decisions to date deal with the suppression of conventionally "real" evidence capable of conclusively proving an accused's guilt in relation to a serious criminal offence. However, when the Supreme Court renders such decisions, factors with which Justices readily identify are overt in the decision-making process and are inevitably responsible for guiding the Court toward certain conclusions, regardless of how controversial those conclusions might subsequently become. For example, the sanctity of one's home – a concept frequently invoked in controversial s. 24(2) rulings – is a notion with which judges readily identify and, as such, is subject to considerable judicial deference in the discretionary decision-making process. The notion that the privacy of a person's home should not be unduly breached is a concept that transcends sociopolitical and socioeconomic divisions. Judges are therefore capable of identifying with the inherent wrongfulness of unauthorized intrusions into an individual's place of residence, be they committed by common criminals or police investigators.[602]

The decision in *Feeney*[603] provides an example of how principles and ideas with which judges relate can lead to controversial s. 24(2) decisions. As set out above, that case involved

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[601] Stuart, *Charter Justice*, *supra* note 52, at 517.
[602] There is evidence that even this ancient maxim is waning when applied to persons involved in drug or gun crime. See *R. v. Silveira*, [1995] 2 S.C.R. 297, 124 D.L.R. (4th) 193 [*Silveira*].
[603] *Feeney*, *supra* note 1.

several eyewitnesses directing police officers investigating a brutal murder to a small, windowless trailer that served as home to the principal suspect.[604] Knowing that Feeney was inside and having received no answer to the announcement of their arrival, the police entered the home with guns drawn.[605] They awakened the suspect without violence and discovered that his clothes were soaked in blood.[606] When the police questioned Feeney, he eventually admitted to attacking the victim, and to stealing money and several items from the deceased's home. That evidence was later found in Feeney's trailer by way of a police search executed under the authority of a warrant.[607]

When the case reached the Supreme Court of Canada, the majority excluded Feeney's statements and all of the real evidence in order to maintain the reputation of the administration of justice. This ruling emanated out of the Court's conclusion that the initial warrantless search of the accused's home was illegal.[608] As Sopinka J. concluded:

> [t]he sanctity of the home has been recognized time and again by courts at least since Semayne's Case ... The police in the present case did not have sufficient grounds either to arrest the appellant, or to obtain a search warrant, yet they forcibly entered the sleeping appellant's one-room dwelling with guns drawn, shook him awake and began questioning him. Such behaviour is antithetical to the privacy interests protected by the Charter and cannot be condoned.[609]

The majority was well aware that its ruling on the s. 24(2) application would effectively deprive the Crown of the evidence it needed to secure Feeney's conviction for murder. Despite this fact, Sopinka J. ruled that:

> [i]f the exclusion of this evidence is likely to result in an acquittal of the accused as suggested by L'Heureux-Dubé J. in her reasons, then the Crown is deprived of a conviction based on illegally obtained evidence. Any price to society occasioned by the loss of such a conviction is fully justified in a free and democratic society which is governed by the rule of law.[610]

Thus, the evidence was excluded to safeguard the rule of law. The majority of the media outlets covering the story did not view the issues in the same way as the majority of the Supreme Court, resulting in a palpable tension between the Court and the press.[611]

Though the majority of the Court opted to couch the *Feeney* ruling in language relating to the rule of law, Sopinka J.'s remarks regarding the sanctity of the home indicate that the decision stemmed almost entirely from the Court's recognition of – and identification with – notions of

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[604] *Ibid.* at para. 7.
[605] *Ibid.* at para. 9.
[606] *Ibid.*
[607] *Ibid.* at paras. 11-12.
[608] *Ibid.* at paras. 51-52.
[609] *Ibid.* at para. 77.
[610] *Ibid.* at para. 83.
[611] See e.g. Thompson, "Wrongdoers", *supra* note 44, at A14; Leishman, "Feeney", *supra* note 44, at B3; and White, "Murder" *supra* note 44, at A14.

individual property interests. The Court has referred to these exact interests in other rulings pertaining to allegations of unreasonable search and seizure. In *R. v. Edwards*,[612] the Supreme Court acknowledged that possession of an actual property interest in the specific area searched will be an important consideration in determining whether the accused will be afforded protection under s. 8 of the *Charter*.[613] Though the correct result regarding s. 24(2) was reached in *Edwards*, it ought not to have been based on the notion of property interest, a doctrine that Professor Stuart has referred to as "rot".[614] This concept undeniably benefits those segments of society who find themselves in financial positions that make it realistic for them to obtain such interests. The members of socially and economically marginalized groups who are unable to do so will inevitably enjoy decreased protections of their core legal rights.

By embedding the property interest concept into the characterization of s. 8 and its application of s. 24(2), the Supreme Court has effectively vitiated the seriousness of unreasonable police searches conducted anywhere other than in an individual's home or place of business. In *R. v. Wise*,[615] the Supreme Court ruled that an illegal search of the accused's car was of a less serious nature simply by virtue of the location searched. As Cory J. ruled, "[m]ore importantly, the invasion of privacy was not of a home or office but of a motor vehicle."[616] Similarly, in *Caslake*,[617] the Supreme Court ruled that drug evidence obtained from an illegal search of the accused's car ought not to be excluded under s. 24(2) as individuals ought to be afforded less privacy with regard to their vehicles. On this point, the majority ruled:

> [t]he search was not especially obtrusive. There is no evidence that there was any damage or harm done to the car, the police simply did a thorough search of the interior. There is a lesser expectation of privacy in a car than there is in one's home or office, or with respect to their physical person. Although Officer Boyle did not know that he had reasonable and probable grounds to conduct a search, objectively speaking, he did. Finally, the search was conducted in good-faith reliance on an RCMP policy that requires the interior of impounded cars be inventoried. As a result, the breach was not sufficiently serious to justify exclusion of the evidence.[618]

The ruling in *Caslake* therefore implies that searches other than those of an individual's home or office will generally lack sufficient seriousness under the second branch of *Collins* to warrant exclusion.

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[612] [1996] 1 S.C.R. 128, 132 D.L.R. (4th) 31 [*Edwards* cited to S.C.R.].
[613] *Ibid.* at para. 45.
[614] Stuart, "Eight", *supra* note 60, at 60.
[615] [1992] 1 S.C.R. 527, 51 O.A.C. 351 [*Wise* cited to S.C.R.].
[616] *Ibid.* at para. 42.
[617] *Caslake*, *supra* note 449.
[618] *Ibid.* at para. 34.

This is not to say that the Court views illegally conducted intrusive searches of the human body as relatively unserious *Charter* violations. Indeed, as Professor Stuart has observed, "[t]he Supreme Court has made it clear that violations of the protection against unreasonable search and seizure under s. 8 will be considered very serious in the case of intrusive searches of the person."[619] In support of this point, Professor Stuart points to *R. v. Pohoretsky*,[620] in which a unanimous Court ruled that "[a] violation of the sanctity of a person's body is much more serious than that of his office or even of his home. Secondly, it was wilful and deliberate, and there is no suggestion here that the police acted inadvertently or in good faith ...".[621] Nevertheless, the more recent developments in the s. 24(2) case law[622] inculcated Professor Stuart to posit that "[t]he jurisprudence may have reached the point that only a violation of s. 8 within the home has any realistic chance of resulting in the exclusion of evidence."[623] Similarly, Adam Parachin suggests that "[w]hile it is true that some violations of s. 8 are far more serious than others, it is surely not in the best interests of the Canadian criminal justice system to erect yet another barrier to the exclusion of real evidence obtained in violation of s. 8."[624]

That the outcomes of controversial s. 24(2) applications are affected by concepts with which judges subjectively identify is also evident in the Supreme Court's recent treatment of evidence obtained through illegal "sniffer-dog" searches. In *R. v. Kang-Brown*,[625] and its companion case *R. v. A.M.*,[626] the majority of the Supreme Court excluded tangible evidence of guilt in the form of illegal narcotics due to the fact that the police did not have the authority to search either accused person.[627] The Court dealt only briefly with s. 24(2) in both cases, disposing of the issue in five paragraphs in *Kang-Brown*,[628] and in four paragraphs in *A.M.*[629] Nevertheless, the result in both judgments was influenced by ideas with which the majority could personally identify. Essentially, the Justices excluded the impugned evidence in both cases because the police lacked reasonable and probable grounds for executing the searches, instead choosing to conduct them in a purely random fashion. In his concurring opinion in *Kang-Brown*,

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[619] Stuart, *Charter Justice*, *supra* note 52, at 501.
[620] [1987] 1 S.C.R. 945, 39 D.L.R. (4th) 699 [*Pohoretsky* cited to S.C.R.].
[621] *Ibid.* at para. 5.
[622] See e.g. *R. v. Monney*, [1999] 1 S.C.R. 652, 171 D.L.R. (4th) 1 (the majority ruled that a passive "bedpan vigil" performed upon a suspected narcotics courier, and without medical personnel present, was not as intrusive as "active" body cavity searches, and that as such, no s. 8 violation had occurred).
[623] Stuart, "Eight", *supra* note 205, at 61.
[624] Parachin, *supra* note 62, at 64.
[625] 2008 SCC 18 [*Kang-Brown*] (QL).
[626] 2008 SCC 19 [*A.M.*] (QL).
[627] *Ibid.* at para. 91. See also *Kang-Brown*, *supra* note 624, at paras. 97-98.
[628] *Kang-Brown*, *ibid.* at paras. 102-105.
[629] *A.M.*, *supra* note 625, at paras. 94-98.

Binnie J. observed that the police search failed to meet even the greatly reduced standard of "reasonable suspicion", and accordingly held that the evidence ought to have been excluded as:

> [t]he administration of justice would be brought into disrepute if the police, possessing an exceptional power to conduct a search on the condition of the existence of reasonable suspicion, and having acted in this case without having met the condition precedent, were in any event to succeed in adducing the evidence. Drug trafficking is a serious matter, but so are the constitutional rights of the travelling public.[630]

The result was thus premised on the fact that the police had violated the accused's rights in a manner that could potentially affect the rights of all individuals, law-abiding or otherwise. Similarly, in his concurring opinion in *A.M.*, Binnie J. ruled that:

> [w]eighed against admission was the fact that the speculative sweep in this case appears to be the standard practice of the OPP and the municipal police forces in Ontario. The searches did not respect the rules set out four years previously by this Court in M. (M.R.); nor did they comply with the school board's own policies enacted pursuant to the Education Act, which call for police to be used only 'when necessary, or if the well-being of the student is at risk'.[631]

The "speculative sweep" used in this instance effectively violated the rights of all who were present at the school, not just those of the individual found to be in possession of illegal narcotics. The judgments in *Kang-Brown* and *A.M.*, then, are a manifestation of the Supreme Court's continuing position that the police should not be permitted to randomly search average members of the public, even if those searches occur in the context of the "war on drugs". Prior to embarking on a search, the police must at least have reasonable grounds to believe that the individual to be searched is not a member of the law-abiding public.

The results in *Kang-Brown* and *A.M.*, are not to be condemned. The Supreme Court was right to exclude the evidence obtained through these purely speculative sweeps. However, the reasoning driving these decisions has an unnecessarily limiting effect of the infringement of core legal rights in other circumstances. Similar to other s. 24(2) decisions, the rulings in *Kang-Brown* and *A.M.* are driven by concepts with which the Supreme Court Justices subjectively identify. As members of the law-abiding public, judges can acknowledge the inherent unreasonableness of allowing police to randomly search individuals merely because they happen to be in public places. Heavily armed police officers using ferocious-looking canines to patrol public spaces creates the image of a totalitarian police state, a notion that is extremely distasteful to even the most ardent supporter of law and order politics. The average law-abiding Canadian does not want to be subjected to intrusive and unpredictable police surveillance while going about their everyday lives. They therefore acknowledge the inherent worth of *Charter* rights that protect

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[630] *Kang-Brown*, *supra* note 624, at para. 104.
[631] *A.M.*, *supra* note 625, at para. 97.

them against such practices. The rulings in *Kang-Brown* and *A.M.* focus on safeguarding the rights of the factually innocent, which are precisely the type of rights enjoyed by judges, their families, and the people with whom they commonly associate, both personally and professionally. They are decidedly not the type of rights that apply solely to the socially, racially and economically marginalized segments of a deeply stratified society.

As these examples indicate, even when the Court's s. 24(2) rulings generate controversy amongst proponents of the crime control model, they are nevertheless typically the product of the Justices' desire to give legal life to their prior rulings, and to ensure that the state's investigatory bodies continue to have respect for judicial authority. Some of the Court's most controversial rulings relating to the exclusion of non-conscriptive real evidence are explainable by the judiciary's adherence to – and protection of – the notion that every person's home is sacred, and that agents of the state should not unduly intrude upon that ground. This interest is itself generated from an ideological perspective rooted in the ultimate respect for personal property and individual ownership of material goods. Similarly, evidence obtained through speculative sweeps of the unsuspecting general public usually warrant exclusion, even when the evidence thereby secured is indicative of the accused's participation in crime. This result is deemed acceptable primarily because the Justices can identify with the necessity of individual rights protection in this context. In the result, the Supreme Court's controversial s. 24(2) decisions are far more in keeping with the values common to the social groups from which they are selected than with any supposed desire to promote the inalienability of individual rights for all citizens.

4.4. Conclusion to Chapter 4

The enactment of the *Charter's* vaguely worded rights and freedoms ensured that significant judicial interpretation would be required if the *Charter* was to have any practical impact on Canadian society. The Supreme Court, the media and numerous academics have all suggested various theories of constitutional adjudication, and in so doing have reached widely disparate conclusions as to how the process actually takes place. The Supreme Court sees itself as merely the trustee of the *Charter*, interpreting it with a view to promoting the rights and freedoms of all Canadians. Crime control advocates argue that in the s. 24(2) context, the Court has created a rule that prefers the rights of criminals to those of crime victims, both actual and potential. In general, s. 24(2) is popularly conceived as a broadly applicable, excessively pro-accused remedy that restricts the Canadian criminal justice system's ability "to get things right". However, when viewed in practice, Canada's exclusionary rule has undeniably crime control oriented

undertones. As a result, something more than the Supreme Court's supposed preference for individual rights protections must be responsible for its development of s. 24(2). Some guidance as to just what this is can be found in more critical approaches to *Charter* interpretation. These more liberal scholars have argued that in general, the subjective views of the primarily conservative judiciary has resulted in a regressive interpretation of the *Charter*, one that favours the interests of society's dominant groups, and has molded Canada's rights and freedoms according to the needs of the socially powerful.

A critical analysis of the Supreme Court's interpretation and application of s. 24(2) demonstrates that the current jurisprudence pertaining to exclusion is based almost entirely on the subjective notions of due process protections with which the judiciary can identify. In so doing, the Court has developed a test for the application of s. 24(2) that effectively limits the extent to which the *Charter's* core legal rights have practical application to individuals involved in criminal activity. Even at their most controversial, the Court's decisions on exclusion adhere to perspectives that are driven by a fundamental adherence to the crime control mandate, and that bolster respect for judicial authority and the sanctity of personal property. The current jurisprudence pertaining to exclusion is thus geared toward the protection of the factually innocent, the conviction of the factually guilty, and the admission of all tangible evidence of criminal culpability except in the most limited of circumstances.

An exclusionary rule that is structured to safeguard the rights of the law-abiding from unreasonable intrusions by the investigatory branch of the state cannot be legitimately rejected on that basis alone. To the contrary, protecting the *Charter* rights of the factually innocent is vital to the proper working of the criminal justice system. However, such a rule can be properly criticized insofar as its focus detracts from the core legal rights of other, less privileged social groups. The reality is that the current s. 24(2) test further disadvantages those individuals who are already subjected to the disproportionate application of the Canadian criminal justice system. By working to secure the admissibility of all tangible evidence of guilt, Canada's current exclusionary rule essentially condones the form that policing commonly takes in economically and racially marginalized neighborhoods, regardless of whether or not it involves investigatory practices that transgress the *Charter's* due process protections. If the courts routinely ignore the rights violations that occur in this social environment, then the core legal rights of the marginalized individuals who reside there effectively cease to have any practical meaning.

Chapter 5. The Consequences of Subjectivity: Problems Flowing From the Current Interpretation of s. 24(2)

This chapter will explore how the Supreme Court of Canada's current interpretation of s. 24(2) has negative consequences for the socially marginalized individuals who are routinely subjected to surveillance and investigation by police. First, the relevant case law effectively leaves the core legal rights that are most applicable to these individuals with no effective remedy, thereby rendering those rights meaningless in a practical sense. Second, the current s. 24(2) test is prone to differential application in times of moral panic, thereby limiting the due process protections afforded to targeted groups at the precise time that they need them most. Third, the s. 24(2) jurisprudence essentially leaves police free to investigate individuals involved in crime using whatever means they deem necessary, provided only that they display a minimal degree of "good faith" when engaged in their duties. As a result, the Supreme Court's exclusionary rule fails to adequately protect the core legal rights of the individuals to whom the Canadian criminal justice system is disproportionately applied. Thus, s. 24(2) undermines the integrity of the core legal rights, gearing their practical effect more toward legitimization than true rights protection.

5.1. Rights without remedies

There is general agreement that adequate remedies must complement legal rights in order for the latter to be effective.[632] In *Marbury v. Madison* – which is generally considered the benchmark ruling on the subject – Marshall C.J. of the United States Supreme Court famously pronounced that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."[633] The primary principle expressed in this passage – that satisfactory remedies must be readily available and routinely implemented in order to give legal rights practical effect – continues to resonate centuries after its initial statement. As Akhil Reed Amar posits, "[f]ew propositions of law are as basic today – and were as basic and universally embraced two hundred years ago – as the ancient legal maxim, *ubi jus, ibi remedium*: Where there is a right, there should be a remedy."[634]

This notion – which is commonly referred to as the remedial imperative – has played a somewhat minimal role in the Canadian jurisprudence pertaining to the exclusion of illegally obtained evidence. The courts have, however, periodically recognized that the practical

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[632] See John C. Jeffries Jr., "The Right-Remedy Gap in Constitutional Law" (1999) 109 Yale L.J. 87 [Jeffries].
[633] *Marbury v. Madison*, 5 U.S. 137 (1803) at 163 [*Marbury*].
[634] Akhil Reed Amar, "Of Sovereignty and Federalism" (1987) 96 Yale L.J. 1425 at 1485-86 [Amar].

effectiveness of due process rights in large part depends on a liberal use of the exclusionary mechanism. For example, Laskin C.J.'s dissenting opinion in *Hogan*[635] discussed the importance of developing an effective remedial mechanism in support of the due process protections contained in the *Bill of Rights*. Although the majority found the impugned evidence reliable, probative, and therefore admissible, Laskin C.J. would have excluded it because of the rights violation. In observing that the *Bill of Rights* did not contain a remedial mechanism, the Chief Justice stated that:

> [t]here being no doubt as to such denial and violation [of the accused's right to counsel], the Courts must apply a sanction. We would not be justified in simply ignoring the breach of a declared fundamental right or in letting it go merely with words of reprobation. Moreover, so far as denial of access to counsel is concerned, I see no practical alternative to a rule of exclusion if any serious view at all is to be taken, as I think it should be, of this breach of the Canadian Bill of Rights.[636]

Laskin C.J.'s dissent was therefore concerned with ensuring that individual rights had a practical impact on the criminal trial process. Thus, even before the advent of the *Charter*, the link between the effectiveness of individual legal rights and the remedy of exclusion was debated at the Supreme Court level. Nevertheless, the majority of the Court rejected this concept, and the Canadian courts steadfastly maintained the position of automatic inclusion.

Despite these valid observations, the current interpretation and application of s. 24(2) is consistently impugned on the basis that exclusion is an unnecessary, overly compensatory remedy that should be resorted to only in the face of the most serious rights violations. These challenges seem somewhat misplaced as the current jurisprudence renders exclusion available in only a limited range of circumstances, most often involving a violation of s. 10(b). These breaches are themselves easily avoidable by adhering to simple police procedure, which makes it quite simple for police to avoid the kind of rights violations that commonly trigger the exclusionary remedy.[637] In other cases, essentially no remedy attaches to even the most effectively substantiated *Charter* violations. Alternative remedies such as monetary damages are not often awarded – or even pursued – for *Charter* breaches. Even if they were, the lesser alternative remedies to exclusion – both those that are currently available and those that could be developed in the future – are insufficient for the purposes of enforcing the core legal rights of all

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[635] *Hogan*, *supra* note 288.
[636] *Ibid.* at 598.
[637] The rights under s. 10(b) are further limited by the Supreme Court's decision that there is no s. 7 duty for the police to stop questioning an accused after they have consulted legal counsel. See e.g. *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405. In that case, a majority of the Supreme Court ruled that statements made to the police by the accused were admissible as voluntary confessions despite the fact that he repeatedly indicated he did not want to make a statement to police.

Canadians. The lack of effective remedies is problematic even though s. 24(2) does not contemplate exclusion in all cases. Without adequate remedies for violations of all the *Charter's* core legal rights – particularly insofar as they apply to the socially marginalized targets of the system – the Canadian criminal justice system inevitably falls into disrepute.

5.1.1. *Charter* violations and monetary damages

When violations of the *Charter's* legal rights are not remedied by exclusion of evidence, they overwhelmingly go without any remedy at all. An examination of the case law pertaining to constitutional torts and the core legal rights indicates that Canadian courts are not often called upon to deal with alleged rights violations of innocent individuals.[638] This is not to suggest that no such cases have been heard. For example, in *Crampton v. Walton*,[639] the plaintiff was awarded $20,000.00 in damages for an assault that occurred during what can only be described as an unreasonable search of his home. The police obtained a warrant to search the plaintiff's home based on information that a marijuana growing operation was contained therein – information that proved to be inaccurate. In executing the warrant, a heavily armed police tactical officer wearing "30 pounds of body armor" burst through the plaintiff's "unlocked screen door", apparently interrupting his preparation of a pickle sandwich. The officer then "assisted [the plaintiff] in his descent" to the floor, pinning him down for 10 minutes while the police conducted an ultimately fruitless search.[640] As Fruman J.A. observed:

> [n]either drugs nor weapons were found. Mr. Crampton, who was lying face down on the kitchen floor with his hands handcuffed behind his back, was then asked to identify himself. He was not the individual named in the warrant as the occupant of the residence. The police had faulty intelligence and the wrong suspect. They departed, leaving Mr. Crampton with a partially-constructed pickle sandwich stuck to the front of his shirt, wet pants in which he had relieved himself, a bruised jaw, a rotator-cuff injury and five cracked ribs.[641]

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[638] See also *Ward v. Vancouver (City)*, 2007 BCSC 3, [2007] 4 W.W.R. 502 (a lawyer well-known for representing political protestors and individuals alleging police brutality was jailed for over four hours, strip searched, and his car was impounded. He was never charged with a criminal offence. He was awarded $5000.00 for being arbitrary imprisoned, $5000.00 for being unreasonably strip searched, and $100.00 for the unreasonable seizure of his vehicle); and *Chrispen v. Kalinowski*, (1997), 117 C.C.C. (3d) 176, [1997] 8 W.W.R. 190 (Sask. Q.B.) (Zarzeczny J. concluding that there is authority under s. 24(1) for judges to award damages for *Charter* violations, and awarding $300.00 in special damages, and $500.00 in compensatory damages for a s. 8 breach); *Crossman v. The Queen*, [1984] 1 F.C. 681, 9 D.L.R. (4th) 588 (T.D.) (the plaintiff was awarded $500.00 for a breach of his s. 10(b) rights). But see e.g. *R. v. Gillespie*, 182 D.L.R. (4th) 599; [2000] 3 W.W.R. 739 (Man. C.A.) (plaintiff awarded damages for s. 8 violation arising out of courthouse perimeter security program not instituted by enabling legislation); *Ilnicki v. MacLeod*, 2003 ABQB 465, [2003] 11 W.W.R. 533 (plaintiff awarded $5,000.00 for s. 8 breach arising out of unreasonable strip search performed in relation to the execution of a traffic warrant); *Blouin v. Canada* (1991), 51 F.T.R. 194 (T.D.) (plaintiff, a prison guard strip searched by his supervisors, was awarded $5000.00 in damages in relation to the illegal search and breaches of his rights under ss. 9 and 10 of the *Charter*).

[639] 2005 ABCA 81, 250 D.L.R. (4th) 292 [*Crampton*].

[640] *Ibid.* at para. 1.

[641] *Ibid.*

Despite the brutality of the search, the case was not specifically decided on the basis of a constitutional tort for a violation of s. 8. The issues before both the trial court and the court of appeal focused on the assault committed by the officer rather than specifically addressing the issue of damages for the *Charter* violation.[642]

Cases such as *Crampton* are exceptions to the general lack of litigation seeking to secure monetary remedies for individual rights violations. As these examples suggest, such litigation is infrequent, does not often result in extensive damage awards, and the individual whose rights have been violated must bear the costs associated with the application. Therefore, arguments that advance monetary damages as a satisfactory alternative to exclusion effectively place additional burdens upon the rights holder. Not only does the accused have to prove that their *Charter* rights were in fact violated, they must also establish that the violation warrants monetary compensation, and they must do so through the institution of separate proceedings before a civil court. When it is acknowledged that the criminal justice system is over-applied to the economically marginalized, the argument for increased monetary damages is further weakened as it places greater financial strain on the individuals who are the least likely to be able to successfully bear that burden. Without the development of procedures and venues designed to alleviate these problems, the arguments for increased use of monetary compensation for violations of the core legal rights will inevitably lead to even greater decreases in the practical effectiveness of those rights.

5.1.2. The lesser alternative remedies approach

Because the remedy of exclusion has been heavily criticized for its purported overcompensation of the accused, many commentators have called for the judicial creation of lesser alternatives to the invocation of s. 24(2). Deterrence proponent Steven Penney attacks the validity of using exclusion as a direct compensation for a particular rights violations, rejecting what he terms the "corrective justice rationale" due to its allegedly unprincipled and heavy-handed results.[643] Penney argues that exclusion of illegally obtained evidence makes it more likely that a factually guilty person will be acquitted, and thus cannot be justified using compensatory principles. He posits that such a result is unjust as the guilty person places a far higher value on the acquittal than they place on the actual right that was violated.[644] Based on this view, Penney concludes

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[642] *Ibid.* at para. 14.
[643] *Ibid.*
[644] *Ibid.* at 111.

that "[e]xcluding unconstitutionally obtained evidence ... gives most defendants a windfall – the remedy is grossly disproportionate to the wrong."[645]

Proponents of the lesser alternative remedies view often advocate for the reinterpretation of the broad remedial power conferred in s. 24(1) in order to establish a range of alternatives to exclusion. One such author, J.A.E. Pottow, argues that "appropriate and just" remedies under s. 24(1) should be considered at the same time as the application to exclude under s. 24(2).[646] He argues that the scope of exclusion under s. 24(2) should be narrowed,[647] that individuals who make unsuccessful applications for exclusion ought to be able to simultaneously seek monetary compensation from the government,[648] and that the compensation ought to exist in the form of a constitutional fine, the value of which would vary according to the severity of the violation.[649] Pottow submits that the interest protected by such awards is "[t]he right of any citizen, even one who has committed the most serious of criminal offences, not to be convicted except in accordance with the Charter."[650]

Despite these suggestions, there are many critics of the lesser alternatives remedies approach. The Supreme Court itself has expressed discontent with alternatives to exclusion, suggesting that the availability of such alternatives should not factor into the decision to exclude. In *Collins*, Lamer J. stated that "[a] factor which, in my view, is irrelevant is the availability of other remedies. Once it has been decided that the administration of justice would be brought into disrepute by the admission of the evidence, the disrepute will not be lessened by the existence of some ancillary remedy."[651] The Justice's observation suggests that the decision under s. 24(2) depends solely on the disrepute flowing from a *Charter* violation, an effect that cannot be undone or lessened by other lesser remedies. Once disrepute is determined to flow from admission, it becomes logically impossible to suggest that some alternative remedy can rescue the reputation of criminal justice.

Moreover, critics of the lesser alternatives approach argue that alternative remedies are incapable of effectively deterring future police misconduct. On this point, Penney himself

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[645] *Ibid.* at 112.
[646] J.A.E. Pottow, "Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24, Part I – Section 24(1) in Crisis" (2000) 43 Crim. L.Q. 459 at 488 [Pottow, "Part I"].
[647] Pottow, *supra* note 59.
[648] J.A.E. Pottow, "Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24, Part III – Proposed Model for the Unified Approach to Section 24" (2001) 44 Crim. L.Q. 223 at 237 [Pottow, "Part III"].
[649] *Ibid.* at 244.
[650] *Ibid.* at 246.
[651] *Collins*, *supra* note 52, at para. 30.

contends that lesser remedies will likely either "underdeter" or "overdeter". With respect to the former problem, Penney argues that:

> [t]o avoid underdeterrence, alternative remedies must impact police interests severely enough to influence their future conduct. Most Charter violations would warrant only modest compensatory damages. Few victims would find it worthwhile to incur the costs required to obtain these awards. As a result, police would likely consider damage awards a minor cost of doing business.[652]

Further, Penney suggests that any attempt to avoid underdeterrence – often involving plans to make individual officers personally responsible for investigatory misconduct – will likely have an overly "chilling" effect on police action, creating situations in which officers are not willing to act due to a fear of becoming personally exposed to damage claims or career limiting sanctions.[653]

Arguments for the establishment of lesser alternative remedies seem to focus almost exclusively on creating methods of avoiding the exclusionary mechanism while still satisfying the notion that rights ought to be complemented by effective remedies. However, rather than seeking to create truly effective remedies for *Charter* violations, these proposals seem content to replace exclusion with any remedy at all. The desirability of avoiding exclusion is premised on the notion that in most cases, the crime control function of the criminal justice system trumps all competing objectives, particularly ensuring due process for all persons investigated by the state. This essentially relegates the *Charter's* core legal rights – and the corresponding violations of those rights – to a peripheral role in the criminal investigation process. If the core legal rights, which are designed to protect against abusive state investigatory techniques, are enforced by merely symbolic remedies that do not routinely prevent the state from using unconstitutionally obtained evidence, it is difficult to contend that those rights have anything more than a symbolic meaning.

Put briefly, the lesser alternative remedies are not capable of satisfactorily addressing each of the complex issues that are created in the wake of an evidence-producing constitutional violation. The development of such remedies – which are only implicitly available – would inevitably lead to a decrease in the use of s. 24(2), a remedy explicitly created by the *Charter*. Moreover, these lesser remedies are incapable of effectively deterring future rights violations, robbing the *Charter's* remedial section of its corrective capability. Furthermore, the alternatives to exclusion unduly focus on the crime control function of the criminal trial, all but ignoring the actual rights violation and its impact on the effectiveness of the core legal rights, and the

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[652] Penney, "Deterrence", *supra* note 59, at 121 [footnotes omitted].
[653] *Ibid.* at 122.

individuals to whom they belong. Therefore, the adjudication of lesser alternative remedies – be they derived from s. 24(1) or elsewhere – should not be used to limit the impact of s. 24(2), and thereby curtail the practical impact of the *Charter's* core legal rights. If alternative remedies are to be developed, their implementation must complement exclusion rather than restrict it.

5.1.3. Non-absolute exclusion and s. 24(2)

An additional argument commonly launched against the broad interpretation of s. 24(2) is that exclusion of illegally obtained evidence cannot facilitate the practical impact of the core legal rights because the rule does not apply equally to all rights violations. Courts in the United States have long debated whether the remedial imperative is capable of justifying that country's judge-made automatic exclusionary rule. In one prominent installment of this on-going debate, *Bivens v. Six Unknown Fed. Narcotics Agents*,[654] Burger C.J. wrote in his dissenting opinion:

> I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric. Beyond doubt the conduct of some officials requires sanctions . . . But the hope that this objective could be accomplished by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream. Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective. This is illustrated by the paradox that an unlawful act against a totally innocent person - such as petitioner claims to be - has been left without an effective remedy, and hence the Court finds it necessary now - 55 years later - to construct a remedy of its own.[655]

Thus, in the Chief Justice's opinion, the American exclusionary rule has failed to safeguard individual rights, as evidenced primarily by the fact that innocent individuals cannot take advantage of that rule. Clearly, Burger C.J. envisioned the development of a more suitable remedial mechanism for violations of the American *Bill of Rights*.

The remedial imperative is no less controversial in discussions of how to properly interpret s. 24(2). David Paciocco impugns the concept's application in the Canadian context, challenging its validity on a number of grounds.[656] He contends that the remedial imperative cannot be the purpose of exclusion as "[t]he remedy is not accessible unless the unconstitutional act produces evidence. It is therefore available only in certain cases, and reliance upon it is said to discourage the development of alternative responses that would be more generally available. Moreover, the development of equally effective remedies would suggest that exclusion is not

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[654] 403 U.S. 388 (1971).
[655] *Ibid.* at 415-416.
[656] Paciocco, "Judicial Repeal", *supra* note 59.

required."[657] Paciocco further refutes the appropriateness of the remedial imperative as s. 24(2) explicitly envisions that even some evidence-producing violations will ultimately fail to warrant exclusion. In this regard, Paciocco states the fact that:

> [s.] 24(2) was clearly never meant to be an absolute exclusionary rule, drives one to the conclusion that the framers of s. 24(2) must have accepted the premise which has caused the abandonment of the remedial imperative rationale in the United States; in matters of exclusion the constitutional rights of a particular individual are secondary to broader concerns related to the administration of justice.[658]

In Paciocco's view, the very nature of the remedial section establishes that it was not intended to have universal application to all rights violations. Thus, a theme common to both Canadian and American criticisms of the remedial imperative is that the broad interpretation and application of an exclusionary mechanism cannot be justified on the basis that it is necessary to give meaning to individual legal rights.

The main argument in this regard is that because exclusion was never intended to serve as a remedy for all rights violations, the remedy cannot be definitively linked to the validity of the core legal rights. This position is based on the reality that not all rights violations produce evidence, and that not all rights violations that do produce evidence ought to result in exclusion. These ideas are directly addressed by s. 24(2) itself, which does not purport to apply to *Charter* violations that produce no evidence, nor all those rights violations that do produce evidence. The exclusionary mechanism is worded so that it only applies to those rights violations that produce evidence that would cause disrepute to flow to the criminal justice system if it were admitted at trial. The argument thus concludes that because exclusion was only intended to apply to this narrow range of rights violations, the remedial imperative cannot be used to justify a broad exclusionary rule. Put briefly, exclusion is simply not necessary to give the core legal rights meaning.

While the point that s. 24(2) was not intended to apply to all *Charter* violations is clearly a valid one, it ignores the fact that s. 24(2) is inextricably linked with the core legal rights, and that one of the primary purposes of those rights is to protect individuals involved in criminal activity from potential investigatory abuses. Just as s. 24(2) does not intend to apply to every rights violation, the concept of exclusion specifically envisions occasions on which evidence capable of proving an accused person's criminal culpability must be excluded from the trial. There is no reason inherent in s. 24(2) that suggests these occasions ought to be overly limited in

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[657] *Ibid.* at 334 [footnotes omitted].
[658] *Ibid.* at 339.

nature. To the contrary, the reality of s. 24(2)'s operation would suggest that there ought to be only limited occasions on which illegally obtained evidence is admitted at trial.

In truth, exclusion is the most logical way of dealing with unconstitutionally obtained evidence. When constitutional violations occur in the criminal investigatory process, they do so primarily while the police who commit the violation are in the process of attempting to secure incriminating evidence. That is, the rights violation is directly related to the state's attempt to produce the desired evidence. Because of this relationship, the most obvious remedy for the rights violation would relate directly to its primary cause, namely the evidence secured. The fact that on some occasions, police conduct that results in a rights violation does not actually produce the evidence that the conduct was employed to produce ought to be immaterial to those situations in which incriminating evidence is secured illegally. Simply stated, the fact that some *Charter* violations will not trigger the *Charter's* exclusionary mechanism is not a sufficient reason for assuming that the core legal rights can continue to have practical meaning in the criminal law context. This is particularly so when one considers that those core rights are specifically designed to prevent investigatory abuses by the state, and that the main purpose of state investigations is to uncover evidence of criminal culpability.

5.1.4. Individual remedies and s. 24(2)

In the early *Charter* jurisprudence, there was considerable discussion regarding the idea that s. 24(2) was not intended to remedy the actual violation of an individual's rights, but rather was concerned solely with the disrepute of administration of justice. Rather than serving as a direct remedy for rights violations, proponents of this view argue that s. 24(2) was to be employed only when the admission of the evidence produced by the rights violation would negatively impact upon the reputation of the administration of justice.[659] In furtherance of this position, Paciocco argues that:

> [i]t would be wrong to suggest that s. 24(2) is intended to ensure that a remedy is provided for constitutional violations. One need merely examine the criteria for exclusion to see that this is so. The focus in deciding whether to exclude is on the administration of justice, not on the vindication of the rights of the accused. Moreover, that focus is on the disrepute caused by the admission of the evidence in the proceedings, not the disrepute to the administration of justice caused by the original constitutional violation.[660]

The argument, then, is that the actual victim of the rights violation is unimportant when it comes to determining whether to exclude certain evidence under s. 24(2).

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[659] *Collins*, *supra* note 52, at para. 31.
[660] Paciocco, "Judicial Repeal", *supra* note 59, at 338-339 [footnotes omitted].

Despite its purported basis on logical principles derived from s. 24(2) itself, this argument is founded entirely on artificial distinctions between rights, rights holders, and rights violations. Paciocco posits that the wording of s. 24(2) indicates that the section is solely concerned with the end product of a rights violation, not the actual violation itself. He therefore concludes that s. 24(2) was explicitly not intended to serve as a remedy for individuals, stating that "[r]emedies are concerned with vindicating particular violations of rights; s. 24(2) is not."[661] However, in order to accept this position, it is necessary to regard illegally obtained evidence purely in an abstract sense, completely devoid of the context in which evidence, once obtained, comes to be deemed illegal.

To suggest that s. 24(2) is wholly unconcerned with providing individual remedies is to suggest that the rights of individuals involved in crime are only worthy of protection insofar as doing so creates some derivative benefit to the administration of justice or the law-abiding citizen. Steven Penney articulates just such a position, arguing that criminals are not as worthy of the "state's concern and respect" as non-criminals.[662] Penney therefore concludes that:

> [t]he Charter protects guilty suspects chiefly because police cannot be certain, *ex ante*, who is guilty and who is not. If *ex ante* certainty were possible, then we would surely grant criminals less constitutional protection than law-abiding persons. When guilt has been established the state may legitimately restrict the liberty and privacy of persons convicted of criminal offences in ways that would clearly violate the Charter if applied to non-offenders. Criminal defendants have no right not to be convicted on the basis of illegally obtained evidence. Excluding evidence to restore the status quo ante between criminals and the law abiding public, therefore, is morally unjustified.[663]

As this supposition clearly indicates, Penney posits that the *Charter's* individual rights derive their validity from the need to protect the innocent individual from the unwarranted encroachments of the state. Any claim that the criminally involved also possess those rights is of a purely incidental nature.

La Forest J. adopted a similar approach in his opinion in *Edwards*.[664] In that case, the majority determined that the accused could not rely on alleged breach of his girlfriend's s. 8 rights to impugn the admissibility of illegal narcotics found in her apartment that belonged to him.[665] In his concurring judgment,[666] La Forest J. observed:

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[661] *Ibid.* at 339.
[662] Penney, "Deterrence", *supra* note 59, at 112.
[663] *Ibid.* at 112-113.
[664] *Edwards*, *supra* note 611.
[665] *Ibid.* at paras. 50-51.
[666] La Forest J.'s judgment is technically a concurring opinion as he agreed with the majority that the appeal should be dismissed. However, he would have dismissed the appeal as the contested issue was not properly before the Supreme Court. La Forest J. explicitly disagreed with the majority's ruling as it pertains to s. 8, and the Justice would have addressed how the rights of the girlfriend – an innocent party – were affected by the impugned search.

> [w]e exercise discretion to exclude evidence obtained by unconstitutional searches from being used against an accused, even when it would clearly establish guilt, not to protect criminals but because the only really effective safeguard for the protection of the constitutional right we all share is not to allow use of evidence obtained in violation of this public right when doing so would bring the administration of justice into disrepute. There are other remedies such as trespass, it is true, but these are not constitutional remedies and they are not equal to the task.[667]

La Forest J. therefore also views the core legal rights of the factually guilty as the proxy for the protection of the rights of the innocent. Though undeserving, the guilty person serves as a useful and convenient vessel through which the rights of the truly worthy are safeguarded.

Regardless of these arguments, exclusion exists as an individual remedy for violations of the core legal rights. In reality, there can be no illegally obtained evidence in the sense envisioned by s. 24(2) without the accused first having established that one of his or her rights was violated, and that the violation was sufficiently connected to the taking of the evidence to trigger s. 24(2). Given this, it is counter-intuitive to suggest that although the admission of illegally obtained evidence could result in the accrual of disrepute to the administration of justice, the mechanism designed to prevent such accrual was explicitly intended to do so without ever addressing the impact that an evidence-producing violation has on the injured individual. In fact, proponents of this position ignore the fact that there is an injured individual at all. This cannot be the true purpose of s. 24(2). Disrepute can only flow to the administration of justice from the admission of illegally obtained evidence if the act that makes the obtainment of the evidence illegal is itself worthy of rebuke. Thus, s. 24(2) cannot be entirely unconcerned with the impact of the rights violation on the individual as this is the very source from which disrepute inevitably flows.

5.1.5. Deterrence, judicial integrity and the exclusion of evidence

Proponents of a narrower exclusionary rule under s. 24(2) often advance either the deterrence rationale or the judicial integrity rationale as the only legitimate justifications for not admitting reliable and relevant evidence at a criminal trial. These rationales argue that the exclusion is only justified when doing so satisfactorily achieves a particular goal entirely unrelated to remedying the particular wrong that has occurred. First, the deterrence rationale justifies the exclusion of evidence only as a means of preventing future rights violations by police. Paciocco describes this position as follows:

> [o]pponents of the exclusionary rule have countered that what needs to be remedied is not the specific wrong done to the victim, but rather the affront to society which a constitutional violation represents. This can be achieved by taking measures to ensure that it does not happen again. The

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[667] *Ibid.* at para. 64.

> exclusionary rule is therefore a remedy only in the broad sense ... Thus, exclusion is required only so long as it serves the regulatory function of deterrence and, even then, only so long as alternative methods of deterring improper police conduct are not found.[668]

According to this position, then, the exclusion of illegally obtained evidence is justified not as a remedy for the specific individual whose rights have been violated, but rather only as providing protection for society in general from the future illegal behavior of the state.

Penney, a proponent of the deterrence rationale, claims that s. 24(2) should only be applied when it is likely to deter future investigatory misconduct. Based on evidence suggesting that the American exclusionary rule deters police from committing future constitutional violations,[669] Penney argues that:

> [t]he only worthwhile reason to exclude evidence under section 24(2) is to deter constitutional violations. Taking deterrence seriously allows us to penetrate the ambiguity and confusion surrounding section 24(2) and pursue an optimal accommodation between the competing interests implicated by the provision: encouraging constitutional compliance and convicting the factually guilty. To achieve this accommodation, courts should exclude unconstitutionally obtained evidence unless doing so would be unlikely to deter; that is, when all state actors responsible for the violation honestly and reasonably believed that they were complying with the Charter.[670]

Based on the demonstrated effectiveness of the deterrence rationale, Penney observes that "[i]f we want police to respect the Charter, we must be prepared to live with the regular exclusion of unconstitutionally obtained evidence and the occasional acquittal of the factually guilty."[671]

Despite the validity of Penney's conclusion, it is impossible to accept the deterrence rationale as a complete justification for the exclusion of illegally obtained but otherwise reliable evidence. Although the exclusionary rule's ability to deter future police misconduct is undoubtedly important, the appeal of deterrence is itself premised on the acknowledgement that a rights violation is an evil unto itself that is deserving of rebuke. If it were not, there would be no need to deter future instances of similar conduct. Thus, a theory that seeks to justify the exclusion of evidence solely by reference to the benefits it may produce in the future ignores what makes those benefits, benefits. There is little merit in a theory that strives for constitutional compliance if it does not also recognize the injuries that occur when compliance does not occur. Such a theory would suggest that working towards the ideal of constitutional compliance is more important than addressing the transgressions that inevitably occur along the way. Any adequate theory of exclusion must take into account the individual whose rights are actually violated, not just those individuals whose rights may be violated at some point in the future. It is difficult to

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[668] *Ibid.* at 335 [footnotes omitted].
[669] Penney, "Deterrence", *supra* note 59, at 117-118.
[670] *Ibid.* at 108.
[671] *Ibid.* at 124.

comprehend why a society would be willing to permit drastic remedies to prevent future rights violations if it does not place any value on rectifying such a violation once it has already occurred.

The judicial integrity rationale suffers from a similar shortcoming. Although using exclusion to maintain the integrity of the justice system is an important objective, it is an incomplete justification for the rule itself. Paciocco describes the imperative of judicial integrity as actually comprised of two distinct rationales: (i) the need for courts to distance themselves from rights violations; and (ii) the need to maintain popular trust in the justice system.[672] Paciocco suggests that the former need is based on the principle that courts ought not to condone the illegal behaviour of police by allowing the fruits of that behaviour to serve the goals of the state; to do so would be tantamount to the courts' direct participation in the constitutional wrong.[673] He further explains that the latter need "[r]ests on the conviction that by admitting unconstitutionally obtained evidence the courts are seen to violate the law and thereby suffer a loss of the respect that they can command from the public. Evidence is excluded because of the anticipated negative public reaction if such evidence is received."[674]

Paciocco personally rejects the need for courts to distance themselves from *Charter* violations, claiming that it is not a plausible rationale for the exclusion of evidence under s. 24(2). He argues that the exclusionary mechanism was not designed to "inculcate public values", but rather was intended to "respond to the values the public already has."[675] Thus, in Paciocco's view, the rationale underlying s. 24(2) is "decidedly" the need to maintain popular trust in the justice system.[676] On this point, he argues that:

> [d]isrepute has to do with reputation and reputation has to do with what others think of you, not with what standards you would like to emulate. If one was to boil all of this down into simple terms and to appreciate it in its historical context, one would be driven to conclude that the framers of the Charter were attempting to fashion a cautious exclusionary rule where evidence would be refused only in relatively extreme cases; after all, there were no signs at the time that s. 24(2) was drafted that the administration of justice was suffering disrepute as a result of the long-standing position that the method of obtainment was irrelevant to the admissibility of probative evidence.[677]

Paciocco concludes that the Supreme Court's interpretation of s. 24(2) has failed to adhere to this goal, primarily by determining that "disrepute" is to be determined by the reasonable Canadian rather than by actual Canadians. This has resulted in exclusion of evidence far more readily than

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[672] Paciocco, "Judicial Repeal", *supra* note 59, at 333-334.
[673] *Ibid.* at 333.
[674] *Ibid.* at 334.
[675] *Ibid.* at 341.
[676] *Ibid.*
[677] *Ibid.* at 341-342.

was intended by the farmers, or is accepted by the public.[678] Penney rejects the judicial integrity rationale for similar reasons, arguing that "[i]n the eyes of most citizens, excluding illegally obtained evidence harms the reputation of the justice system much more often than admitting it does. There is no indication, moreover, that in the years before the Charter the absence of an exclusionary remedy fomented widespread disrespect for the system."[679] While the accuracy of these observations may diminish the judicial integrity rationale's ability to justify exclusion standing on its own, it does not vitiate the inherent value of the goals on which the position is based.

Like the deterrence rationale, the judicial integrity position in both of its forms articulates important reasons for the exclusion of illegally obtained evidence, but does not justify the rule completely. Clearly, exclusion of evidence works to avoid judicial condonation of illegal police actions. It is this very idea that vests the core legal rights with practical meaning. If judges condone such behaviour by admitting its fruits at trial, then the societal norms created by the *Charter's* rights become reduced to hollow rhetoric. However, judicial condonation of a rights violation is only problematic if the rights violation is itself viewed as a fundamental wrong. It makes little sense for the justice system to avoid condoning illegal police behaviour without also taking steps to compensate the individual victimized by that behaviour in the first place. Thus, rationales that gloss over individual rights violations by focusing on one or another of the eventualities that may flow from those violations are necessarily deficient as overall justifications for an exclusionary rule. The fact is that if the rule is to be justified, it must take these rationales into account while focusing on the need to address the actual violation that has occurred.

5.1.6. Exclusion as the only effective remedy

The Supreme Court's development of the *Charter's* exclusionary mechanism fails to adequately safeguard the core legal rights of all Canadians by leaving numerous forms of individual rights violations without effective remedies. If the core legal rights are to effectively provide meaningful due process protections, the remedies available for violations of those rights must specifically address the issues to which they apply. The exclusion of illegally obtained evidence is the only remedy capable of satisfying these issues: it acknowledges that the core legal rights of all persons are worthy of protection; it acknowledges that investigatory abuses committed by the

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[678] *Ibid.* at 342.
[679] Penney, "Deterrence", *supra* note 59, at 111.

state are a wrong unto themselves; it provides direct compensation to the injured individual; it deters future investigatory misconduct by police; and, it enhances the public's awareness of the importance of individual rights. Furthermore, it ensures that the individuals who are most likely to be investigated by police – namely, the socially powerless – have a method of seeking meaningful redress for violations of their core legal rights. Therefore, a strong exclusionary mechanism is necessary if the core legal rights are to have any practical meaning to the individuals who are most in need of such protections in the first place.

5.2. Artificial distinctions and the misuse of s. 24(2)

The Supreme Court's current s. 24(2) jurisprudence is additionally problematic in that it is susceptible to differential applications depending on the particular circumstances, individuals and evidence that are involved in specific police investigations. This misuse is possible primarily because of the Supreme Court's present approach to evidentiary classification under the *Therens/Collins/Stillman* regime. The Court's distinction between conscriptive and non-conscriptive evidence works in confluence with the other aspects of the Supreme Court's s. 24(2) jurisprudence to create a test prone to misuse in circumstances involving individuals and activities with which judges and other powerful members of society do not subjectively relate. This is particularly so when the illegally obtained evidence relates directly to the commission of an offence that is the subject of increased political and media attention, such as is the case with drug and firearm offences currently. In the post-*Stillman* era, the second and third branches of the Court's exclusion analysis – those concerning the severity of the *Charter* violation and the effects of exclusion – generally apply only to evidence classified as non-conscriptive, or as conscriptive but discoverable. These two categories of evidence essentially include all drug and firearm evidence. The reasoning that occurs under the second and third branches routinely minimizes the seriousness of rights violations that occur to individuals charged with these categories of crime. This has resulted in large part to a return to the pre-*Charter* position of admitting all relevant and reliable evidence, particularly as that evidence relates to certain categories of offences.

More specifically, under the second branch of *Collins*, judges routinely classify as less serious those *Charter* violations that occur in relation to the types of criminal offences that are more commonly detected in the lower income neighbourhoods that are subjected to over-policing. When judges fail to identify with individuals whose rights have been transgressed, it becomes possible – and indeed more likely – that they will characterize rights violations

occurring in these contexts as less serious, particularly when the individual whose rights have been violated are guilty of crimes deemed to be particularly problematic to society at large. As such, evidence that is unconstitutionally obtained in these situations is routinely deemed admissible in an effort to control these categories of offences. As Professor Stuart posits, "[p]articular abhorrence of drug offences may well have coloured consideration of the second *Collins* factor, such that seriousness of the violation is unduly deemphasized. The Courts as guardians of the Charter should be above the war against drugs. This one category of offences does not require special and reduced Charter standards."[680]

Similarly, the third branch of *Therens/Collins/Stillman* involves assessing whether the exclusion of illegally obtained evidence would result in greater disrepute than would its admission. The third branch evolved out of McIntyre J.'s dissenting judgment in *Therens*, which held that there could be no automatic exclusion of illegally obtained evidence as the specific language of s. 24(2) "[m]ust have its effect ...".[681] In seeming to contradict this idea, however, McIntyre J. went on to state that "[t]he exclusion of the evidence in the circumstances of this case would itself go far to bring the administration of justice into disrepute."[682] While this pronouncement might be logical, the finding that s. 24(2) requires consideration of the potential disrepute flowing from exclusion is purely a matter of judicial choice. The language of s. 24(2) does not suggest that it is in any way concerned with the effects of *excluding* tainted evidence. To the contrary, the section is solely involved with gauging the effects of admitting illegally obtained evidence, a fact that renders any consideration of the effects of exclusion implicit at best.

The analysis under this third branch currently hinges on a consideration of the seriousness of the criminal offence in question, and the centrality of the unconstitutional evidence to the Crown's case.[683] These examinations often lead to the dismissal of applications for exclusion under s. 24(2), and thus a relative decrease in the practical effectiveness of the *Charter's* core legal rights in so far as they apply to illegal investigations that uncover real evidence. As Professor Don Stuart has noted:

> [t]he Supreme Court of Canada and the Ontario Court of Appeal] seem generally determined not to exclude real evidence found in violation of s. 8. Those courts tend to ratchet up the rhetoric respecting the third Collins factor about the seriousness of the offence and the effect on the repute of the system if exclusion of reliable evidence were to result in acquittals ... Canadian criminal

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[680] *Ibid.*
[681] *Therens*, *supra* note 97, at para. 14.
[682] *Ibid.* at para. 14.
[683] See Mahoney, *supra* note 60, at 461; *Caslake*, *supra* note 449.

> trials under the Charter are no longer exclusively concerned with determining guilt or innocence. It betrays respect for the Charter to argue a return to the pre-Charter days where police conduct was not a material consideration.[684]

Analysis under this branch is also problematic because the category of crimes that are particularly subjected to increased levels of political rhetoric – namely drug and firearms offences – are predominantly detected by police while they are patrolling racially marginalized individuals and lower income neighborhoods. Simply stated, the kinds of drug and firearms offences that are commonly policed are the ones committed by those individuals who are most in need of protection from abusive or illegal investigations by the state.

The addition of the third branch has had a minimizing effect on the exclusionary remedy, particularly after *Collins* and *Stillman*. Similar to the analysis under the second branch of *Therens/Collins/Stillman*, when courts analyze the effects of exclusion, they are more likely to perceive activities that are detected in society's lower socioeconomic strata as inherently more serious than other types of recorded crime – many of which transcend economic barriers to far more significant degree – and are thus likely to find that a greater degree of disrepute will flow from disallowing the disputed evidence. Given that all *Charter* rights are – at least theoretically – equally applicable to all individuals, it is difficult to justify a test for exclusion that is highly susceptible to political rhetoric. Any conception of s. 24(2) that leads to the essentially automatic inclusion of broad categories of evidence in the absence of blatant, severe *Charter* violations is undesirable, particularly when the automatically included evidence pertains to crimes that are over-investigated in poor, racialized neighbourhoods,, thereby increasing the over-representation of those individuals in Canada's criminal justice system.

There is little doubt that the category of offences to which the "special and reduced" *Charter* standards apply has been broadened in recent years. While these lower standards were formerly reserved for drug offences, the category now includes firearms offences, particularly those that are typically associated with urban street crime. This categorical expansion can be explained by the moral panics regarding these crimes that currently exist in urban Canadian centres such as Toronto, Montreal, and Vancouver. Sociologists Erich Goode and Nachman Ben-Yehuda define the concept of moral panic as "[e]xplosions of fear and concern at a particular time and place about a specific perceived threat."[685] Goode and Ben-Yehuda suggest that such conditions "[a]rise as a consequence of specific social forces and dynamics. They arise because,

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[684] Stuart, *Charter Justice*, *supra* note 52, at 515.
[685] Erich Goode & Nachman Ben-Yehuda, "Moral Panics: Culture, Politics, and Social Construction" (1994) 20 Annual Review of Sociology 149 at 150.

as with all sociological phenomena, threats are culturally and politically constructed, a product of the human imagination."[686] In response to the current panic relating to guns and gun crime, a body of s. 24(2) case law has begun to develop in guns are automatically admitted at trial, regardless of how that evidence is obtained.

Several recent decisions from the Ontario Court of Appeal are particularly representative of this trend.[687] As discussed earlier, the Ontario Court of Appeal's decision in *L.B.*[688] arose out of a fact scenario in which a young black male's arrest for illegal possession of a firearm originated out of what appeared to be a clear case of racial profiling. It also involved other police misconduct that appeared to be overt. At the initial trial, the judge found violations of the accused's rights under ss. 9 and 10(b), excluded the .22 caliber handgun under s. 24(2), and acquitted L.B. of the charges.[689] However, the Ontario Court of Appeal disagreed with the trial judge's decision, ultimately finding that no *Charter* violations had occurred. The Court of Appeal ruled that the police had never detained L.B., and that it was therefore not necessary for them to provide the youth with a reasonable opportunity to retain and instruct counsel.[690] therefore no violations of either ss. 9 or 10(b), and that even if they had, the firearm evidence would have been admissible under s. 24(2).

The reasoning employed by the Court of Appeal in reaching its determination in *L.B.* is indicative of a desire to suppress gun crimes, regardless of the police conduct employed to uncover evidence of those crimes. Speaking for a unanimous panel, Moldaver J.A. rejected the trial judge's determination that L.B. had been psychologically detained when the police approached and questioned him outside his high school. On this point, the justice decided that:

> [t]he respondent's conduct in approaching the officers hardly fits the image of a frightened youth who felt psychologically compelled to submit to the police in deprivation of his liberty. On the contrary, it speaks to a street-wise teenager who quickly sized up the situation and determined that his best defence in the circumstances was a strong offence. Put simply, this was not a case of psychological compulsion exerted by the police; it was a case of psychological control attempted by the respondent.[691]

It is difficult to separate the characterization of the accused in this case as "street-wise" from the fact that he was eventually found to be in possession of a firearm. There is certainly nothing inherently street-wise or offence-oriented about a citizen approaching two police officers who have just arrived on the scene in an undoubtedly aggressive fashion. Regardless, Moldaver J.A.

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[686] *Ibid.* at 150-151.
[687] See e.g. *R. v. Grant*, *supra* note 228.
[688] *L.B.*, *supra* note 20.
[689] *Ibid.* at para. 1-2.
[690] *Ibid.* at para. 72.
[691] *Ibid.* at para. 62.

found that the police investigation did not violate any of the accused's *Charter* rights, and that the handgun was therefore admissible as evidence.[692]

Although the Court of Appeal's ruling on the ss. 9 and 10(b) arguments rendered it technically unnecessary to do so, the panel nevertheless issued an opinion on the application of s. 24(2). This *obiter dictum* is a clear indication of the panel's intention to ensure that the challenged evidence in *L.B.*, as well as similar evidence in other cases, is admitted under the *Charter*. First, Moldaver J.A. held that even if the officers had violated L.B.'s *Charter* rights, those violations would not have been of sufficient severity to render the evidence inadmissible. In this regard, the Justice ruled:

> [b]ased on the record, I am satisfied that Officers Reimer and Purches acted in good faith throughout. If they crossed the "murky" line between legitimate questioning and arbitrary detention, in my view, they did so inadvertently. On this record, any Charter breaches that followed were likewise inadvertent and not a product of wilful or flagrant disregard of [L.B.'s] rights.[693]

Second, Moldaver J.A. decided that excluding the evidence from the trial would have a far more pernicious impact on the repute of the administration of justice than would its admission.[694] On this point, the Court of Appeal held:

> [t]his case involves a loaded handgun in the possession of a student on school property. Conduct of that nature is unacceptable without exception. It is something that Canadians will not tolerate. It conjures up images of horror and anguish the likes of which few could have imagined twenty-five years ago when the Charter first came to being. Sadly, in recent times, such images have become all too common – children left dead and dying; families overcome by grief and sorrow; communities left reeling in shock and disbelief ... That is the backdrop of this case and in my view, it provides the context within which the conduct of the police should be measured, for purposes of s. 24(2), in deciding whether we should be excluding completely reliable evidence (here, the gun) and freeing potentially dangerous people without a trial on the merits.[695]

Moldaver J.A. therefore concluded that "[a]bsent egregious conduct on the part of the police ...",[696] the public would not countenance exclusion of such evidence in such circumstances. The Court of Appeal's eventual determination of the issue was in large part driven by what the panel regarded as the most appropriate response to an emerging situation, one that legislators could not possibly have foreseen at the time the *Charter* was drafted.

The current tendency of the Ontario courts to render decisions concerning the admissibility of evidence under s. 24(2) by employing considerable rhetoric regarding the tragedy of gun violence is extremely troubling. Equally as disconcerting is the increasing number

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[692] *Ibid.* at para. 72.
[693] *Ibid.* at para. 76.
[694] *Ibid.* at para. 79.
[695] *Ibid.* at paras. 80-81.
[696] *Ibid.* at para. 82.

of lower court decisions from Ontario ruling that *Charter* violations of sufficient severity to warrant the exclusion of other types of evidence may not be significant enough to justify the exclusion of handguns.[697] Nor does the Supreme Court of Canada appear to be immune from the current moral panic regarding firearms and urban street crime. In *R. v. Clayton*, which also involved black males, handguns, and the city of Toronto, the Court endorsed – albeit in *obiter* – an Ontario trial court's decision to admit firearm evidence in the face of *Charter* violations which the trial court had found to be neither "technical" nor "trivial".[698] This trend provides compelling evidence that the Supreme Court's current s. 24(2) jurisprudence is vulnerable to misuse in the face of significant moral controversy. This has a disproportionately negative impact on those who are already disproportionately affected by the criminal activities giving rise to the moral panic in the first place. In the result, the racially and socially marginalized are both most likely to be the target of a moral panic, and mot likely to be negatively affected by the misuse of s. 24(2).

5.3. Failing to guard the guardians[699]

The Supreme Court's current articulation of s. 24(2) has created a presumption of good faith with respect to all police investigatory conduct that triggers the *Charter's* core legal rights. While determinations of good faith on the part of investigating officers have long played a role in the judicial assessment under s. 24(2), the concept currently determines the admissibility of unconstitutionally obtained evidence that has not been conclusively dealt with under the trial fairness analysis. According to the Supreme Court's presumption of good faith, unless there is specific evidence of flagrant and intentional bad-faith, the subject police officers will be considered to have investigated in good faith regardless of the fact that they breached the accused's core legal rights in the process. This determination in turn strongly militates against the exclusion of unconstitutionally obtained evidence, thereby allowing police officers to employ a range of improper investigatory techniques. Indeed, provided that their behaviour meets the minimal standard of good faith conduct, they are free to investigate in whatever manner they deem fit without fear of losing evidence to exclusion under s. 24(2). This presumption leads to the routine judicial condonation of police investigatory misconduct, the over-inclusion of

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[697] See e.g. *R. v. Emsley*, [2006] O.J. No. 5476 at paras. 60-61 (Sup. Ct. J.) (QL); *R. v. Iraheta*, *supra* note 316, at para. 64 (Sup. Ct. J.) (QL); and *R. v. Morse*, [2006] O.J. No. 4396 at para. 50 (Sup. Ct. J.) (QL).
[698] *Clayton*, *supra* note 373, at paras. 129-130.
[699] A version of this subsection has been accepted for publication. Hauschildt, Jordan, "Blinded by Faith: The Supreme Court of Canada, s. 24(2) and the Presumption of Good Faith Police Conduct" (2009) Crim. L.Q.

evidence obtained through serious rights violations, and ultimately to the diminishment of the *Charter's* individual rights protections as they apply to all Canadians, particularly the marginalized individuals who are the primary targets of police investigations throughout the country.

5.3.1. The Canadian position on good faith police conduct

The incorporation of good faith police conduct into the analysis under the *Charter's* exclusionary mechanism is founded on the commonly accepted belief that most police officers do not routinely engage in occupational misconduct and that they can therefore be trusted to undertake their investigations with a considerable degree of integrity and professionalism. There is a long judicial history of accepting that Canadian police are by default worthy of trust. In *R. v. Strachan*,[700] Esson J.A. of the British Columbia Court of Appeal observed that he knew "[o]f no reason for doubting that Canadian police continue to have a reputation for being usually fair-minded; and Canadian police forces a reputation for being usually well-conducted; and that those reputations are deserved."[701] Although Esson J.A. acknowledged that "[t]here are, of course, exceptions, some of which have been brought to light by the work of commissions and boards of inquiry which have investigated particular cases or particular aspects of police work", he concluded that "[t]hose remain exceptions in our history."[702]

The Canadian public also exhibits an enormous degree of respect for police officers. A 2007 survey indicated that 84% of Canadians trust the police, a number representing a 3% increase from the results of the previous year's poll.[703] Police officers occupy the 6th highest position amongst the 23 professions included in the poll, indicating that Canadians trust the police more than professionals such as engineers, judges, church representatives, economists, lawyers and journalists.[704] What the relevant judicial opinions and surveys fail to reveal, however, is the reasoning behind the high levels of public faith in the police, particularly when there appear to be many legitimate reasons for viewing the exercise of the extensive powers granted to police with a great deal of trepidation.

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[700] (1986), 25 D.L.R. (4th) 567, 24 C.C.C. (3d) 205 (B.C.C.A.), aff'd [1988] 2 S.C.R. 980, 56 D.L.R. (4th) 673 [*Strachan* (1986) cited to C.C.C.].
[701] *Ibid.* at 234.
[702] *Ibid.*
[703] Leger Marketing, OmniCan Report, "Profession Barometer", online: Leger Marketing <www.legermarketing.com/documents/SPCLM/070522ENG.pdf>.
[704] *Ibid.*

Charter cases on s. 24(2) were quick to incorporate the concept into the exclusion analysis. In *Therens*,[705] the subjective attitude of the investigating officer played a central role in the ultimate determination of the case. In ruling on the issue of exclusion, Estey J. was primarily concerned with the severity of the actual rights violation, a qualitative factor that the Justice assessed almost entirely by reference to the actions of the police officer guilty of the breach. [706] The majority decided that the rights violation was of a greater severity because the officer acted in the absence of any statutory authority. On this point, Estey J. stated that "[i]f s. 10(b) of the Charter can be offended without any *statutory authority* for the police conduct here in question and without the loss of admissibility of evidence obtained by such a breach then s. 10(b) would be stripped of any meaning and would have no place in the catalogue of 'legal rights' found in the Charter."[707] It follows logically from this observation that there would be instances of flagrant rights violations committed by police in the course of criminal investigations which would not result in exclusion simply because the violation was committed with prior statutory authorization.

This dissenting judgment in *Therens* also suggests that the overall seriousness of the rights violation is more appropriately judged by considering whether the officer displayed adequate respect for judicial pronouncements on the law rather than by considering whether they actually intended or attempted to respect the rights of the accused. On this point, Le Dain J. held:

> [t]he police officer in this case was in my opinion entitled to assume in good faith that the respondent did not have a right to counsel on a demand under s. 235(1) of the Criminal Code. Because of this good faith reliance, I am unable to conclude, having regard to all the circumstances, as required by s. 24(2) of the Charter, that the admission of the evidence of the breathalyzer test in this particular case would bring the administration of justice into disrepute.[708]

In Le Dain J.'s opinion, then, the seriousness of the *Charter* violation had been significantly reduced by the possibility that the officer involved had indeed acted in good faith. It was enough for the officer to assume what he was doing was acceptable, rather than taking any steps to ensure that this was indeed the case.

Although the police officer in *Therens* may indeed have been relying upon the Supreme Court's pre-*Charter* rulings on the issue of detention, he was also clearly aware of the newly created s. 10(b), and nevertheless took steps to secure evidence from the accused without ever advising him of his right to counsel. Rather than demonstrating good faith, such conduct can at

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[705] *Therens*, *supra* note 97.
[706] *Ibid.* at para. 11.
[707] *Ibid.* at para. 11 [emphasis added].
[708] *Ibid.* at para. 73.

best be described as willful blindness on the part of a police officer who was overtly more concerned with securing incriminating evidence than with abiding by the rights of the criminally accused. As such, both the majority and dissenting rulings in *Therens* were early indications that the Supreme Court was prepared to assess police conduct broadly, particularly by focusing on the subject officer's adherence to applicable legislation and prior judicial decisions rather than his or her exhibited faithfulness to the *Charter's* core legal rights.

Two years later, the Supreme Court's landmark ruling in *R. v. Collins*[709] solidified the fact that good faith police conduct is directly relevant to the admissibility of illegally obtained evidence under s. 24(2). In discussing the second of the three categories of factors to be considered on an application for exclusion – those dealing with the seriousness of the alleged *Charter* breach – Lamer J. specifically adopted the portion of Le Dain J.'s dissenting judgment in *Therens* regarding the effect of police conduct on the admissibility inquiry.[710] The Justice then excluded the challenged evidence, concluding that:

> [t]he administration of justice would be brought into greater disrepute, at least in my respectful view, if this Court did not exclude the evidence and dissociate itself from the conduct of the police in this case which, always on the assumption that the officer merely had suspicions, was a flagrant and serious violation of the rights of an individual. Indeed, we cannot accept that police officers take flying tackles at people and seize them by the throat when they do not have reasonable and probable grounds to believe that those people are either dangerous or handlers of drugs.[711]

As such, the evidence secured by the police officer's flying throat tackle was excluded primarily because it was obtained through police misconduct that could properly be characterized as flagrant and serious, precisely the type of violent police misconduct that the majority of the Supreme Court did not want to condone.

The rulings in *Therens* and *Collins* would eventually lead to a line of Supreme Court decisions equating the absence of flagrant bad faith on the part of police with the officers' exhibition of good faith for the purposes of s. 24(2). According to Stephen Coughlan, the *Collins* test takes an all-or-nothing approach to the issue of police misconduct in the context of exclusion, one in which:

> "[g]ood faith" is opposed to "bad faith": if the police violate Charter rights deliberately, willfully, or flagrantly, they act in bad faith; otherwise, they act in good faith. Under this interpretation, "good faith" and "bad faith" fill the field: every police action will be characterized as one or the other. Further, the vast majority of police actions will properly be described as good faith, because that term really only means that the police carried out their duties in the ordinary way ...[712]

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[709] *Collins*, *supra* note 52.
[710] *Ibid.* at para. 38.
[711] *Ibid.*
[712] Coughlan, *supra* note 30, at 304-305.

The result of this aspect of *Collins*, then, was to officially define "good faith" police conduct as all police conduct that did not exhibit overt instances of "bad faith". This definition creates a nearly insurmountable hurdle for an accused attempting to exclude evidence because of the seriousness of the alleged *Charter* violation. Absent overtly abusive physical contact – such as the flying tackle manoeuvre performed in *Collins* itself – police actions will generally be deemed that have been performed in good faith.

However, the Supreme Court has not always remained totally consistent with the all-or-noting position taken in *Collins*. In this regard, Coughlan points to the Supreme Court's ruling in *R v. Hamill*,[713] where illegally obtained evidence was admitted according to a much narrower conception of good faith police conduct. In *Hamill*, the police executed a search under the authority of a writ of assistance,[714] an investigatory device authorized by legislation that, at the time of the search, had yet to be declared unconstitutional.[715] In finding the police had acted in good faith, Lamer J. held that "[t]he search was alleged to be unreasonable only because the police officers relied on a writ of assistance when a search warrant was required. The officers proceeded under a writ of assistance rather than a search warrant because they believed in good faith that they could rely on a writ of assistance, as such writs had not yet been challenged under the Charter."[716] The fact that the officers had acted under the authority of legislation that was valid at the time of the search led the Court to conclude that "[t]he violation of the Charter was not sufficiently serious to justify excluding the evidence."[717]

As Coughlan notes, the decision in *Hamill* represents the first occasion on which the Supreme Court admitted evidence under s. 24(2) using the "technical sense" of good faith police conduct as opposed to the "ordinary" sense of the term used in *Collins*. As described by Coughlan, "[i]n this technical sense, evidence is gathered in good faith if the investigative technique which is declared unconstitutional had until that time been legal, due to a statutory provision or to a previous court decision: that is, the police not only believed the technique was proper, they had been told by some authority that the technique was proper."[718] This definition seems more logically sound than the one extracted from *Collins*, primarily because the technical

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[713] [1987] 1 S.C.R. 301, 38 D.L.R. (4th) 611 [*Hamill* cited to S.C.R.]. See also *R. v. Sieben*, [1987] 1 S.C.R. 295, 38 D.L.R. (4th) 427.
[714] *Hamill*, *ibid.* at para. 2.
[715] *Ibid.* at para. 8.
[716] *Ibid.* at para. 11.
[717] *Ibid.*
[718] Coughlan, *supra* note 60, at 306.

definition at least incorporates positive content into the concept of good faith, rather than merely defining the notion as the absence of something else, namely bad faith.

In keeping with the differences between the conceptions of good faith set out in *Collins* and *Hamill*, Coughlan argues that the Supreme Court's subsequent treatment of the issue has also been inconsistent. He points specifically to the Court's decisions in *R. v. Kokesch*[719] and *R. v. Wise*[720] as examples, suggesting that the technical sense carried the day in the former case, while the ordinary sense was adopted by the majority in the latter ruling.[721] For the majority in *Kokesch*, Sopinka J. employed the technical sense of good faith police conduct in order to distinguish between investigatory conduct performed under the authority of legislation subsequently declared invalid, and police action designed to test the limits of constraints already in place upon their powers of investigation:

> [t]he police are entitled, indeed they have a duty, to assume that the search powers granted to them by Parliament are constitutionally valid, and to act accordingly. The police cannot be expected to predict the outcome of Charter challenges to their statutory search powers, and the success of a challenge to such a power does not vitiate the good faith of police officers who conducted a search pursuant to the power. Where, however, police powers are already constrained by statute or judicial decisions, it is not open to a police officer to test the limits by ignoring the constraint and claiming later to have been "in the execution of my duties".[722]

Sopinka J. therefore clearly viewed a police officer's testing of the limits placed on his or her investigatory power as falling beyond the scope of good faith as that concept exists under s. 24(2). Conversely, for the majority in *Wise*, Cory J. ruled that "[t]he actions of the police in this case were not such that they could be termed 'actions taken in bad faith'. There was no physical violence, force, coercion or threat employed. The carelessness, with regard to the expiry date of the warrant and the lengthy continuation of the surveillance, do not, in the circumstances of this case, justify the exclusion of the evidence."[723] For Cory J., then, the mere absence of bad faith led to the conclusion that there was in fact good faith.

The Supreme Court subsequently backed away from the technical approach to good faith police conduct as advanced by the majority in *Hamill* and *Kokesch*, instead adopting an approach far more in keeping with *Wise*. In a trilogy of warrantless perimeter drug search rulings issued in 1993,[724] the impugned evidence was deemed admissible under s. 24(2) on all three occasions,

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[719] [1990] 3 S.C.R. 3, 51 B.C.L.R. (2d) 157 [*Kokesch* cited to S.C.R.].
[720] [1992] 1 S.C.R. 527, 51 O.A.C. 351 [*Wise* cited to S.C.R.].
[721] Coughlan, *supra* note 60, at 309-310.
[722] *Kokesch*, *supra* note 717, at para. 54.
[723] *Wise*, *supra* note 718, at para. 40.
[724] *R. v. Grant*, [1993] 3 S.C.R. 223, [1993] 8 W.W.R. 257 [*Grant* cited to S.C.R.]; *R. v. Plant*, [1993] 3 S.C.R. 281, [1993] 8 W.W.R. 287 [*Plant* cited to S.C.R.]; *R. v. Wiley*, [1993] 3 S.C.R. 263, 84 C.C.C. (3d) 161 [*Wiley* cited to S.C.R.].

primarily because the Court was of the opinion that the police had on each occasion relied in good faith on s. 10 of what was then the *Narcotic Control Act*.[725] In *Grant*, the first of these three companion cases, the police used the warrantless search power contained in s. 10 to obtain information about the accused's home, which they suspected contained a marijuana grow operation.[726] The information gleaned from the warrantless search was used to support a subsequent application for a search warrant.[727] A unanimous Supreme Court ruled that "[t]he police officers were operating under the assumption that s. 10 [of the *Narcotic Control Act*] provided statutory authority for the warrantless perimeter searches conducted [and that as] such ... the officers acted in good faith."[728] Sopinka J. reached this conclusion despite the fact that the authorization specified in s. 10 is limited to the warrantless search of "[a]ny place other than a dwelling-house ...".[729] The impugned search in *Grant* was carried out specifically to obtain information about just such a place.

In order to find good faith police conduct in *Grant*, the Court was required to endorse an artificial distinction between the perimeter of the house and the actual house itself.[730] With this reasoning as a foundation, it became possible to conclude that because the police did not physically enter the home, they were technically within purview of s. 10. This distinction, however, seems entirely strained and begs the question, how does one enter and search the perimeter of a home? The drafters of s. 10 clearly intended to differentiate between searches of an individual's home and searches of other *places*, such as cars, offices, lockers, etc. The judicial separation of a home's perimeter from the rest of the structure was merely a colourable effort by the courts to extend additional search powers to the police. Rather than truly acting in good faith, the Police in *Grant* appear to have relied on this dubious distinction simply to avoid the warrant requirement altogether. The officers appear to have selected the least onerous method of obtaining authorization for their search, a method that afforded the accused a greatly diminished

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[725] R.S.C., 1985, c. N-1, s. 10 [*N.C.A.*]. In its entirety, s. 10 read: "A peace officer may, at any time, without a warrant enter and search any place other than a dwelling-house, and under the authority of a warrant issued under section 12, enter and search any dwelling-house in which the peace officer believes on reasonable grounds there is a narcotic by means of or in respect of which an offence under this Act has been committed." Warrantless searches continue to be available under s. 11(7) of the current *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, but only if exigent circumstances exist.

[726] *Grant*, supra note 722, at paras. 4-5.

[727] *Ibid.* at para. 6.

[728] *Ibid.* at para. 63.

[729] *N.C.A.*, *supra* note 723 at s. 10.

[730] *Grant*, supra note 722, at para. 20-21. The court opted not to address the technical issues of s. 10 compliance as: (i) the Attorney General conceded s. 10 should be read down so that it only applies in exigent circumstances; (ii) this ground had not been fully argued on appeal; and (iii) the legislation was to be amended by Parliament regardless of the outcome of the case.

degree of due process protection. They chose to proceed by way of warrantless search because it suited their specific purposes, and despite the fact that it was within their power to secure a warrant to search the home under s. 12 of the *N.C.A.*[731] In so doing, the police overtly selected a form of authorization with a legal validity that was unquestionably less certain than authorization under s. 12. To rule that this type of behaviour is tantamount to good faith police conduct is far more indicative of the Court's adherence to the ordinary sense of good faith than it is to the narrower, technical sense of the term. Similarly untenable results were reached in each of the companion cases to *Grant*, *Plant*[732] and *Wiley*.[733]

The debate regarding the proper conception of good faith police conduct culminated in the Supreme Court's ruling *R. v. Silveira*,[734] which remains the leading decision on the issue as it pertains to s. 24(2).[735] That case involved an investigation that took place over the course of three nonconsecutive days – August 10, 14, and 18. During that time, a police surveillance operation observed the accused participating in a number of drug transactions completed near a community centre in a public park located in downtown Toronto. During each deal, the officers observed the accused enter his residence – which was located near the park – to obtain the drugs immediately after the terms of payment were reached. After the third such transaction, the police arrested the accused.[736] At this point, the police apparently became concerned for the first time that accomplices inside the accused's residence might receive notice of the arrests and therefore attempt to destroy the evidence contained therein.[737] However, the officers had not yet obtained a search warrant for the home. They had yet to do so despite the fact that they believed they had enough information to obtain such a warrant after the second transaction, which occurred on August 14 – four days before the arrests were made.[738]

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[731] *N.C.A.*, *supra* note 723, at s. 12. In its entirety, s. 12 read: A justice who is satisfied by information on oath that there are reasonable grounds for believing that there is a narcotic, by means of or in respect of which an offence under this Act has been committed, in any dwelling-house may issue a warrant, under the hand of the justice, authorizing a peace officer named therein at any time to enter the dwelling-house and search for narcotics.

[732] See *Plant*, *supra* note 722. Sopinka J. held that police have a duty to act on the powers granted to them by statute, and that they are not required to predict the outcome of an appeal. On the date the search at issue was executed, the British Columbia Court of Appeal's brief ruling in *Kokesch* remained good law. That decision held that perimeter searches commenced under the authority of s. 10 were in fact compliant with s. 8 of the *Charter*. Sopinka J. makes these points by referring to and paraphrasing pages 33-34 of the S.C.R. reporting of *Kokesch*.

[733] *Wiley*, *supra* note 722, at para. 30. The Supreme Court once again admitted illegally obtained evidence under s. 24(2) primarily because the police acted in good faith reliance on the British Columbia Court of Appeal's decision in *Kokesch* regarding the validity of perimeter searches pursuant to s. 10 of the *N.C.A.*

[734] *Silveira*, *supra* note 600.

[735] Stuart, *Charter Justice*, *supra* note 52, at 503.

[736] *Silveira*, *supra* note 600, at para. 127.

[737] *Ibid.* at para. 128.

[738] *Ibid.*

Purportedly out of a desire to avoid furnishing the authorizing justice with out-of-date information, the police decided that they had to add the details obtained from the final transaction to their affidavit prior to actually filing that affidavit in order to obtain a search warrant. In the meantime, they entered the accused's home without a warrant, uninvited, and with guns drawn. They then "checked" the area for firearms, and instructed the occupants to continue with what they had been doing prior to the arrival of the police. With the house secured, the armed officers waited for the search warrant to arrive, while the occupants continued preparing their dinner and watching a Toronto Blue Jays baseball game on television.[739] The search warrant reached the home approximately one hour later, at which time a search of the residence produced 10 ounces of cocaine and approximately $10,000.00 in cash, which was partially comprised of the marked bills used by the undercover officer in making the three observed drug transactions.[740]

A majority of the Supreme Court endorsed the Attorney General's concession that the police violated the accused's rights under s. 8 of the *Charter* by entering his residence prior to the issuance of the search warrant.[741] In turning to the resulting analysis under s. 24(2), the majority began by noting that:

> [i]t is hard to imagine a more serious infringement of an individual's right to privacy. The home is the one place where persons can expect to talk freely, to dress as they wish and, within the bounds of the law, to live as they wish. The unauthorized presence of agents of the state in a home is the ultimate invasion of privacy. It is the denial of one of the fundamental rights of individuals living in a free and democratic society. To condone it without reservation would be to conjure up visions of the midnight entry into homes by agents of the state to arrest the occupants on nothing but the vaguest suspicion that they may be enemies of the state. This is why for centuries it has been recognized that a man's home is his castle.[742]

Despite these observations, Cory J. ruled that neither of the lower court decisions was in error in concluding that the police had acted properly as "[t]he evidence reveals that the police considered that they had the right to enter the house to preserve the evidence and an able and experienced trial judge appeared to agree with that conclusion."[743] Although the legal basis for the officers' belief in this regard is not clear, the majority noted that "[i]f there was no specific finding that the police had acted in good faith, there was certainly no indication that there was any evidence of bad faith on the part of the police."[744] Cory J. thus concluded that "[t]he

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[739] *Ibid.*
[740] *Ibid.* at para. 130.
[741] *Ibid.* at para. 140. L'Heureux-Dube J., concurring in the result, disagreed with Cory J. that the actions of the police violated s. 8. See para. 115.
[742] *Ibid.* at para. 148.
[743] *Ibid.* at 150.
[744] *Ibid.*

circumstances of the public arrests and the need to preserve the evidence ... [constituted] exigent circumstances. In those circumstances, it cannot be said that the breach of the Charter rights by the police was committed in bad faith."[745]

As is clear from Cory J.'s opinion, the majority was content to define good faith police conduct in the ordinary rather than the technical sense of the term. Because the majority felt that there was no explicit evidence of bad faith conduct, the officers were deemed to have acted in good faith. The Justices arrived at this conclusion despite the fact that the police did not rely on any legal precedent or legislative authority in entering the home prior to the arrival of the search warrant. To the contrary, Cory J. specifically ruled that the police action in this regard was in "direct contravention" of the *N.C.A.*[746] It is thus difficult to understand how the police acted in good faith merely because they were under the impression that they had the general legal authority to enter a home due to what were purportedly exigent circumstances. As La Forest J. observed in dissent, "[t]he facts here were such that the police could have obtained a warrant before beginning their operation. The exigent circumstances here arose solely out of the manner in which the police chose to structure the operation, i.e., they created their own exigent circumstances."[747] Even the majority conceded this point, with Cory J. observing that "[i]t may be that it would have been preferable for the police to have obtained a search warrant based on the earlier transactions completed prior to that made on the day of the arrests."[748] Had they done so, there would have been no exigent circumstances and thus no need to enter the house without a warrant. In these circumstances, it is difficult to understand why the police officers' illegal actions were excused as having been undertaken in good faith.

Though La Forest J.'s opinions do not normally serve as exceptions to the Supreme Court's tendency to render decisions in keeping with the dominant conservative ideology, the Justice's dissent in *Silveira* rejected the notion that the police had acted in good faith in that case. On this point, La Forest J. observed that:

> [t]he police surely knew, or ought to have known, that a warrantless entry was, to say the least, highly unorthodox. That they had largely prepared the required information before their strategic take-down meeting demonstrates that they were well aware that a warrant was required to permit entry into the house. It would be alarming if they were not so apprised; s. 10 of the Narcotic Control Act, the statute under which they were operating, says so in so many words. Further, the police knew, or ought to have known, that the Charter has enshrined the right to be secure against

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[745] *Ibid.*
[746] *Ibid.* at para. 141.
[747] *Ibid.* at para. 53.
[748] *Ibid.* at para. 154.

> unwarranted police entry into a dwelling, a right that has been regarded as fundamental for some 400 years.[749]

La Forest J. noted that the failure of the police to respect the warrant provisions of the *N.C.A.* was exacerbated by the fact that even when the police appeared before the justice of the peace to obtain the warrant, they neglected to inform the court that at that very instant, six armed police officers had already entered and occupied the accused's home.[750]

The Justice went on to describe a further "litany" of police misconduct during the investigation of the accused. For example, after the accused had been taken into custody, the police attempted to secure from him incriminating information prior to his being afforded the opportunity to consult a lawyer as required by s. 10(b) of the *Charter*. In assessing this factor, La Forest J. ruled that the officer's personal policy of denying "[a]ccused persons access to the telephone is indicative of a general nonchalance on the part of this police investigation team of the need to operate within the confines of established patterns of conduct."[751] In finalizing his rejection of the purported good faith police conduct in this case, the Justice stated:

> I am struck by the cumulative evidence of a poorly managed operation, a glaring pattern of disregard for Charter protected interests of the appellant and his family, and, at best, an inexplicable ignorance of the necessity to apprise a judicial officer fully of all relevant information when seeking a warrant. I have no hesitation in concluding that this extremely serious Charter violation was in no way mitigated by police good faith.[752]

As a result of the officers' collective lack of good faith, La Forest J. went on to consider the remainder of the relevant factors under the s. 24(2) analysis, and ultimately would have excluded the impugned evidence, quashed the accused's convictions, and remitted the matter back to the lower court for retrial.[753]

La Forest J.'s characterization of the police behaviour at issue in *Silveira* seems more accurate than the uncritical view of the police that apparently formed the basis of the majority's opinion. However, Cory J.'s ruling implicitly clarifies the Supreme Court's acceptance of good faith police conduct in its ordinary sense rather than in its technical form. Prior to the decision in *Silveira*, Coughlan argued that if good faith was to be a consideration in the s. 24(2) analysis, it ought to do so only if it existed in its technical sense. Although Coughlan doubted the validity of incorporating good faith into the analysis at all, he observed that technical good faith had certain advantages over ordinary good faith:

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[749] *Ibid.* at para. 65.
[750] *Ibid.* at para. 66.
[751] *Ibid.* at para. 68.
[752] *Ibid.* at para. 73.
[753] *Ibid.* at paras. 94-95.

> [g]ood faith in the technical sense is easy to determine: either explicit authority for the investigative technique existed, or it did not. Good faith in the ordinary sense is more subjective, and reasonable people can disagree. A different onus presumably applies in the two cases: the accused should show bad faith, but the Crown would have to prove technical good faith. Finally, technical good faith helps the case for admission; ordinary good faith does not.[754]

Despite the seemingly greater plausibility of technical good faith, the Supreme Court has adopted the concept in its ordinary form, thereby allowing Canadian judges considerable discretion when determining whether the seriousness of a *Charter* violation has been mitigated by the conduct of the police.

Though the ruling in *Silveira* continues to be influential, it did not bring an end to the Supreme Court's alteration of the role played by good faith police conduct in determining the admissibility of unconstitutionally obtained evidence. Two years after *Silveira*, the Court issued its decision in *Stillman*, [755] in which the majority ruled that the exclusionary mechanism is principally concerned with the trial fairness, and that if the analysis under the trial fairness branch determines that the admission of certain evidence would render a trial unfair, it is unnecessary to consider the remaining *Collins* factors.[756] Significantly then, the decision in *Stillman* implicitly suggests that good faith police conduct will generally be relevant under s. 24(2) only in circumstances in which the impugned evidence is classified as non-conscriptive.[757] Although this would seem to limit the situations in which good faith police conduct would be relevant to admissibility, the decision has not reduced the occasions on which the concept has been employed in minimizing the seriousness of an established *Charter* violation.

To the contrary, the judicial assessment made under the second branch of *Collins* is now generally conclusive of s. 24(2) applications that are not dealt with according to the trial fairness analysis, particularly insofar as those applications pertain to non-conscriptive evidence. As Professor Don Stuart has argued, "[i]n the case of real evidence it seems clear that the Court's determination as to the seriousness of the violation will be determinative. Evidence will only be excluded if the Court is prepared to brand the police conduct in terms such as 'deliberate', 'flagrant' or 'blatant'."[758] If the court is not prepared to characterize the violation using such language, the evidence will generally be admitted at trial despite having been obtained in an unconstitutional fashion. Thus, rather than reducing the scope of the good faith police conduct

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[754] Coughlan, *supra* note 60, at 307-308.
[755] *Stillman*, *supra* note 50.
[756] *Ibid.* at para. 72.
[757] *Ibid.* at para. 74. Cory J. defines non-conscriptive evidence as follows: "[i]f the accused was not compelled to participate in the creation or discovery of the evidence (i.e., the evidence existed independently of the Charter breach in a form useable by the state), the evidence will be classified as non-conscriptive."
[758] Stuart, *Charter Justice*, *supra* note 52, at 500.

notion, the majority ruling in *Stillman* arguably increased the overall importance of the exception,

Similarly, the applicability of the good faith concept has been widened after *Stillman*, particularly through the Supreme Court's articulation of the "discoverability" doctrine. In this context, the discoverability doctrine functions as a hypothetical form of the good faith police conduct presumption. It suggests that illegally obtained evidence can be rendered admissible if the police could have located it using methods that did not violate the *Charter*. In such cases, invocation of the doctrine allows the judge to ignore the illegality of the steps actually taken by police, instead preferring an alternate, mythically ideal version of events, one that could have occurred had what actually happened not actually happened. The majority's discussion of discoverability is overtly premised upon whether the police "could have and would have" acted legally to obtain evidence that was in fact illegally obtained. This reasoning is somewhat bewildering. Discoverability acknowledges the fact that when given the opportunity to actually act legally, the police in question clearly failed to do so, but suggests that when they could have done otherwise, the violation will not affect trial fairness. It is, however, neither clear why the police chose not to do what they so easily could have done, nor why their failing to do so is considered acceptable simply because it was possible for them to have done what they did not do. In this regard, the discoverability doctrine simply serves to rationalize police misconduct, suggesting that because the officers could have acted legally, the fact that they did not do so is immaterial.

The *Stillman* ruling does not, however, explicitly render all discoverable evidence admissible at trial. Rather, a finding of discoverability merely extends the admissibility analysis beyond the trial fairness branch of *Collins*. Commentators have indicated that the doctrine seemingly conflicts with the notion set out in the second branch of *Collins* regarding the fact that the availability of non-violative investigative techniques increases the severity of the *Charter* breach. According to Carol Brewer, the discoverability doctrine "[o]perates in a fashion far closer to a 'catch-22.' Although establishing on a balance of probabilities that the evidence would have been discovered will permit the Crown to avoid exclusion at the trial fairness stage, it will also increase the likelihood of exclusion when the seriousness of the violation is being considered."[759] Similarly, Richard Mahoney refers to the "catch-22" of discoverability as "absurd", observing that "[i]t is surprising that the Supreme Court continues to accept the

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[759] Brewer, *supra* note 59, at 250.

argument set out [in the second branch of Collins] yet employs discoverability at each of the other two stages of the Stillman analysis to quite the opposite effect."[760] However, the courts have not been constrained by the seemingly inherent illogic in the differential treatment of police conduct under the discoverability doctrine and the second branch of *Collins*. The *Stillman* ruling itself suggests that a positive determination under the discoverability analysis will generally lead to a finding that the violation in question is not overly serious, and thus concomitantly to the admission of the impugned evidence.

In addition to the increased importance of good faith police conduct in relation to the admissibility of non-conscriptive evidence, and the expansion of the notion's applicability through the discoverability doctrine, recent decisions from the provincial appellate courts also indicate that judges are increasingly willing to invoke the notion of good faith police conduct in cases involving overt police misconduct. In *R. v. Harrison*,[761] the conduct of a police officer was subjected to judicial scrutiny as his overtly illegal search of the accused's vehicle produced 77 pounds of cocaine possessing a street value of between $2.4 and $4.6 million.[762] The search originated out of a routine vehicle stop occurring near a small town in northern Ontario. The subject officer stated that he initially intended to stop the accused's vehicle because it lacked a front license plate. However, the officer acknowledged that once his patrol car was directly behind the accused's truck, he recognized that the vehicle bore license plates from Alberta, a province in which the officer was aware that it was not an offence to operate a vehicle with only a rear plate.[763] Despite this realization, the officer decided to stop the vehicle anyway, prompting the following exchange between him and the trial judge:

> THE COURT: I just have one question, and that is, when you determined that the vehicle, or the operator of the vehicle, wasn't committing any offence, why did you pull him over?
>
> A. Ah, continuation of the, ah, the traffic stop. I had my emergency lights already going, um, the, ah, the vehicles behind me. I had been pulling over. Um, my integrity was, ah, was there, the integrity for police, and also now to check up on, to make sure that this person is eligible to drive in the Province of Ontario.[764]

Upon executing the traffic stop, the officer noticed the truck had a "lived in look", questioned the accused and a passenger, determined that they had departed from Vancouver only a few days before, found them to have conflicting stories regarding their association, and determined that

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[760] Mahoney, *supra* note 60, at 464.
[761] 2008 ONCA 85, appeal as of right to the S.C.C., [2008] S.C.C.A. No. 89.
[762] *Ibid.* at para. 8.
[763] *Ibid.* at para. 14.
[764] *Ibid.*

the accused was driving with a suspended license.[765] The officer thus arrested the accused,[766] asked whether there were drugs or weapons in the vehicle, and then searched the interior of the truck. The search produced two sealed boxes, which were opened by the officer and found to contain cocaine.[767]

The trial judge ruled that the police officer had violated the accused's rights under ss. 8 and 9 of the *Charter*. He found that the accused was arbitrarily detained as the officer's reasons for the initial traffic stop were contrived and lacked credibility, and that the vehicle search was unreasonable as it was neither incidental to the accused's arrest nor reasonable in the circumstances.[768] The trial judge further ruled that the officer's conduct was "brazen and flagrant", observed that "the search was not conducted in good faith", and characterized the rights violations as "extremely serious".[769] Nevertheless, the trial judge found that the breaches were not sufficiently serious to warrant exclusion,[770] that the offence was extremely serious, and that the evidence was central to the Crown's case.[771] Therefore, the trial judge ultimately ruled that the exclusion of the evidence would cause more harm to the repute of the administration of justice than would its admission.[772]

A majority of the Ontario Court of Appeal endorsed the trial judge's decision to admit the impugned evidence. Before commencing an examination of the facts at issue, O'Connor A.C.J. summarized the majority's conclusion that the "[b]reaches did not fall in the most egregious category" of *Charter* violation mainly because:

> [t]he officer's conduct was not shown to be systemic in nature, or the result of operational policies or guidelines, or even an order from a senior officer. The actions involved were those of one officer, who had been on the force for four years and who made some flawed decisions during the roadside encounter and later when testifying. And while some might describe the officer's breaches as "deliberate" (the trial judge did not use that word), that description tends to paint a picture of a more planned and premeditated course of action than the record reveals.[773]

This ruling suggests that in order for a police officer to "deliberately" violate a *Charter* right, there must be some evidence of premeditation, or malice aforethought. The Justice later expanded upon his initial observations, noting that:

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[765] *Ibid.* at paras. 16-19.
[766] *Ibid.* at para. 20.
[767] *Ibid.* at paras. 22-23.
[768] *Ibid.* at para. 39.
[769] *Ibid.* at para. 40.
[770] *Ibid.* at para. 47.
[771] *Ibid.* at para. 51.
[772] *Ibid.* at para. 50.
[773] *Ibid.* at para. 4.

> [a] fair reading of the officer's evidence does not reveal that he had a carefully thought out plan or practice to breach the Charter. The officer suspected that there were drugs in the car. His on-the-scene decision to follow his suspicions without reasonable grounds was a serious mistake. By the time he searched the car, however, it is arguable he had enough information to warrant a search, though on cross-examination, he agreed that he did not have enough information to obtain a warrant.[774]

As a result, both the trial and a majority of the Court of Appeal concluded that even though the police misconduct in question was flagrant and not in good faith, that "[a] trial judge engaged in a proper s. 24(2) analysis can find serious police misconduct and, because of other factors in play, legitimately admit the evidence improperly obtained."[775] Thus, not only does the absence of bad faith in some cases equal good faith, so too does the presence of "not-quite-so-bad-enough faith".

In concluding that the trial judge's application of s. 24(2) to the facts of the case was not unreasonable in light of the "serious social evil that is cocaine trafficking",[776] O'Connor A.C.J. held that:

> [w]e believe that without minimizing the seriousness of the police officer's conduct or in any way condoning it, it was open to the trial judge to find that reasonable members of the community could well conclude that the exclusion of 77 pounds of cocaine, with a street value of several millions of dollars and the potential to cause serious grief and misery to many, would bring the administration of justice into greater disrepute than would its admission.[777]

The majority of the Court of Appeal neglected to outline the type of police conduct that would inculcate reasonable members of the community to conclude that the admission of 77 pounds of cocaine would result in the accrual of disrepute. Given that the trial judge found the police misconduct to be both flagrant and brazen, the inevitable supposition in this regard is that reasonable members of the community would never come to such a conclusion. The logical extension of this decision is that *Charter* rights are not afforded to all individuals to an equal degree.

The Supreme Court's assessment of police conduct in the context of s. 24(2) has created a presumption of good faith rebuttable only through the demonstration of flagrant misconduct on the part of the investigating officers. Increasingly, the type of bad faith conduct necessary to support the judicial exclusion of illegally obtained evidence involves the officer's explicit intention to circumvent judicial authority in the course of an investigation. It is not enough that the officer engaged in actions without ensuring that they were *Charter* compliant, or without

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[774] *Ibid.* at para. 42.
[775] *Ibid.* at para. 64.
[776] *Ibid.* at para. 65.
[777] *Ibid.* at para. 70.

thinking about the issue one way or another; he or she must have undertaken those actions knowing full well that an existing judicial authority specifically prohibited him or her from doing so. This interpretation of good faith police conduct largely ignores the protective purpose of the *Charter* by relegating the actual rights violation to a position of merely incidental importance in the s. 24(2) calculus. It is also based on the entirely unsubstantiated notion that not only ought Canadians expect the best from their police forces, but also on the assumption that it is reasonable to rely on the notion that in the overwhelming majority of cases, the police actually meet those expectations.

5.3.2. Legitimate "good faith" or "self-preservation"

The Supreme Court of Canada has created a strong presumption of good faith police conduct in relation to violations of the *Charter* core legal rights and applications to exclude unconstitutionally obtained evidence under s. 24(2). Courts throughout the country have embraced this notion, and judges are increasingly willing to equate the absence of overt bad faith with the exhibition of good faith, and to subsequently use this conclusion to admit the impugned evidence. These developments are particularly troubling when, as was argued earlier, that Canada's police forces generally operate in a manner that ought to give rise to anything but a presumption of good faith. Indeed, the work environment of the police is generally characterized by the negative personal worldviews of individual officers, attitudes which often translate into unconstitutional and abusive forms of policing that are in the officers' minds justified by the evidence they uncover. The impossibility of external supervision of the majority of police contact with accused individuals exacerbates the negative repercussions of the police worldview. Moreover, there is considerable evidence that it is not uncommon for police to resist *Charter* rulings that tend to restrict their investigatory powers, that they engage in racial profiling, and that they often lie in order to cast their investigatory practices in the best possible light. These realities suggest that good faith police conduct should play only a strictly limited role in the exclusion of unconstitutionally obtained evidence, if indeed it is to be permitted to play any role at all.

That the courts are loath to officially acknowledge police misconduct is hardly surprising. Doing so would run the risk of turning the entire criminal prosecution process on its head. The police are the first responders; they represent the individual's first contact with the investigatory and enforcement arm of the state. The actions taken by individual officers provide the foundations on which the criminal justice system functions. In reality, the work performed by

lawyers, judges, sheriffs, correctional service workers, probation officers, psychologists, psychiatrists and parole officers is based entirely on the essentially unsupervised actions taken by individual police officers when they are patrolling the streets. Thus, the very legitimacy of the entire criminal legal system depends on the officer acting in a reasonable, responsible and conscientious manner. The courts must therefore reinforce the notion of the honest, diligent, and courageous police officer, no matter how unlikely it is that such officers actually exist as the *sine qua non* of policing.

Indeed, the very legitimacy of the courts in the criminal law process depends upon the notion of good faith police conduct. If officers take advantage of their low visibility work environment in order to break the law, if they disdain the legal norms created by judges, if they are habitually dishonest, if they believe members of certain races are more likely to be criminals, then it is simply not possible for the criminal trial process, which is at its core based upon the investigations conducted by these officers, to have any legitimacy whatsoever. It is therefore directly within the courts' self-interest to construct complex apparatuses through which police misconduct is either ignored, rationalized, or condoned. On the rare occasions in which police misconduct is acknowledged for what it is, it is unquestioningly isolated as the work product of individual rogue officers. These responses discourage both the reporting and the investigation of police misconduct, and thus operate as tacit permission for police officers to continue to engage in such behaviour with the relative security of knowing that it will go undetected and unpunished.

The realities of the police occupational culture – and the effects that it has on the function of policing – appear to be entirely antithetical to a presumption of good faith police conduct. If police officers adhere to a sub-cultural norm by which all non-police elements of the criminal justice system are viewed with contempt, it is illogical to presume that those same officers will – in good faith – attempt to abide by the rules and regulations created by the non-police elements of that system. An officer who disdains legal rules and believes that they do not apply to his or her actions in the field cannot and should not be presumed to have attempted to carry out his or her duties in keeping with those rules, particularly when the available evidence proves that the officer failed to do so. If an occupational culture condones a blatant disregard for the truth, the members of that occupation cannot realistically be presumed to be telling the truth unless there is some independent corroboration of the veracity of their statements. If an occupational culture is characterized by racial and gender bigotry, its members cannot be presumed to have acted in good faith in their dealings with racially, sexually and economically marginalized individuals.

The presumption of good faith police conduct ardently and naively ignores the occupational culture in which the majority of police work occurs. Judicial acceptance of the largely unsubstantiated notion that police, by default, act in good faith, casts serious doubt on their ability to safeguard the practical effectiveness of the *Charter's* core legal rights.

5.4. Conclusion to Chapter 5

By interpreting s. 24(2) in a manner that closely adheres to the dominant conservative ideology, the Supreme Court of Canada has created jurisprudential circumstances in which significantly negative practical consequences result. First, the Court's leading decisions on s. 24(2) render only a certain limited range of rights violations remediable by exclusion, thereby rendering all other rights and rights violations all but meaningless in their practical sense. Second, the current test is prone to misuse when invoked as a response to moral panics. In this sense, the courts routinely use s. 24(2) to decrease the apprehended severity of particular rights violations, thereby limiting the due process protections afforded to the individuals who are the subject of the moral panic, individuals who are typically representative of racially and socially marginalized groups. Third, the Supreme Court's jurisprudence on exclusion condones a wide range of investigatory techniques that result in clear *Charter* violations. The Court has created a presumption of good faith behaviour for all police conduct, a presumption that is rebuttable only through the establishment of flagrant, intentional, premeditated bad faith on the part of investigating officers. This means that in the majority of police contact with targeted socially groups will be deemed to have been in good faith regardless of the evidence that suggests that this is most often not the case.

As these negative repercussions indicate, the Supreme Court's development of Canada's exclusionary rule does not sufficiently protect the integrity of the *Charter's* core legal rights as they apply to all individuals, particularly those who are routinely targeted by the police for investigation. The type of rights violations that are predominantly left without effective remedies are those that that produce non-conscriptive, incriminating evidence. This form of evidence is secured through the violation of the rights of individuals involved in criminal activity. Because the criminal activity of marginalized social groups is more commonly targeted by police, it is the rights of the individual members of these groups that are most likely to be violated and the least likely to be remedied. It is these same individuals who are most likely to be engaged in behaviour that causes a moral panic. The misuse of the Supreme Court's s. 24(2) test therefore further detracts from the integrity of the core legal rights of the socially marginalized. Moreover,

the presumption of good faith police conduct essentially means that individuals who are most likely to come into contact with police are at the greatest risk of suffering a rights violation that is ultimately condoned because the police are deemed to have investigated without exhibiting egregious bad faith. Once again, the socially marginalized are the most common victims of this form of condonation because they are the most common victims of police investigations. Clearly then, any adequate reform of s. 24(2) must take these negative repercussions into account.

Chapter 6. Redefining Disrepute: The Future of s. 24(2)

Rather than developing through a neutral or value-free process of adjudication in which the judiciary simply applied the plain language of the *Charter* to the facts of the cases that came before them, the current interpretation of s. 24(2) has developed in large part through the application of the subjective views and ideological preferences of the Supreme Court of Canada. This judicial decision-making process, which operates primarily on a subconscious level, has created an exclusionary rule that significantly reduces the practical effectiveness of the core legal rights as they pertain to all individuals. Although these reductions in effectiveness theoretically apply to everyone who is investigated by the police, the social realities of the Canadian criminal justice system ensure that the negative aspects of the present s. 24(2) regime have a disproportionate impact on the socially and racially marginalized individuals to whom the justice system is already over-applied. In this context, s. 24(2) transforms the *Charter's* core legal rights from potentially legitimate due process protections into mechanisms that serve only to legitimize the injustices inherent in the contemporary criminal investigation and prosecution processes. This process of legitimization occurs because rather than actually providing individuals with true due process protections, the core legal rights only appear to do so. They thereby enhance the perception that because of its focus on due process, the Canadian criminal justice system operates fairly and treats everyone who it processes equally when in fact, it actually fails to provide those protections to entire classes and groups of individuals.

Despite these significant issues, the *Charter's* exclusionary mechanism retains the potential to play an important role in reforming the administration of Canadian criminal justice. If s. 24(2) is to satisfactorily achieve this potential, its current interpretation and application must be abandoned. The *Therens/Collins/Stillman* regime must be rejected and replaced by a methodology that is designed to ensure that the core legal rights serve as truly effective due process protections for all Canadians, particularly insofar as those rights apply to the socially marginalized individuals who are most in need of such protections. Indeed, if s. 24(2) does not work to safeguard the *Charter* rights of the racial and economic groups that are typically targeted by the criminal justice system for increased surveillance and investigation, then the core legal rights to which the exclusionary mechanism is related do not exist as true due process protections, and therefore do not belong in a constitutionalized bill of rights that is typically credited with providing such protections.

In order to ascertain how effective reform of s. 24(2) should be structure, it is first necessary to dispense with some of the arguments commonly levelled against a broader

interpretation of the *Charter's* exclusionary mechanism. First, the "original intentions" doctrine of constitutional interpretation will be briefly analyzed, and the legitimacy of its application to the *Charter's* exclusionary mechanism will ultimately be rejected. Similarly, s. 24(2)'s proper role as a rights enhancing mechanism will be assessed in light of the fact that other, readily available constitutional sections were specifically designed as the means for limiting all *Charter* rights, including the core legal rights. These alternative sections can be both resorted to and relied whenever a competent legislative body is of the opinion that the practical impact of the core legal rights requires limitation to allow for the achievement of legitimate policy concerns. There is therefore no reason to use s. 24(2) to curtail the practical effectiveness of the *Charter's* due process protections. Following these examinations, it is then necessary to examine and ascertain the practical role played by the core legal rights in Canadian society. This will demonstrate that the nature of these rights significantly narrows the specificity of their practical application, a situation that requires they be broadly interpreted and enforced with effective remedies if they are to accomplish their primary practical purposes. With these arguments as a foundation, it will then be possible to set out a concept for the reform of s. 24(2).

The current Canadian jurisprudential and socio-legal contexts necessitates the redevelopment of the *Charter's* exclusionary mechanism in a manner that accurately accounts for the unjust social environment in which both the core legal rights and s. 24(2) operate. This type of reform will require a substantial reconfiguration of the concept of disrepute as it is used in the *Charter's* exclusionary mechanism. The Court must restructure and broaden the scope of disrepute so that it captures both the forms of police misconduct that are currently considered to damage the Canadian criminal justice system's reputation, as well as those that presently have that effect, but are nevertheless condoned or ignored by the contemporary s. 24(2) regime. The new definition of disrepute must acknowledge the fact the policing is focussed on economically and racially marginalized social groups, and that the core legal rights of these individuals are thus at far greater risk of being violated than are the same rights of individuals who belong to more advantaged social groups. The Supreme Court must ensure that s. 24(2) operates to provide a real remedy for the individuals who are most likely to be subjected to illegal police investigations, and who are thus most likely to require the *Charter's* due process protections in the course of criminal litigation. This in turn means that real remedies must be available for violations that produce all forms of evidence, not merely those that secure non-discoverable conscriptive evidence. This is particularly so as the type of illegal police investigation that is commonly directed toward members of socially marginalized groups is designed to uncover non-

conscriptive real evidence. Violations that occur in the context of disproportionate and targeted policing must be acknowledged as generally bringing the administration of justice into disrepute. If they are not, then neither s. 24(2) nor the core legal rights are truly worthy of description as constitutionalized due process protections.

6.1. The fallacy of original intent

Much of the harshest criticism directed at the Supreme Court's s. 24(2) rulings has been premised on the contention that the current jurisprudence departs unjustifiably from the Parliamentary spirit underpinning the wording of the section. These arguments are typically based on the doctrine of "original intent" or "originalism", which posits that there is an identifiable purpose for all constitutional provisions, even those that are worded in vague and imprecise language, such as s. 24(2). Despite the prevalence of these arguments, an analysis of the interpretational norms in the constitutional law context indicates that Canadian courts routinely reject arguments based on broadly stated notions of "original intent", and that in fact, the concept is nothing more than a rhetorical fallacy invoked by advocates seeking restrictive interpretations of potentially progressive legislative initiatives. Thus, the problems inherent in the original intent argument render the concept inapplicable in the Canadian constitutional context in general, meaning that the reform of s. 24(2) need not be limited simply out of the desire to abide by the supposed legislative intentions of the past.

The Canadian articulation of the doctrine of original intent undoubtedly owes the bulk of its origins to American constitutional scholarship. Peter Hogg succinctly defines originalism – or "interpretavism" as it is referred to in the U.S. – as standing for the proposition that "[c]ourts ought to adhere faithfully to the 'original understanding' of the meaning of the Constitution. Only in this way, it is argued, can the judges' own policy preferences be excluded from constitutional litigation."[778] The exclusion of such preferences is said to be necessary as otherwise, "[u]nelected judges [are granted] the power to amend the Constitution without recourse to the amending procedures provided by the Constitution."[779] After making these initial observations, Hogg clearly rejects both the premise of originalism, and its outcome. Using the American socio-legal context as a backdrop, he challenges the validity of a strict originalist approach to constitutional interpretation, suggesting that "[i]t seems a hard rule to say that the elimination of racial segregation cannot be administered by the courts because the group of men

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[778] Hogg, *Constitutional Law*, *supra* note 148, at 766.
[779] *Ibid.*

who framed the Fourteenth Amendment after the Civil War – more than 100 years ago – did not contemplate its use for that purpose. This is certainly not a rule to fire the imagination."[780] Hogg ultimately dispatches with the validity of this interpretational methodology in the Canadian context as well, arguing, "[i]t is simply inevitable that judicial interpretations will change with changing societal values. Judges are not historians, and, even if they were, they would be rightly reluctant to decide modern controversies by reference to research as to the attitudes of people long dead and gone."[781]

Despite the methodological and logistical problems associated with the doctrine of originalism, it has frequently been invoked in the controversy surrounding Canada's exclusionary rule. Since the earliest days of s. 24(2)'s interpretation by the Supreme Court of Canada, both academics and jurists have referred to the fact that the section was the product of a compromise between two opposing pre-*Charter* positions on exclusion. Indeed, the Supreme Court itself explicitly mentioned as much in *Collins*, as Lamer J. observed that s. 24(2) "[h]as adopted an intermediate position with respect to the exclusion of evidence obtained in violation of the Charter. It rejected the American rule excluding all evidence obtained in violation of the Bill of Rights and the common law rule that all relevant evidence was admissible regardless of the means by which it was obtained."[782] In the post-*Collins* era, Steven Penney made a similar observation, stating that:

> [s]ection 24(2) was conceived against the backdrop of the American "exclusionary rule", which in Canada is often (inaccurately) perceived to mandate exclusion in every instance of constitutional infringement. The language of section 24(2), which authorizes the exclusion of unconstitutionally obtained evidence when the court determines that admission could "bring the administration of justice into disrepute," reflects a desire to avoid this result. Beyond that, the meaning of the provision is unclear.[783]

Those who oppose the purportedly "pro-exclusion" mandate that has been followed by the Supreme Court are quick to draw upon these ideas when arguing for a reduction in the rule's scope. The premise of their argument is simple enough: s. 24(2) was intended to strike a balance between automatic exclusion and automatic inclusion, and the Supreme Court has failed to see this intention through. They allege that because the Court has created a rule containing elements closely akin to those of the American doctrine of automatic suppression, it has effectively

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[780] Peter W. Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 Osgoode Hall L.J. 87 at 95.
[781] Hogg, *Constitutional Law*, *supra* note 148, at 766.
[782] *Collins*, *supra* note 52, at para. 29.
[783] Penney, "Deterrence", supra note 59, at 107.

betrayed the compromise struck by the framers of the *Charter*, and has therefore unjustifiably failed to abide by the original intent of the section.

As Daniel Santoro has explored in great detail, some of the strongest attacks levelled against the current interpretation and application of s. 24(2) are grounded in both implicit and explicit expressions of the "originalist" interpretational perspective.[784] For instance, David Paciocco argues that the Supreme Court's development of the *Charter's* exclusionary remedy has run so far afoul of its original purposes that it has actually been tantamount to a judicial repeal of the express language of the section. Paciocco disputes the validity of the *Therens/Collins/Stillman* regime by first observing that:

> [o]ur exclusionary provision is spelled out in what appears to be splendid detail in the text of our Constitution. Despite this, there has been as much judicial creativity in the development of the Canadian exclusionary rule as there was in the evolution of its American cousin. To put it bluntly, language has often proved secondary in the interpretation of s. 24(2). Uncategorical judicial statements by the Supreme Court of Canada have produced a rule which bears little relationship to the text of the section. While it is always imprudent to attempt to rely on a provision without considering interpretive jurisprudence, it would be sheer folly in attempting to understand the Canadian exclusionary rule to place focus on the language of s. 24(2).[785]

Paciocco particularly rejects the elements of the Court's s. 24(2) jurisprudence capable of bearing any interpretation that would require the automatic exclusion of certain forms of evidence. In elaborating on his argument, he contends that:

> [t]he rejection of the polar extremes has been drafted into the provision. The section requires courts to determine whether admission of the evidence in question could cause the relevant kind of disrepute, "having regard to all of the circumstances". The spirit of the provision, if not that very language, calls into question the legitimacy of developing even quasi-automatic principles for exclusion. Despite this, the court has produced just such a principle, and its implications are enormous.[786]

Paciocco blames the development of this principle on the Supreme Court's injection of the "fair trial" concept into the s. 24(2) analysis. He challenges the legitimacy of basing the test for exclusion on the changing concept of trial fairness, asking "[w]hy should the admissibility of [unconstitutionally obtained] evidence turn on a single assessment made according to evolving criteria, without a sound theoretical base, particularly given the clear wording of s. 24(2) to the contrary?"[787] In Paciocco's view, then, the current jurisprudence pertaining to the exclusion of evidence is faulty at its most basic level because it has failed to abide by both the spirit and substance of s. 24(2).

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[784] Santoro, *supra* note 47, at para. 26.
[785] Paciocco, "Judicial Repeal", *supra* note 59, at 326.
[786] *Ibid.* at 354 [footnotes omitted].
[787] Paciocco, "Dichotomy", *supra* note 59, at 181.

Paciocco is by no means alone in using the interpretational doctrine of originalism to criticize the Supreme Court's s. 24(2) decisions. Many other authors have at least implicitly taken a similar approach, focusing primarily on the Court's development of the trial fairness concept, and its concomitant treatment of non-discoverable conscriptive evidence.[788] For instance, J.A.E. Pottow has questioned how the Court has arrived at a rigidly pro-accused interpretation of the *Charter's* exclusionary mechanism, particularly in the face of clear language and legislative intent to the contrary. On this point, Pottow suggests, "[o]ne is left to wonder why the case law of s. 24(2) has grown so distorted: whence, in the face of textual flexibility, came the drive to craft rigid, per se rules? And it is not mere rigidity in the abstract, but a 'directional' rigidity – rigidity that favours the accused."[789] In a similar vein, Fraser and Addison argue that the Court's approach to s. 24(2) runs contrary to the original intent of the section, contending that "[i]nterpreting a rights document as strongly as possible in favour of the person whose rights have been violated may be justified in general, but it is not the proper approach to take to a remedy clause intended to balance Charter rights and the interests of the community."[790] For these authors, then, the original intent of s. 24(2) was to balance the rights of the accused with the rights of individuals affected by crime, and the rights of the community at large.

Julianne Parfett also argues that the current interpretation of s. 24(2) runs afoul of the legislative intent behind the section, claiming that "[t]he language of s. 24(2) is clear. It requires a balancing of interests. The section requires that evidence obtained as a result of a breach will be excluded, but only if, after a consideration of all the circumstances, the admission of the evidence would bring the administration of justice into disrepute."[791] Parfett uses this observation as the foundation for the following conclusion: "[o]riginally conceived as a compromise between what was perceived to be the automatic exclusionary rule in the United States, and the Canadian common law rule which permitted admission of the evidence regardless of the manner in which it was obtained, the exclusionary rule has in fact developed into a quasi-automatic exclusionary rule."[792] The originalist undertones of this argument are unmistakable: the Supreme Court's s. 24(2) jurisprudence fails to live up to the clear intent behind the *Charter's* exclusionary rule, a failure that renders those decisions theoretically illegitimate.

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[788] See e.g. Brewer, *supra* note 59; Parachin, *supra* note 62; and Parfett, *supra* note 59.
[789] Pottow, *supra* note 59 at 58-59.
[790] Fraser & Addison, *supra* note 59, at para. 13.
[791] Parfett, *supra* note 59, at para. 33.
[792] *Ibid.* at para. 1.

Despite the frequency with which the original intentions doctrine is invoked to impugn the validity of the Supreme Court's interpretation of s. 24(2), the Canadian judiciary has a long and thorough history of rejecting the various forms of originalism as legitimate interpretational methodologies for the Canadian Constitution in general, and the *Charter* in particular. As Santoro persuasively argues, "[o]riginalism as a constitutional interpretive doctrine has been consistently rejected by the Supreme Court. There is no reason why originalism should be used to interpret s. 24(2) when it is not used to interpret the rest of the Constitution."[793] Santoro supports his argument by charting the Canadian courts' longstanding dismissal of the concept, beginning with the Judicial Committee of the Privy Council's 1929 decision in *Reference re: British North America Act, 1867 s. 24*.[794] This decision, which was the first to employ the "living tree" metaphor in describing the proper interpretive method for the Canadian Constitution,[795] specifically rejects arguments based on original intent, holding that "[t]heir Lordships do not think it right to apply rigidly to Canada of today the decisions and the reasons therefore which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development."[796]

The explicit judicial rejection of the original intent doctrine has continued unabated up to the present day, as is evidenced by the Supreme Court of Canada's recent decision in *Reference re: Same-Sex Marriage*.[797] In that case, a unanimous Supreme Court ruled that "[t]he 'frozen concepts' reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."[798] Santoro uses this exegesis of the anti-original intentions case law as the foundation for his conclusion that "[o]riginalism is philosophically incompatible with the very nature of a constitution",[799] and argues that such an interpretational methodology "[i]s particularly inappropriate when the provision being interpreted is part of a constitutionally entrenched bill of rights, such as the Charter. A narrow and technical originalist interpretation has the effect of constricting rights and freezing development. Canadian courts are thus extremely resistant to originalism when

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[793] Santoro, *supra* note 2, at para. 5.
[794] [1929] 3 W.W.R. 479, [1930] 1 D.L.R. 98 [*Reference re: B.N.A. Act* cited to D.L.R.].
[795] *Ibid.* at para. 44.
[796] *Ibid.* at para. 39.
[797] 2004 SCC 79, [2004] 3 S.C.R. 698 [*Same-Sex Marriage*].
[798] *Ibid.* at para. 22.
[799] Santoro, *supra* note 47, at para. 42.

questions of individual rights are involved ...".[800] Thus, Santoro surmises that the arguments against the Supreme Court's current s. 24(2) jurisprudence must inevitably fail insofar as they are founded solely upon originalist ideals.

Despite conclusively demonstrating the Supreme Court's rejection of originalism in its constitutional interpretation, Santoro does not rest his argument on this ground alone. As he points out, not only have Canadian courts long rebuffed the doctrine, originalism itself is a fallacy insofar as it applies to particular constitutional sections. On this point, Santoro observes that:

> [i]t is a fiction to suppose that there is an actual single intention behind any section of the Constitution. It is more accurate to describe any given constitutional provision as the outcome of the tension between numerous interacting viewpoints, as part of a continual process of evolution. This "evolutionary" description is especially applicable to s. 24(2) of the Charter. The process that led to the wording of s. 24(2) was far too complicated and controversial to pinpoint any underlying spirit. Describing s. 24(2) simply as "a compromise provision," while perhaps helpful in certain contexts, is a gross oversimplification of the historical truth, and cannot be used to ground a criticism of the current jurisprudence.[801]

Rather than there being a single, identifiable purpose behind the wording of the *Charter's* exclusionary mechanism, Santoro contends that "[i]t is evident from the historical record ... that the current s. 24(2) was the product of a great amount of tension, the expression of numerous voices."[802] Thus, even if the Supreme Court was willing to accept arguments based on originalist principles, there is no legitimate, authoritative source capable of accurately revealing the original intention behind the section. Indeed, the idea that such an intention ever existed is a largely unsubstantiated fiction.

Santoro also specifically rejects the appropriateness of using originalist claims in the s. 24(2) context. He points out that even if it was possible to ascertain the underlying intent of the section, using that intention to restrict all future interpretations would have "[t]he effect of inhibiting the healthy development of law by freezing into the Constitution a particular interpretation that is not mandated by its clear language."[803] He argues that such a result would be particularly damaging in the criminal law context as it is an area that:

> [i]s continually evolving, and this process should not be inhibited. Seen in this light, originalism is a particularly inappropriate doctrine to apply when attempting to interpret s. 24(2). Canadian law should not recognize a "frozen-rights" approach in its criminal law. The implications of such a doctrine are enormous. Accordingly, such an approach is universally regarded as unacceptable in

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[800] *Ibid.* at para. 43.
[801] *Ibid.* at para. 48.
[802] *Ibid.* at para. 61.
[803] *Ibid.* at para. 63.

> every other field of human rights law. There is no reason why the same standards should not be applied when interpreting s. 24(2).[804]

Instead of increasingly narrow, conservative re-interpretations of s. 24(2), Santoro posits that "[a] progressive interpretation of aggressive exclusion is necessary in order to ensure that Charter values are recognized in the Canadian criminal justice system."[805]

In the result, the originalist argument in the s. 24(2) context appears to be accurate in only one regard: it is clear that the language of the section does not contemplate the exclusion of all unconstitutionally obtained evidence. However, the doctrine of original intentions cannot be used to impugn the Supreme Court's current s. 24(2) jurisprudence, nor can it be used to restrict the reform of that jurisprudence. As Santoro suggests, "[t]here may very well be good reasons, logical, philosophical, or otherwise, to redevelop portions of the doctrine surrounding s. 24(2). It is clear, though, that this renewal must not be done in the name of the 'original intention' behind s. 24(2)."[806] In reality, there is no aspect of s. 24(2) or its legislative history that can be legitimately blamed or commended for Court's current interpretation and application of the *Charter's* exclusionary mechanism. The current test for exclusion has instead evolved out of a broadly worded section, and primarily as a matter of judicial choice. As the Court has been free to develop the current rule unhindered by the unsubstantiated notions of originalism, so too will its reform of the s. 24(2) jurisprudence be free from any such restrictions.

6.2. Properly situating s. 24(2) within the true rights-limiting mechanisms

The inapplicability of the originalist doctrine in the Canadian constitutional context means that the Supreme Court of Canada need not restrict its interpretation of s. 24(2) by appealing to the supposed intentions of the *Charter's* framers. Nor is it necessary for the Court to curtail the breadth of the exclusionary rule as a means of allowing for the achievement of legitimate policy goals. Unlike in the U.S., where both the due process protections created by the American Bill of Rights and the exclusionary rule created by the courts are absolute, the *Charter's* exclusionary mechanism exists in neither a legislative nor a jurisprudential vacuum. Other sections of the *Charter* deal specifically with the limitations that can be properly imposed on the individual rights and liberties belonging to Canadians. Both ss. 1 and 33 serve as mechanisms through which various legislative branches of government can impose limitations on the core legal rights in situations deemed necessary in the interests of policy or politics. As such, if *Charter* rights are

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[804] *Ibid.* at para. 73.
[805] *Ibid.* at para. 100.
[806] *Ibid.* at para. 100.

to be subject to limitations, they ought to be imposed through these mechanisms rather that through s. 24(2).

6.2.1. The "limitations clause"

The rights and freedoms set out in the *Charter* are subject to limitations. Such encroachments can also legitimately be made to accommodate policy goals and political preferences. Indeed, the language of the *Charter's* first section explicitly states as much. According to s. 1:

> [t]he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[807]

The constitutionally entrenched rights and freedoms in Canada, then, are distinct from their American counterparts in that a specifically enshrined constitutional mechanism exists to allow for their truncation in certain designated circumstances. Such limits need only be "reasonable", "prescribed by law", and "demonstrably justified in a free and democratic society".

The fact that limitations must be prescribed by law indicates that rather than imposing limits themselves, the Canadian courts have the power to review laws passed by the elected legislatures to ensure that they conform to the *Charter*. This power of review will in some cases extend to elements of the common law. When a reviewed law is found to contravene a section of the constitution, s. 1 gives the courts the power to ensure that only those limitations that are both reasonable and demonstrably justified are permitted to stand. In *R. v. Oakes*,[808] the Supreme Court of Canada set out what is still the authoritative interpretation of s. 1. In discussing the context in which the analysis under s. 1 takes place, Dickson C.J. noted that:

> [f]irst, [s. 1] constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitution Act, 1982) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms -- rights and freedoms which are part of the supreme law of Canada.[809]

The Chief Justice then reiterated the fact that *Charter* rights are not inalienable, observing that "[i]t may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance."[810]

Dickson C.J.'s judgment then set out the specific criteria required to demonstrate that a rights limitation was allowable according to the dictates of s. 1. First, the limit must be related to

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[807] *Charter*, *supra* note 36, s. 1.
[808] [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [*Oakes* cited to S.C.R.].
[809] *Ibid.* at para. 63.
[810] *Ibid.* at para. 65.

a concern that is both "pressing" and "substantial".[811] Second, the means chosen to achieve this pressing and substantial concern must be sufficiently proportionate.[812] This proportionality is then in turn assessed according to whether the limitation is rationally connected to achievement of the concern, whether it impairs the right as little as possible in satisfactorily attaining the goal, and whether the positive effects secured by the objective are sufficiently outweighed by the deleterious effects of the limitation.[813] Though Dickson C.J.'s test is not without its detractors,[814] the s. 1 methodology set out in *Oakes* continues to dominate the relevant jurisprudence more than two decades after the case was first decided, having been subjected to only a few, relatively minor alterations.[815]

The "limitations clause" contained in s. 1 essentially establishes the Supreme Court as the ultimate arbiter of legislative propriety in Canada. Any law proclaimed into force could potentially be challenged on *Charter* grounds, a fact that effectively transfers an enormous amount of power from the legislatures to the judiciary. In commenting on this transfer of power, Pamela Chapman observes that:

> [t]he role of the Courts has not only expanded [under the *Charter*], but has changed in a fairly radical way. Rather than simply deciding which level of government ought to have jurisdiction over a particular public policy, the judiciary has now been invited to hold legislative decisions up to scrutiny against a higher constitutional standard, and perhaps decide that *no* level of government can legislate in a given area.[816]

Similarly, in arguing that s. 1 vests judges with a broad authority to oversee the legislative process, Lajoie and Quillinan argue: "[t]his supreme constitutional control, specified by its application to the substance of the law instead of merely to its form, as often existed previously, cannot be anything but political control as well, given the discretion awarded to the judiciary."[817] As such, s. 1 ensures that the Canadian courts in general – and the Supreme Court in particular –

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[811] *Ibid.* at para. 69.
[812] *Ibid.* at para. 70.
[813] *Ibid.* at paras. 70-71.
[814] For a critique of the Supreme Court's application of *Oakes*, see Leon E. Trakman, William Cole-Hamilton & Sean Gatien, "*R. v. Oakes* 1986-1997: Back to the Drawing Board" (1998) 36 Osgoode Hall L.J. 83 [Trakman, Cole-Hamilton & Gatien].
[815] The consideration as to whether benefits of the limit were outweighed by its drawbacks was slightly revised in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 [*Dagenais* cited to S.C.R.]. The relevant portion of that judgment [para. 95] reads as follows: "[t]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures."
[816] Pamela A. Chapman, "The Politics of Judging: Section 1 of the *Charter of Rights and Freedoms*" (1986) 24 Osgoode Hall L.J. 867 at 867 [emphasis in original].
[817] Andreé Lajoie & Henry Quillinan, "Emerging Constitutional Norms: Continuous Judicial Amendment of the Constitution. The Proportionality Test as a Moving Target" (1992) 55 Law & Contemp. Probs. 285 at 286.

are in a position to ensure that *Charter* rights are sufficiently respected by Parliament and the provincial legislatures.

There is no doubt that the limitations clause contained in s. 1 applies directly to the *Charter's* core legal rights. The fact that certain of the *Charter's* due process sections – such as s. 8 – are expressly qualified by the concept of reasonableness, does not preclude a limitation of those rights being deemed reasonable for the purposes of s. 1.[818] Therefore, s. 1 of the *Charter* clearly provides the elected legislatures with the authority to enact laws that reasonably limit the core legal rights, provided that such limits are appropriately designed to achieve a truly pressing and substantial policy concern. In this way, s. 1 is directly related to s. 24(2) insofar as it is used to cure violations of the *Charter's* due process protections. When a due process right is limited by legislation and that legislation is subsequently saved by the courts under s. 1, the affected right is no longer considered violated, and the operation of s. 24(2) is thereby precluded. There is thus no need for the courts to resort to s. 24(2) in an effort to impose limitations on the practical impact of the core legal rights for strictly policy reasons as the legislative branch has the clear authority to do so on its own.

6.2.2. The "notwithstanding clause"

Despite the fact that s. 1 vested the elected legislatures with the necessary authority to transgress individual rights and liberties when doing so was deemed vital to the successful achievement of important policy goals, the framers of the *Charter* included an additional rights limiting mechanism in the document.[819] This second rights-limiting mechanism takes the form of s. 33(1) of the *Charter* – commonly referred to as the notwithstanding clause – which provides as follows:

> [p]arliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.[820]

In addition to the express declaration requirement set out in s. 33(1) itself, invocations of the notwithstanding clause have a limited lifespan. Enactments under this section remain in effect for

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[818] Hogg, *supra* note 148, at 869. See e.g. *R. v. Hufsky*, [1988] 1 S.C.R. 621, 84 N.R. 365 (the Supreme Court upholding a s. 9 violation under s. 1); and, *R. v. Thomsen*, [1988] 1 S.C.R. 640, 84 N.R. 347 (the Supreme Court upholding a s. 10(b) violation under s. 1).

[819] *Ibid.* at 878-879 (arguing that s. 33 was inserted in an effort to appease apprehensive provincial premiers by preserving the sovereignty of their respective legislatures).

[820] *Charter*, *supra* note 36, s. 33(1).

a maximum of five years, but can be renewed through re-enactment after the expiry of their specified terms.[821]

Although s. 24(2) is not technically a *Charter* right, and though it is not directly referred to in s. 33(1) as one of the *Charter* sections that can be specifically overridden by a competent legislative body, the notwithstanding clause nonetheless applies to s. 24(2) in much the same way as does legislation saved under s. 1. This is so as the federal Parliament or a provincial legislature could enact a law stating that a particular evidence gathering technique is permissible notwithstanding one of the core legal rights. Provided that the legislation contained all of the necessary elements set out in s. 33(1), and that it adhered to the requirements set out in the remainder of s. 33, the law would be sufficiently insulated from *Charter* scrutiny on the grounds that it violated any of ss. 8, 9, or 10(b). As such, in all situations covered by that law, it would be impossible for a court to find that a rights violation had occurred, meaning that s. 24(2) would never be triggered. Such a law would be tantamount to legislating that evidence obtained in violation of a core legal right is nonetheless automatically admissible at trial, regardless of whether or not its admission would bring the administration of justice into disrepute.

6.2.3. Limiting the limitation of rights

The combination of ss. 1 and 33 clearly vests the federal Parliament and the provincial legislatures with the power to pass laws that explicitly limit the core legal rights. As a result, the individual due process protections contained in the *Charter* are by no means absolute, and judicial decisions regarding the scope and practical impact of those rights are by no means final. As Hogg states, "[b]y virtue of s. 33, a judicial decision to strike down a law for breach of s. 2 or ss. 7 to 15 of the Charter is not final. The judicial decision is subject to legislative review. If the competent legislative body still wants the law, it can re-enact it by including the notwithstanding clause contemplated by s. 33."[822] The purpose of this exegesis is not to invite the federal and provincial governments to begin the process of imposing limits on the core legal rights through the enactment of regressive laws. Rather, the discussion of ss. 1 and 33 is intended to demonstrate that s. 24(2) need not be interpreted as a rights limiting mechanism. Given the realities of Canadian constitutionalism, the imposition of rights limitations should be expressly restricted to the overt exercise of the existing mechanisms specifically designed to accomplish those purposes. While ss. 1 and 33 clearly indicate that individual rights in Canada are not

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[821] *Ibid.* ss. 33(3) – 33(5).
[822] Hogg, *supra* note 148, at 886.

absolute, they do not imply that the courts have the authority to limit those rights using whatever constitutional or quasi-constitutional mechanism they deem fit for the exercise. To the contrary, if practical limits are to be imposed on *Charter* rights, they ought to be pursued through the appropriate constitutional channels in an open and forthright manner.

6.3. Creating an environment amenable to the effective reform of s. 24(2)

The core legal rights and s. 24(2) are potentially strong tools in the fight for individual rights protection in Canada's criminal prosecution process. However their potential in this regard is not without limitation. A new interpretation of s. 24(2) will not, on its own, spearhead a major reform of the current criminal justice system. It will not immediately reverse the disproportionate effect that Canadian criminal justice currently has on the disadvantaged. Reform of s. 24(2) could, however, ensure that the socially marginalized individuals who are presently targeted by police investigations have access to truly effective remedies for the violations of their core legal rights that occur in the course of those investigations, a change that could in turn begin to alleviate the repressive tendencies of contemporary criminal justice. Although critical legal theorists such as Allan Hutchinson would likely disregard such a suggestion as simply another example of a *Charter* proponent's willingness to stand idly by "waiting for Coraf",[823] the reform of s. 24(2) may indeed be the catalyst for the fundamental changes that Canada's criminal justice system urgently requires. In any event, the reform of s. 24(2) cannot help but have a beneficial effect as the current exclusionary rule is deeply flawed. What remains open to question is the form in which the necessary restructuring will proceed, and the extent of the change that the process of reform will bring about.

6.3.1. Changing the philosophy of exclusion

In order to facilitate a thorough and effective reform of s. 24(2), the courts must take a completely different approach to both Canada's exclusionary mechanism, as well as the very concept of excluding relevant and reliable evidence from the criminal trial process. The successful reform of the *Charter's* exclusionary rule will depend primarily on the Supreme Court of Canada's ability to successfully broaden the notion of disrepute as it exists within s. 24(2). However, this substantive step itself requires that the judiciary first recreate the entire exclusionary philosophy so that the successful operation of s. 24(2) comes to be seen as a vital complement to the core legal rights rather than as an unfortunate penalty that ought to be avoided

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[823] See Hutchinson, *Coraf, supra* note 81, at 5.

whenever possible. As a preliminary step in the reform of s. 24(2), then, the courts must change the manner and attitude in which judges commonly approach the issue of exclusion. Before broadening the circumstances in which the remedy of exclusion will become a real possibility, the courts must first legitimize the concept of exclusion itself. If the idea of exclusion continues to be resisted by the courts, either implicitly or explicitly, then the reform of s. 24(2) will inevitably fail.

As the treatment of unconstitutionally obtained evidence in the United States clearly indicates, the mere adoption of a broad and rigorous exclusionary rule will not, on its own, satisfactorily strengthen due process protections or instigate fundamental changes to the focus of criminal justice. To the contrary, without changing the jurisprudential attitude toward exclusion, the institution of a stronger exclusionary rule will likely have the opposite effect. The controversy regarding the U.S. suppression doctrine continues to flourish despite the fact that unconstitutionally obtained evidence in the U.S. has been subject to at least quasi-automatic exclusion in one form or another for the better part of a century. By most accounts, this controversy exists because the automatic suppression rule purportedly operates to exclude all illegally obtained evidence, regardless of the circumstances, and thus causes "perverse" outcomes in which the police and the public are unduly punished and the criminal is unduly rewarded. However, these criticisms should be understood against the background of a highly politicized judiciary, the most powerful portion of which – the United States Supreme Court – has seen fit to criticize the very exclusionary rule that it originally created. The U.S. Supreme Court has at least implicitly suggested that automatic suppression is an unprincipled legal mechanism that all too often permits the guilty to walk free. Prominent American defense lawyer and law professor Alan Dershowitz has described the U.S. Supreme Court's development of the "[s]o-called 'exclusionary' rule ..." in the following terms:

> [i]n the beginning was the basic exclusionary rule: simple, clear, easy to explain to the police and the public. If the government obtained the evidence unconstitutionally, then the government would not be able to use that evidence in a criminal trial. Then the limitations and exceptions began: the illegally obtained evidence could be used against defendants other than the one from whom it was obtained; it could be used if the defendant took the witness stand; it could be used by the grand jury ... Having muddied the waters by a series of confusing interpretations, some of the justices began to complain that the rule was no longer clear – that the waters were indeed muddy.[824]

In this way, the American judiciary has significantly affected the general opinion regarding the validity of exclusion as a remedy for rights violations. By denigrating its own exclusionary rule as unclear and unprincipled, the U.S. Supreme Court has encouraged popular and professional

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[824] Alan M. Dershowitz, *Taking Liberties* (Chicago: Contemporary Books, Inc., 1988) 13-14.

dissatisfaction with the suppression doctrine as it currently exists, and the very concept of exclusion on which that doctrine is based. This effect has been magnified by the creation of numerous exceptions to the rule of automatic exclusion, which leave observers with the general impression that the judiciary wishes to avoid the consequences of its own inflexible case law whenever and wherever possible. In these circumstances, it is unreasonable to expect that the legal community and the general public to endorse the exclusionary doctrine when even the judicial body that created the rule does not fully support it.

Similar to the American situation, the current Canadian approach to exclusion at least implicitly projects a judicial discomfort with losing relevant and reliable evidence through the operation of s. 24(2). This discomfort persists despite the fact that even proponents of a narrow exclusionary rule such as Steven Penney report that the suppression of illegally obtained evidence results in relatively few lost convictions.[825] Regardless, the judiciary's s. 24(2) decisions continue to portray exclusion as a negative consequence of the *Charter's* inclusion of the core legal rights. If a truly effective reform of s. 24(2) is to be accomplished, the Supreme Court must abandon this position in its entirety. The Court must instead demonstrate its support for the concept of exclusion as an appropriate remedy through which the core legal rights of all Canadians are strengthened, particularly in their practical sense.

It will not be enough for the judiciary to champion exclusion as a method of protecting the law-abiding public from rights abuses. Nor can the remedy be justified as successfully insulating the courts from the corruption and abuses that sometimes occur during the investigation and arrest of criminal suspects. The Court must instead recognize that exclusion is a necessary aspect of the core legal rights, particularly as they apply in the current social context of the criminal justice system. The Supreme Court of Canada must therefore interpret s. 24(2) in a manner that clearly indicates to all that it is unacceptable for the state to take unconstitutional steps in the investigation of crime, that the core legal rights were specifically intended to prevent just such steps from being taken, and that when such abuses occur, the state will be punished accordingly, and the victim will receive tangible, effective redress. In the absence of such a demonstration, exclusion will continue to be resisted by the courts and the public, police investigations will continue to be justified according to the type of evidence they produce, and the core legal rights of the socially marginalized will continue to suffer the negative consequences of these perceptions to a disproportionate extent.

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[825] See Penney, *Deterrance*, *supra* note 59, at 119 ("[t]he American experience teaches us that exclusion exerts a significant deterrent effect and generates few lost convictions.").

6.3.2. Acknowledging the practical impact of the *Charter's* core legal rights

Just as the Supreme Court must radically change the philosophical approach that it currently takes to exclusion, so too must it acknowledge the practical purposes of the core legal rights, how they apply in context, and how this relates to the necessity of s. 24(2). Although this topic is not typically addressed in the current jurisprudence or academic commentary pertaining to Canada's exclusionary mechanism, the protections set out in ss. 8, 9, and 10 are unique among *Charter* rights in that their practical application pertains mainly to individuals who, for a variety of reasons, are found to be involved in crime. In the regular course of events, the individuals who use these rights practically apply have been charged with an offence because the police have secured from them some form of incriminating evidence, regardless of whether that evidence was obtained using illegal or potentially illegal means. Because of the social realities of policing, this in turn means that the *Charter's* due process protections are used primarily by those racially and economically marginalized individuals whose crimes have been successfully detected as a result of the fact that the larger social groups to which these individuals belong are routinely subjected to more intensified forms of surveillance and investigation than are other, more advantaged social groups.

If the core legal rights are to have any justifiable and effective practical application, it is the individuals involved in crime who will be the necessary beneficiaries of the operation of those rights. If the factually guilty are considered less worthy of core legal rights than the factually innocent, then there is in reality no real reason to have due process rights in the first place. In order to ensure that the core legal rights exist as something more than symbols, then, the Supreme Court of Canada must explicitly acknowledge these rights for what they truly are: the means through which the state is prevented from investigating individuals whom it believes to be involved in criminal behaviour using any means it deems necessary for the purpose, even when the state's belief is in fact correct. All other, more theoretical justifications for due process protections must be abandoned because of their tendency to lead courts to either restrict the core legal rights themselves, or to use s. 24(2) to accomplish this purpose.

The core legal rights are clearly distinguishable from the other rights contained within the *Charter*. At their most basic level, the due process rights are principally concerned with restricting the ability of the state's investigatory branch from employing whatever means it deems necessary to collect relevant evidence of criminal activity. Each of the core legal rights works to prevent the state from misusing a specific investigatory technique that – when properly employed – is integral to the state's ability to detect and control crime. For instance, the right to

be free from unreasonable search and seizure is intended to prevent the state from searching any individual in any situation for any purpose it deems necessary.[826] It is not to prevent the state from searching, full stop. The qualification that only "unreasonable" searches are prohibited implies that the state has the authority to search and seize when circumstances indicate that doing so is reasonable, although this authority is not derived from the *Charter* itself.[827]

The individual's right not to be arbitrarily detained or imprisoned similarly prevents the state from detaining or imprisoning anyone it desires to detain or imprison for whatever reason it deems necessary. But as is the case with s. 8, s. 9 does not prevent the state from detaining or imprisoning individuals when doing so is not arbitrary. Furthermore, the rights set out in s. 10 are somewhat different in that they apply only to individuals who have been arrested or detained by the state. The s. 10 rights – perhaps the most important of which is the right to retain and instruct counsel – are intended to prevent the state from unfairly forcing people who have been arrested or detained into providing information in furtherance of the state's investigation. However, s. 10 only serves to ensure those individuals are made aware of the rights and protections available to them prior to providing the state with such information, not to outright prevent them from doing so. When ss. 8, 9 and 10 are considered as a group, it becomes clear that the basic function of the core legal rights is to recognize the state's ability to investigate individuals, while simultaneously recognizing the importance of ensuring that those investigations are carried out in a fair and reasonable manner.

Rather than simply relying on the basic practical purposes of the core legal rights in justifying their existence, the Supreme Court of Canada has instead sought to justify the existence of those rights by referring to their broader, more theoretical purposes. In this sense, the core legal rights are declared necessary for the protection of all Canadians, even those law-abiding individuals with whom the criminal justice system is not particularly concerned, and to whom it is in practice rarely applied. The idea in this regard is that the core legal rights do not exist simply to protect criminals from potential abuses by the state, but that they instead serve as the means through which all citizens are protected from the imposition of a "police state". Although this theoretical idea does acknowledge that the due process protections do sometimes safeguard the guilty, it stresses the fact that the restrictions they place on the state's investigatory branch are justified in that they also prevent the undue encroachment on the privacy and liberty

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[826] See e.g. *Kang-Brown*, *supra* note 624; and *A.M.*, *supra* note 625.

[827] *Southam*, *supra* note 462, at 650. Dickson J. ruled that s. 8 "[a]cts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not in itself confer any powers, even of "reasonable" search and seizure, on these governments."

interests of all individuals, thereby ensuring the preservation and continuation of a free and democratic society. This theoretical purpose has an undoubtedly broader appeal than the practical purpose, primarily because it suggests that the due process rights provide everyone with tangible benefits instead of serving only to prevent criminals from being "properly punished".

The Supreme Court of Canada routinely appeals to this overarching theoretical purpose when describing the nature the *Charter's* legal rights, in both its decisions pertaining to the substance of those rights, and its procedural decisions on the issue of s. 24(2). For example, in *Southam*,[828] Dickson J. described the purposes of s. 8 in the following terms:

> [t]he guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that *an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.*[829]

The Supreme Court has therefore based its development of s. 8 at least in part on the underlying principle that it is both proper and necessary to safeguard the fundamental interest in being left undisturbed by agents of the state, an interest possessed by all individuals regardless of their social position.

Similarly, in *R. v. Storrey*,[830] the Supreme Court continued to develop the core legal rights by using general societal protection as a partial justification. In this instance, the Court explicitly elaborated on the importance of ensuring that appropriate limits are placed on the investigatory powers of the police. When establishing that the lawfulness of an arrest must be based on reasonable and probable grounds, a majority of the Court observed that:

> [w]ithout such an important protection, even the most democratic society could all too easily fall prey to the abuses and excesses of a police state. In order to safeguard the liberty of citizens, the Criminal Code requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence.[831]

In this way, the Court routinely highlights the fact that the core legal rights – and the warrant procedures they have necessitated – protect all individuals from unwarranted intrusions by the state. By invoking mental images of totalitarian regimes and police states in which criminal justice is typically used against the powerful just as arbitrarily as it is against the powerless, the Court implicitly justifies the core legal rights in a manner that ignores the social environment in

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[828] *Southam*, *supra* note 462.
[829] *Ibid.* at 652-653 [emphasis added].
[830] [1990] 1 S.C.R. 241, 53 C.C.C. (3d) 316 [*Storrey* cited to S.C.R.].
[831] *Ibid.* at para. 14.

which they are normally triggered. This has the consequence of unnecessarily and unjustifiably limiting the situations in which the rights of marginalized individuals to whom the justice system is disproportionately applied are enforced with effective remedies.

This is not to say that protecting society-at-large from investigatory tactics characteristic of a police state is not an important goal; it undoubtedly is. But however laudable this theoretical aim may be, it bears little relation to the actual day-to-day workings of the criminal investigatory process, and thus ought to play a relatively minor role in the development of the core legal rights and the exclusionary rule to which those rights relate. The criminal justice system currently operates in such a manner that the core legal rights have little practical application to innocent individuals who have been subjected to unfair and arbitrary harassment by agents of the state, or at least not those individuals who possess the means of challenging such behaviour. Absent overt police misconduct in the form of fabricating evidence, a violation of the core legal rights of an innocent person will never produce incriminating evidence, and will therefore never result in the laying of criminal charges. No charges will result as the truly innocent individual will never be in possession of incriminating evidence. Without the laying of charges, the relative reasonableness or unreasonableness of the search will never be litigated in the course of a criminal trial. Unless the innocent individual uses their own resources to commence a personal action against the state claiming compensation for investigatory misconduct, the courts will never test the legitimacy of the particular investigatory technique that was employed. It is only when the violation produces some form of incriminating evidence that the rights breach is likely to come to light. In the result, the *Charter's* core legal rights have primary practical application to those who are involved in criminal activity.

Because the core legal rights are in practice relied upon primarily by individuals who have been charged with a criminal offence, the practical effectiveness of those rights is inextricably linked to the exclusion of unconstitutionally obtained evidence under s. 24(2). Given their specificity of application, it is difficult to establish what the core legal rights accomplish in the absence of exclusion. If a due process right can be routinely violated without a strong likelihood of the state losing the use of the evidence obtained in a manner that the due process right was created to specifically prevent, it becomes next to impossible to ascertain any legitimate reason for why that due process right was created in the first place. If what is produced by a violation of a core legal right is deemed admissible in the majority of criminal proceedings, then the trial process will remain largely as it would have been had the right not been included in the *Charter*. The only difference would be that in the former case, the state's misconduct is

acknowledged and implicitly condoned, while in the latter it is ignored altogether. Neither of these two outcomes is particularly appealing. Without a strong and effective exclusionary remedy, then, the core legal rights have little more than a purely symbolic meaning.

6.3.3. Acknowledging the need for change

If s. 24(2) is to be meaningfully reformed, the changes made to the exclusionary rule must take into account both the social context of the *Charter's* core legal rights, and the social context of the Canadian criminal justice system. The reality is that in practice, primarily individuals who are found to be involved in criminal activity use the core legal rights. This becomes problematic as the investigatory apparatus of the state is disproportionately applied to individuals living in racially and economically marginalized neighbourhoods. When viewed in this light, the *Charter's* due process protections have a far more limited application than is suggested by their overarching theoretical purpose, and that their effectiveness is inextricably linked to the remedy of exclusion. The Canadian courts must therefore specifically acknowledge that exclusion is a necessary complement to strong and effective core legal rights, and must also recognize that the primary practical reason for due process protections is to ensure that the state does not use abusive means to secure incriminating evidence from individuals involved in crime. Only with these foundations in place can s. 24(2) be reinterpreted and reformed in a manner capable of effective positive social change.

6.4. The critical reform of s. 24(2)

Over the past 25 years, the interpretation and application of s. 24(2) has developed in a manner that has a significantly negative impact on the practical effectiveness of the *Charter's* core legal rights, particularly as those rights apply to the marginalized individuals to whom the criminal justice system is over-applied. As a result, the Supreme Court of Canada's current regime for the exclusion of unconstitutionally obtained evidence must be fundamentally overhauled. That said, several of the less determinative elements of the s. 24(2) jurisprudence – namely the necessary link between the violation and the obtainment of the evidence; the party bearing the persuasive burdens; and the standard used to judge the accrual of disrepute – could essentially be left intact. However, if true reform is to be achieved, the Court's redevelopment of s. 24(2) must explicitly account for the social realities of criminal justice in Canada. The Court must acknowledge that the repressive tendencies of the justice system apply unequally to certain targeted social, racial and economic groups, and it must recognize that this social reality necessitates the development of an enforcement mechanism that ensures strong and expansive core legal rights for all

individuals in all situations. Put another way, the Supreme Court's new approach to s. 24(2) must ensure that in practice, the exclusionary rule satisfactorily safeguards the core legal rights of all Canadians in general, with a specific emphasis on ensuring the effectiveness of the due process rights of the socially and racially marginalized individuals to whom the criminal justice system is disproportionately applied.

The most effective method of ensuring that due process rights have a sufficiently broad practical impact is through the development of an aggressive exclusionary mechanism. While the express language of s. 24(2) does not envision the exclusion of all tainted evidence from the criminal trial process, the nature of the core legal rights and the manner in which they apply in practice indicates that without a strong suppression mechanism, the due process rights are empty and meaningless in an applied sense. The Supreme Court must therefore interpret the operative portions of s. 24(2) in an expansive manner, one that is unhindered by latent policy concerns falling beyond the general purview of the section. The key portion of s. 24(2) that must be radically overhauled is the section's central aspect – the notion of "disrepute". More specifically, the Supreme Court must broaden the circumstances in which the admission of unconstitutionally obtained evidence serves to bring the administration of justice into disrepute. The new definition must go beyond currently accepted notions of when the exclusion of relevant and reliable evidence is justified as a remedy. Disrepute must be recognized to accrue in a broader set of circumstances than those that involve violations of s. 10(b), the application of physical violence by the investigating officers, or some form of flagrant and intentional *Charter* violation. It must be acknowledged that the illegal police investigatory practices that are disproportionately applied to marginalized individuals serve to maintain their social marginalization, and thus necessarily bring the administration of justice into disrepute. If s. 24(2) is to achieve its full potential as a rights enhancing mechanism, then, the core of the *Therens/Collins/Stillman* regime must be dismantled, and the interpretation process begun anew with social context at the forefront.

6.4.1. The scope of the core legal rights and s. 24(2)

Proponents of a narrow exclusionary rule commonly argue that increasing the factual circumstances in which s. 24(2) operates will lead to a substantial decrease in the scope of the core legal rights themselves, thereby avoiding the *Charter's* exclusionary mechanism altogether. For example, J.A.E. Pottow suggests that judges reconcile the tension between a broad exclusionary rule, the undesirability of exclusion and the desire to attach remedies to rights

violations by reducing due process protections at the outset of the analysis. In this regard, Pottow argues:

> [t]he only way a judge can feed both beasts is to find no Charter breach at the outset, and hence avoid the need to consider the remedy. As such, the judge assuages the Remedy Principle that tugs at her conscience by rationalizing that there is no right in need of remedying in the first place ... very few judges, many of whom I doubt would even be doing so at a conscious level, would include in their judgments an express reference to their undermining an accused's substantive rights due to difficulties in crafting satisfactory remedies. But sometimes the process can be divined indirectly from a particularly striking holding: *res ipsa loquitur*.[832]

According to this argument, then, the reformed approach to exclusionary would have the opposite of its intended effect. Rather than increasing the practical impact of the core legal rights, the redefined notion of disrepute would significantly erode the substance of those rights themselves.

Despite the very real concern regarding the reformed approach's potential to reduce the scope of the core legal rights, the judiciary's adoption of the expanded definition of disrepute under s. 24(2) is fundamentally dependant upon the Supreme Court's general acceptance of the need to increase the practical impact of the *Charter's* due process rights in the first place. As the interpretation of Canada's exclusionary rule is largely a matter of judicial choice, only a judiciary that fully supports the reformed approach to s. 24(2) would expand the scope of the exclusionary rule. It would be entirely counterproductive for the Supreme Court to engage in a substantial reform of its exclusionary rule, one that was explicitly premised upon increasing the core legal rights of all individuals, and to then simultaneously work to reduce the scope of the due process rights in order to avoid triggering the reformed exclusionary rule at all.

Such a counterproductive approach would also clearly run contrary to the requirement that the core legal rights and s. 24(2) be interpreted and applied as a cohesive set of rights-protecting mechanisms. When such an interpretational cohesion is absent, the *Charter's* due process provisions become mere tools of legitimization for the criminal justice system's frailties rather than true individual rights protections. Legal philosopher and law professor Ronald Dworkin's conception of political responsibility accurately illustrate this notion. According to Dworkin, judges called upon to render decisions in unclear cases can only do so justifiably if their rulings do not run counter to other decisions they intend to render on related matters. Dworkin describes his theory of political responsibility as follows: "[t]his doctrine states, in its

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[832] Pottow, "Part II", *supra* note 59, at 99-100.

most general form, that political officials must make only such decisions as they can justify within a political theory that also justifies the other decisions they propose to make."[833]

If this theory were applied to s. 24(2), it would suggest that any decision to strengthen the scope of the exclusionary mechanism would be justifiable only within an interpretational theory that also demands the strengthening of the core legal rights. The same would be true for any decision to reduce the core legal rights themselves. Such a decision would not be justified unless it was accompanied by a decision that reduced the scope of exclusion. Judicial decisions rendered at cross purposes in this context would be clearly motivated by goals other than true rights protection. In this sense, it matters little whether it is the remedy available in s. 24(2) or the core legal rights themselves that are being reduced for legitimization purposes. The end result is inevitably the same: the criminal justice system is made to appear increasingly fair and impartial without actually becoming either of these things.

It is thus unlikely that the Supreme Court would engage in a substantial reform of s. 24(2) in an attempt to ensure that effective remedies are available for violations of the core legal rights insofar as they apply in their practical sense, while at the same time willingly rendering decisions that significantly restrict the application of those same due process protections. By the same theory, the Supreme Court would be equally unwilling to countenance decisions rendered by lower courts that would have essentially the same effect. That is, lower courts would be unable to avoid the reformed exclusionary rule by ignoring violations of the core legal rights as doing so would run counter to the Supreme Court precedents that govern the scope of those rights. As a result, it would be counter-productive to render such decisions, as they would be vulnerable to challenge on appeal. It is unreasonable to assume that the lower courts throughout Canada would be any less willing to abide by Supreme Court precedents setting out a reformed s. 24(2) than they are to adhere to the current pronouncements on the subject. In such a jurisprudential context, it is unlikely that a legitimate reform of the *Charter's* exclusionary mechanism could be responsible for a simultaneous decrease in the scope of the core legal rights.

6.4.2. Redefining disrepute in the s. 24(2) context

The current test for the exclusion of unconstitutionally obtained evidence has a nullifying effect on the core legal rights of all individuals, and particularly those who are targeted for increased police surveillance and investigation because of their social, economic and racial marginalization. The starting point for a fresh interpretation of s. 24(2), then, is the substantial

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[833] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 87.

reconfiguration of the method through which the admission of evidence related to a specific rights violation is deemed to bring the administration of justice into disrepute. In the current jurisprudential environment, the range of circumstances said to officially meet this threshold is overly narrow, having been created according to the dictates of conservative ideologies. As a result, there are essentially only two factual scenarios that lead to exclusion. First, a rights violation that produces conscriptive evidence not otherwise discoverable through alternative legal means – be those means theoretical or actual – will generally lead to the exclusion of the challenged evidence. Second, a rights violation committed in an extremely flagrant and overtly intentional manner and that produces non-conscriptive evidence will sometimes lead the exclusion of that evidence. In all remaining situations – which one might reasonably suspect would cover the overwhelming majority of rights transgressions – the unconstitutionally obtained evidence will be admitted, rendering the *Charter* violation of merely incidental importance to the overall trial process.

Clearly, this methodology is invalid. Its intense focus on whether evidence is conscriptive or non-conscriptive effectively permits the product of a rights violation to determine the issue of exclusion, leaving the substance of the actual *Charter* breach all but ignored. In the limited circumstances where that substance is actually addressed, the relative propriety or impropriety of the rights violator's actions will ultimately decide the outcome of the s. 24(2) analysis. In these situations, even when the actual outcome of a particular s. 24(2) decision is the exclusion of the challenged evidence, the judicial reasoning employed to reach that decision can effectively cause the narrowing of the factual circumstances in which exclusion will become available as a remedy. A particular decision on exclusion can produce this effect by implicitly raising the level of investigatory misconduct necessary to cause disrepute. For example, when an exclusionary ruling is based on the fact that the police used physical violence to secure the disputed evidence, there will be a future tendency to regard *Charter* violations that do not involve violence as less serious, and therefore less deserving of exclusion. Similarly, if a s. 24(2) ruling results in exclusion because the subject police officers engaged in a premeditated plan to subvert the *Charter* to secure incriminating evidence, violations that involve less overt misconduct will be deemed less serious, rendering exclusion less likely. The end result of this process is an ever-narrowing exclusionary rule, and thus an ever narrowing set of core legal rights.

The results-driven nature of this process stems directly from Lamer J.'s ruling in *Collins*, in which the Justice determined that rather than being concerned with the actual illegality of a rights violation committed by police, s. 24(2) was solely concerned with preventing the "further

disrepute" that could potentially flow from allowing the product of that illegal police action to be used at trial. On this point, Lamer J. held that:

> [m]isconduct by the police in the investigatory process often has some effect on the repute of the administration of justice, but s. 24(2) is not a remedy for police misconduct, requiring the exclusion of the evidence if, because of this misconduct, the administration of justice was brought into disrepute. Section 24(2) could well have been drafted in that way, but it was not. Rather, the drafters of the Charter decided to focus on the admission of the evidence in the proceedings, and *the purpose of s. 24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence in the proceedings.*[834]

This contention has had an undeniably constraining impact on the interpretation of s. 24(2). The logical extension of Lamer J.'s conclusion suggests that in at least some circumstances, evidence obtained by police in a manner that tends to bring the administration of justice into disrepute would nevertheless be useable at trial because its admission into the proceedings would not bring the administration of justice into disrepute. This reasoning – which creates a tenuous and highly artificial concept of disrepute – laid the foundations for the results-driven s. 24(2) analysis that developed over the next two decades. By fixating on the accrual of "further disrepute", the exclusionary rule progressed in a manner that relegated the actual rights violation to a purely peripheral position in the overall process. This has resulted in the creation of a body of jurisprudence that ignores certain elements of illegal police investigations that ought to bring the administration of justice into disrepute, thereby camouflaging the criminal justice system's disproportionate impact on targeted social groups. In this way, the current s. 24(2) resists the extension of due process rights to marginalized individuals and individuals involved in crime, the very people to whom the core legal rights apply in practice.

The thrust of the reform, then, must involve redefining the notion of disrepute insofar as it is currently used within the context of s. 24(2). This new definition must accurately recognize that all rights violations – regardless of the form of evidence they produce – carry with them the potential to cause at least some disrepute to accrue to the administration of justice. The focus of s. 24(2), therefore, should be on ascertaining the limited range of circumstances in which such disrepute does not actually flow from a rights violation. If the core legal rights are to be taken seriously, this analysis cannot properly be founded upon the evidentiary product of a particular rights violation. The disrepute flowing from the state's transgression of a vital aspect of Canada's supreme law can no more be legitimately mitigated by the type of evidence it secures than it can be lessened simply by virtue of the seriousness of the offence being investigated, or by the presumed good intentions of the rights violator. To suggest otherwise is to argue that an

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[834] *Collins*, *supra* note 52, at para. 31 [emphasis added].

individual only has due process rights when it is not inconvenient for the state to provide them with those rights. If true reform is to occur, the focus of s. 24(2) must be explicitly shifted away from the product of state's transgression of individual rights and onto those transgressions themselves.

6.4.3. Outlining a new interpretive methodology for s. 24(2)

The Supreme Court should avoid any strict, concretized articulation of the new test for the exclusion of evidence obtained in violation of the *Charter* lest it suffer the same fate as the "non-exhaustive" set of "guidelines" set out by Lamer J. in *Collins*. It is nonetheless instructive to set out in skeletal form a version of what a new approach to s. 24(2) might come to resemble. First, the necessary connection between the *Charter* violation and the obtaining of the evidence would remain a purely temporal one, structured in roughly the same manner as set out by Dickson C.J. in *Strachan*.[835] More specifically, provided that the violation occurred either before the evidence was obtained, or in the course of obtaining it, and as long as the rights violation and securing of the evidence were not rendered overly remote by the intercession of an extended period of time, s. 24(2) would continue to be triggered into operation in response to *Charter* transgressions. Mandating a direct causal link between the integral events is generally unacceptable as it unduly and artificially limits the circumstances in which exclusion could arise as a possible remedy.[836] Such an approach clearly runs contrary to an interpretation of the exclusionary mechanism that is intended to broaden the overall applicability of that rule. As Professor Don Stuart has observed in his discussion of the negative impact that would be occasioned by the imposition of a causal connection requirement, "[t]he Charter would be sterilized in its impact in criminal law if the remedy of exclusion were to be too curtailed."[837]

Second, as per the express language of ss. 24(1) and 24(2), the persuasive burden of demonstrating that admission of the impugned evidence could result in the accrual of disrepute would remain with the party seeking to have evidence excluded, namely the accused. There is simply no way around the specific wording of the section in this regard as the only party with any incentive to "establish" that admitting certain evidence would cause disrepute is the party who would be negatively effected by the use of that evidence. The only way for the accused to

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[835] *Strachan, supra* note 359.
[836] For the effects of a strict causal connection, see e.g. *R. v. Cohen* (1983), 148 D.L.R. (3d) 78, 5 C.C.C. (3d) 156 (B.C.C.A.) (where s. 24(2) was not triggered despite the police officer's use an illegal choke hold because the evidence was secured through a subsequent frisk search rather than the illegal throat search).
[837] Stuart, *Charter Justice, supra* note 52, at 485.

avoid this burden would be to place an artificial duty upon the Crown to ensure that its prosecutions would never result in damage to the justice system's reputation. However admirable such an endeavour may seem, advocating its inception into the s. 24(2) calculus would unreasonably force Crown counsel to engage in a process of self-deception, requiring as it would the same party to simultaneously argue both for and against the admission of a particular piece of evidence. Obviously, such a result is to be avoided. However, the fact that the relatively powerless accused is forced to bear the persuasive burden of proving both that his or her *Charter* right was in fact violated, and that the evidence produced by that violation would in fact result in the accrual of disrepute, should not be lost on the court that hears those applications. Indeed, the fact that the persuasive burden rests with the victim of a rights violation strongly advocates for a less rigid threshold for the establishment of the requisite disrepute under s. 24(2). Once this relatively low threshold is met, the presumption of disrepute would be achieved and exclusion would follow, except in cases where the Crown successfully rebutted this presumption.

Third, the notion that the assessment of disrepute in the exclusionary context ought to be accomplished by employing the "reasonable person standard" need not be altered. Although conservative academics argue that this standard deprives the general public from of its rightful role in determining questions of exclusion,[838] the Court has quite rightfully steered clear of allowing the average law-abiding Canadian to play a direct role in the determinations that are made under s. 24(2). Indeed, the oft-cited quote from Yves-Marie Morrissette on this point largely settles the issue:

> [a] convenient and longstanding legal fiction exists for the purposes of judicial dialectics: the reasonable man, whether it be the man on the Clapham omnibus or, perhaps today in Canada, the career-woman on the Voyageur bus. One commendable feature of this concept is its coherence. Judges may disagree among themselves on what the reasonable man would do in any given case, but in the end the courts never disagree with the reasonable man. They are, in reality, the reasonable man. The question should be: "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case?"[839]

Morrissette's technique for ascertaining disrepute is particularly apt for the new interpretation of s. 24(2). Indeed, if the person called upon to judge whether disrepute would accrue through the admission of particular evidence is truly reasonable, he or she will freely acknowledge the overwhelmingly disproportionate application of the criminal justice system to racially, economically and geographically marginalized Canadians. They will acknowledge that individuals involved in crime are worthy of protection from the abuses of the state in and of

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[838] See e.g. Paciocco, "Judicial Repeal", *supra* note 59; and Fraser & Addison, *supra* note 59.
[839] Morrissette, *supra* note 51, at 538.

themselves, not merely as the means through which the factually innocent are theoretically prevented from suffering such abuses. They will likewise take into account that given their specificity of application, due process protections that are not backed up by effective remedial mechanisms serve as little more than tools of legitimization for the injustices inherent in the criminal justice system. These realizations will in turn permit the reasonable person to regard all rights violations with great trepidation, and to acknowledge the disrepute that inevitably accrues to the justice system as a result of all but the most minimal of transgressions.

Finally, rather than engaging in backward-looking, overly complex analyses of the various forms of evidence that can be produced by violations of the core legal rights, the reformed approach to s. 24(2) would concentrate on identifying when a particular violation could be characterized as sufficiently minimal to warrant the possible admission of the evidence produced through that violation. That is, the focus of the exclusionary analysis under the new approach would be shifted from determining the circumstances in which unconstitutionally obtained evidence is excludable, to ascertaining the situations in which such evidence would be admissible. This reformed exclusionary rule would thus start from the assumption that a *Charter* violation would inevitably result in some form of disrepute. The determination as to whether or not the disrepute is excusable would itself be based entirely on an analysis of whether the rights violation in question could legitimately be considered minimal in nature. The language of s. 24(2) is certainly open to such an approach. There is nothing inherent in the wording of *Charter's* exclusionary mechanism that would prevent the Supreme Court from broadly defining the notion of "disrepute" such that it allows for the mitigation of only those rights violations that are truly minimal and incidental. Nor are there any external concerns that could legitimately be called upon to justify prohibiting such an interpretation.

The minimal violation approach to disrepute would likewise not offend the idea that s. 24(2) requires "all the circumstances" be considered before a decision on exclusion is rendered. This charge has often been levelled against the purportedly quasi-automatic exclusionary rule for non-discoverable conscriptive evidence set out in *Stillman*. Indeed, McLachlin J.'s (as she then was) dissent in that case rejected the majority's discussion of the trial fairness branch on precisely this ground, arguing that "[t]his approach is the antithesis of the balancing envisioned by the framers of s. 24(2). If one factor or set of factors determines admissibility, there can be no balancing. Nor can there be consideration of 'all the circumstances' as s. 24(2) requires. Instead there is simply an exclusionary rule: if the evidence will result in an unfair trial, then it must be

excluded."[840] L'Heureux-Dube J.'s *Stillman* dissent also disagreed with the majority's interpretation of s. 24(2), primarily because in her view, it did not satisfactorily address all of the relevant circumstances. On this point, the Justice observed that "[t]he test set out by this Court in Collins mandates a consideration of all the factors and circumstances of an individual case, and this inquiry should not stop after examining the first of these factors: the effect of the admission of the evidence on the fairness of the trial."[841] These dissents clearly suggest that any interpretation of s. 24(2) that focuses on a single element of a rights violation is unacceptable due to the plain language of the section that purportedly requires a broader-based analysis.

Despite these arguments, there is in reality no "plain meaning" that can be conclusively attributed to s. 24(2) in general, or its reference to "all the circumstances". As Daniel Santoro points out, "[t]he 'plain meaning' argument in this context is a clear red-herring. It is trite that 'all the circumstances of the case' should be considered when deciding whether to exclude evidence."[842] Indeed, such a principle certainly applies to essentially every judicial determination to be made in any given case. What is less clear to Santoro is why the majority's ruling in *Stillman* is to be considered a failure in this regard. In refuting this claim, he argues that "[t]he majority in Stillman simply articulated a forceful argument that in certain circumstances it is nearly always the case that evidence ought to be excluded – circumstances where the evidence is conscriptive."[843] Rather than unduly focusing on only one set of circumstances, Santoro concludes that the majority's much maligned discussion of the trial fairness branch:

> [i]s simply another way of saying that there are certain "circumstances" which always bring the administration of justice into disrepute, namely an unfair trial. Thus, even if all the other circumstances are evaluated, it could not change the fact that an unfair trial brings the administration of justice into disrepute. This is fatal, and cannot be alleviated. It does not seem, then, that the majority approach is on its face incompatible with a plain reading of the section.[844]

The majority's ruling in *Stillman* can thus be interpreted as resting on a consideration of "all the *relevant* circumstances". If a given factor makes all other circumstances irrelevant, there is no need to consider irrelevant factors simply in order to avoid being indicted by critics as not having fully canvassed the law as it is stated in *Collins*. If a court concludes that a given aspect of a rights violation would inevitably render any evidence thereby produced inadmissible under s. 24(2), it has considered "all the relevant circumstances", and the inquiry can properly end at that point.

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[840] *Stillman, supra* note 50, at para. 245.
[841] *Ibid.* at para. 183.
[842] Santoro, *supra* note 47, at para. 76.
[843] *Ibid.*
[844] *Ibid.* at para. 77.

Moreover, the very idea that "all the circumstances" can ever be sufficiently encapsulated within any methodological framework for s. 24(2) is entirely fictional. L'Heureux-Dube J. and McLachlin J. argue that the majority's decision in *Stillman* is invalid insofar as evidence of any type that is not subjected to the full *Collins* analysis transgresses the plain meaning of s. 24(2). However, it is not at all clear why the *Collins* decision is generally accepted as adequately setting out "all the circumstances" to be considered on an application for exclusion. This is particularly so as Lamer J.'s ruling in *Collins* does not suggest that the tripartite test set out therein was ever to be seen as ultimately determinative of all s. 24(2) applications. It was simply intended as an outline and summarization of some of the factors the Justice felt were particularly relevant to the issue of exclusion. In reality, no single statement of a legal test can fully capture "all the circumstances" that may in fact need to be considered in any specific case. As Joel Bakan has observed in relation the s. 1 test set out in *Oakes*:

> [i]t is not clear why the four criteria in the *Oakes* ... test constitute a uniquely correct interpretation of section 1. The words 'reasonable limit' and 'demonstrably justified' do not necessarily, or even obviously, translate into the Court's four-step test. The argument that the test was determined by the text of section 1 and the purposes that supposedly underlie it is simply implausible.[845]

The same can be said for the test in *Collins*, which is at its very core a judicial creation based primarily on subjective notions as to when unconstitutionally obtained evidence should be excluded from a criminal trial. It is no more and no less preordained by the wording of s. 24(2) than any other interpretation. As such, the mere failure to consider "all the circumstances" as they are articulated in *Collins* is not sufficient to invalidate an alternative approach to the *Charter's* exclusionary mechanism.

The key determination to be made under the reformed s. 24(2) analysis, then, is when a violation of the core legal rights can properly be categorized as sufficiently minimal to warrant use of the evidence produced through that violation against the individual who has been victimized by the illegal police practice. Such determinations will necessarily be made on a case-by-case basis rather than through the application of any rigid method of categorization. This flexible approach is necessary to account for the fact that the same aspect of a given rights violation may in one case exist as a purely minimal breach, while in another case, it may serve to deprive the accused of the essential substance of the right in question. Under this new approach, no specific category of violation would automatically result in exclusion. However, less analysis would be required in the face of all overtly serious, flagrant, and intentional violations. These

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[845] Bakan, *supra* note 528, at 28.

will be acknowledged as causing disrepute to the criminal justice system, and will thus necessarily lead to exclusion in all but the rarest of instances. In all cases, however, both the actions of the rights violator and the effects that those actions have on the victim of the violation must be considered in determining whether the transgression can be properly classified as purely minimal in nature. This process will ensure that the true nature of the actual rights violation remains at the forefront of the analysis, thereby ensuring that the core legal rights of all individuals are respected.

6.4.4. The truly minimal rights violation

Changing the focus of s. 24(2) in the manner suggested in this thesis would inevitably increase the range of factual circumstances in which unconstitutionally obtained evidence will be excluded from criminal proceedings. This does not mean, however, that all such evidence will be automatically deemed inadmissible. Instead, the courts will be required to determine the limited occasions on which disrepute will not flow from a violation of the core legal rights. Such situations would likely involve occasions on which the accused plays a significant role in the violation of his or her core legal rights.[846] Such a situation would arise if the accused engaged in unprovoked behaviour that substantially altered the form of the police investigation to which they were subjected, and eventually contributed in a meaningful way to a transgression of the *Charter's* due process protections.

For example, if an accused were to make an incriminating statement despite the investigating officer's earnest effort to comply with the core legal rights in general, and s. 10(b) in particular, the reformed approach to s. 24(2) would not demand exclusion unless there were some other factual circumstances that rendered the remedy necessary. Just such a situation occurred in *R. v. Harper*,[847] where the accused made his first admission of criminal culpability even before the police had a change to administer a s. 10(b) warning. Lamer C.J. related the salient facts of the case as follows:

> [t]he police were met by the appellant at the door who stated, 'I'm the guy you want. Just take me away.' The police officer who arrested the appellant testified that he told the appellant that, "He had the right to retain and instruct counsel without delay, and if he could not afford a counsel, legal aid was available to him". The police officer said that the appellant appeared to understand and replied, "Yeah, I know that." The police officer then advised the appellant of his right to remain silent, to which the appellant again responded, "Yeah, I know." While the officer was

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[846] See Stuart, *Charter Justice*, *supra* note 52, at 497, n. 327; and, 507, n. 403.
[847] See e.g. *Harper*, *supra* note 571.

> taking background information from the appellant, the appellant stated, "Shit. I did that to her, and she's pregnant too. How much time do you think I'll get? About nine months?"[848]

Despite finding a violation of s. 10(b) in the circumstances,[849] Lamer J. ruled that the evidence was admissible under s. 24(2) because "[t]he appellant appears to have had an almost irresistible desire to confess – both when he first opened the door and subsequently, after he received his s. 10(b) caution (albeit a defective one) and was advised of his right to silence."[850] Such a result would not be disturbed under the reformed approach to s. 24(2).

Situations other than the "irresistible desire to confess" could have the same result as did the accused's behaviour in *Harper*. For example, if the accused were to deliberately attempt to frustrate the genuine efforts of the police to abide by the *Charter's* due process protections by engaging in actions such as stalling for time,[851] or if he or she acted in an aggressive or abusive manner that was not provoked by the police and that was intended to prevent the officers from carrying out their *Charter*-related duties,[852] a resulting rights violation that could be properly characterized as minimal would not automatically result in exclusion of the unconstitutionally obtained evidence. In these situations, once the minimal nature of the violation was established, the accused would be required to demonstrate that their behaviour was explicable by direct reference to some instigating action of the investigating officers. If they were not able to do so, admission of the challenged evidence into the proceedings would be the likely result.

The type of *Charter* violation that could be properly described as minimal will undoubtedly be a rare occurrence. Essentially, only those violations that both appear minimal on their face, and those that can be satisfactorily corroborated by the investigating officer will be deemed truly minimal for the purposes of the reformed s. 24(2). All other violations, including those that may seem minimal, but that cannot be sufficiently accounted for, will be acknowledged as infringing upon the expanded notion of disrepute, and will thus trigger the *Charter's* exclusionary remedy. Despite increasing the scope of exclusion, the goal of expanding the notion of disrepute is not to simply assist individuals involved in crime successfully evade detection. Rather, it is to instigate reform to the current function of policing. Unless the status quo of Canadian criminal justice is challenged, its disproportionality will continue, as will the

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[848] *Ibid.* at para. 2.
[849] *Ibid.* at para. 10.
[850] *Ibid.* at para. 15.
[851] See e.g. *R. v. Tremblay*, [1987] 2 S.C.R. 435, 45 D.L.R. (4th) 445 (the accused actively obstructed the investigation by stalling when he was given the phone to contact a lawyer).
[852] See e.g. *Ibid.* (accused was violent, vulgar, and obnoxious in his interactions with the police to the extent that it affected their investigation).

negative consequences created by unequal forms of policing. The proposed reform of s. 24(2) is directed toward upsetting those aspects of the legal status quo that help maintain the broader context of social injustice in which the criminal justice system exists.

6.4.5. The immateriality of "good faith" police conduct in the reformed s. 24(2)

As argued in Chapter 1, the realities of policing in Canada indicate that individual officers cannot legitimately be presumed to have executed their day-to-day duties in good faith. The Supreme Court's current assessment of police conduct in the s. 24(2) context is therefore invalid and must be abandoned. A reformed approach to the *Charter's* exclusionary mechanism must explicitly prohibit trial judges from presuming good faith police conduct in all instances that lack evidence of overt, premeditated bad faith. The more technical approach to good faith is similarly invalid. Good faith police conduct cannot be inferred simply because the police the officers who acted unconstitutionally did so in reliance on some authority – be it legislative or judicial – that informed them that their actions were permitted at the time they were taken. Simply stated, it is improper to allow any form of the good faith concept to infiltrate the judicial decision-making process under s. 24(2).

As has been suggested, the presumption of good faith police conduct is contrary to the social reality of policing in Canada. With regard to the impropriety of the technical concept of good faith, Stephan Coughlan argues that even if the technical definition of good faith is used, the exception remains untenable as it conflicts with the purposive approach to constitutional interpretation. On this point, he argues that one must:

> [c]onsider the long-term consequences of admitting evidence in the actual cases in which investigative techniques are struck down. The police will cease to use that technique in the future, but the actual appellant will be no better off. In the long run, the message being sent is that there is no value to an accused in challenging police investigative techniques – in effect, that an accused should not bother to challenge police violations of individual rights.[853]

The removal of the incentives for an individual accused to challenge the legality of a police investigative technique will lead to fewer such challenges, and will ultimately allow the police to engage in dubious forms of investigation, provided that they have not already been deemed explicitly unconstitutional or illegal. On this point, Coughlan concludes that "[t]he good faith exception places the onus for supervising police practices not on the state but on accused persons. This is a questionable policy at best."[854]

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[853] Coughlan, *supra* note 60, at 312.
[854] *Ibid.*

Such a result is clearly at odds with the reformed approach to s. 24(2). It also clearly runs counter to Lamer J.'s ruling in *Collins*. In setting out a structural methodology to facilitate the judicial application of the *Charter's* exclusionary mechanism, Lamer J. observed that admissibility rulings should be considered not only in terms of how they will impact upon the case immediately before the court, but also as to how they will affect similar cases in the future. In discussing this issue, Lamer J. ruled that "[e]ven though the inquiry under s. 24(2) will necessarily focus on the specific prosecution, it is the long-term consequences of regular admission or exclusion of this type of evidence on the repute of the administration of justice which must be considered."[855] If the long-term consequence of admitting illegally obtained evidence because of "good faith" police conduct is to eliminate future litigation of unlawful police behaviour, then the regular admission of that evidence must impact negatively upon the administration of justice. Any judicial action that serves to further insulate the already under-scrutinized day-to-day actions of the police from external review enhances the problematic aspects of the low-visibility environment in which police investigatory misconduct flourishes, and thus cannot help but result in the accrual of disrepute to the administration of justice.

Any unacceptable aspect of the old s. 24(2) test must be equally incompatible with the reformed approach. The inevitable conclusion is therefore that the notion of good faith police conduct, regardless of how it is characterized, can never be legitimately determinative of a decision to admit unconstitutionally obtained evidence under s. 24(2) under either approach to exclusion. Police conduct can only be properly relevant to the issue of admissibility insofar as it involves the judicial assessment of whether the subject officers engaged in bad faith, a fact that under the new approach would negate a subject officer's ability to satisfactorily corroborate the fact that a right's violation that appears minimal in nature is indeed truly minimal. This process is distinguishable from the current s. 24(2) test in which the court assesses the propriety of police conduct by presuming good faith in all situations that do not involve physical violence or evidence of a premeditated plan to violate *Charter* rights. Under the new approach, the court would first determine whether the violation appears minimal in nature. If it does, then the conduct of the police would be assessed to determine if there was evidence of bad faith on the part of the investigating officers. If there was, exclusion would follow. If not, the officer would be given an opportunity to corroborate the minimal nature of the violation.

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[855] *Collins*, *supra* note 52, at para. 31.

In the result, if there is no evidence of bad faith conduct, the motives of the police in conducting a particular investigation will simply cease to be relevant under s. 24(2). The fact that the investigating officers did not act in bad faith cannot be permitted in any way to determine the admissibility of the disputed evidence. It is merely a neutral determination that the police acted in accordance with the responsibilities and duties of their position as law enforcement officers. The fact that an officer successfully did what it was his or her duty to do does not in any way decrease the severity of a *Charter* violation, and thus cannot legitimately be treated as doing so. It can only be relevant insofar as it serves to corroborate the minimal nature of a rights violation that appears minimal on its face. Thus, under the reformed approach to s. 24(2), the motives underlying a specific police investigation can be a factor in favour of excluding challenged evidence, but not one that functions on its own in favour of admission.

6.5. The new exclusionary rule in action

The reformed approach to s. 24(2) can perhaps best be explained by demonstrating how it might actually work in practice. In order to facilitate this demonstration, the new s. 24(2) methodology will first be applied to the facts that confronted the Supreme Court of Canada in a recent controversial s. 24(2) decision, *Orbanski*.[856] The new exclusionary rule will then be applied to the two fact scenarios discussed at the outset of this thesis, namely those of *Feeney* and *L.B.* Applying the new concept of disrepute to these three cases is instructive as they were each decided according to different rationales, all of which effectively reduced the scope of the *Charter's* exclusionary rule, and thus the scope of core legal rights. In brief, *Orbanski* saw the exclusion of conscriptive evidence obtained in violation of s. 10(b) because the fairness of the accused's trial was not impacted in a sufficiently negative manner by the rights breach, because the *Charter* violation in question was not overly serious, and because it would have done more harm to the justice system's reputation to exclude the evidence that it would to admit it. In *Feeney*, the evidence was excluded because the police violated the accused s. 8 rights by entering his home without a warrant, a breach that was so serious that the administration of justice would be brought into disrepute even though the evidence to be excluded implicated the accused in a murder. Lastly, in *L.B.*, the evidence was admitted because there were no *Charter* violations, and even if there had been, the challenged evidence would have been admitted because the police misconduct was not overly malicious, and because the accused's crime was extremely serious. By applying the new approach to s. 24(2) to each of these three cases, an attempt will be made to

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[856] *Orbanski, supra* note 49.

demonstrate how an exclusionary rule that is reconciled with the social realities of Canadian criminal justice would resolve the issues.

6.5.1. *Orbanski* revisited

The fact scenario in *Orbanski* is a relatively familiar one involving criminal allegations that transcend racial, economic and social boundaries. Two on-duty police officers patrolling the streets in a marked police vehicle during the early morning hours observed the accused's vehicle drive through a stop sign without stopping, and then proceed down a street in a somewhat erratic manner.[857] After following the vehicle for a short distance, the officers activated their vehicle's emergency equipment and executed a routine traffic stop on Orbanski's vehicle, of which he proved to be only occupant. Once the arresting officer engaged the accused in conversation, he detected the odour of alcohol emanating from the accused's breath and noticed that his eyes appeared glassy, both of which are physical factors that are readily accepted indicia of impairment by alcohol.[858] The officer then asked the accused if he had been drinking that night, and Orbanski admitted to having consumed one beer over the course of the evening. At that point, the officer asked the accused to exit the vehicle for the purposes of performing field sobriety tests.[859]

Upon exiting his vehicle, the accused was informed that the field sobriety tests were voluntary, and that he could contact a lawyer before performing them. The officer then offered Orbanski the use of a cellular phone for the purposes of contacting a lawyer.[860] Despite taking these necessary steps, the officer nonetheless failed to notify the accused of the fact that free legal advice was readily available to him at that time. The officer thus failed to satisfy the informational requirements of s. 10(b),[861] and the accused's rights under that section were therefore violated.[862] The accused ultimately declined to contact a lawyer at the roadside, agreed to perform the sobriety tests, promptly failed those tests, and was subsequently arrested for impaired driving.[863] After his arrest, he was transported to a police station, fully advised of his s. 10(b) right to counsel, and issued a demand to provide samples of his breath for analysis. Upon contacting legal counsel, the accused complied with this demand, eventually providing blood

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[857] *Ibid.* at para. 5.
[858] *Ibid.*
[859] *Ibid.*
[860] *Ibid.* at para. 6.
[861] See e.g. *R. v. Brydges*, [1990] 1 S.C.R. 190, 103 N.R. 282.
[862] *Orbanski, supra* note 49, at para. 6.
[863] *Ibid.* at para. 7.

alcohol readings that exceeded the legal limit. Orbanski was then charged with impaired driving contrary to s. 253(a), and driving "over 0.08" contrary to s. 253(b), both of the *Criminal Code*.[864]

A majority of the Supreme Court eventually ruled that the field sobriety tests and the police officer's questioning as to whether or not Orbanski had consumed alcohol prior to driving limited the accused's s. 10(b) rights,[865] but that these limits were ultimately justified under s. 1 as the "operational requirements" of the relevant statutory authority.[866] Thus, the accused's rights were deemed to have been limited rather than violated, meaning that s. 24(2) had not been triggered into operation. The majority therefore did not apply that section to the facts of the case. However, in a concurring opinion, LeBel J. declined to save the violations under s. 1,[867] and therefore proceeded with a s. 24(2) analysis.[868] He ultimately determined that although the violations of Orbanski's s. 10(b) rights produced non-discoverable, conscriptive evidence, the relevant Supreme Court of Canada case law had not created an automatic exclusionary rule for such evidence,[869] and that the relatively unserious nature of the violations rendered the evidence admissible under s. 24(2).[870] LeBel J. decided that the violations were not overly serious because they involved the mere failure to provide all of the necessary information required under s. 10(b), rather than the failure to provide any of that information at all. On this point, the Justice ruled that "[i]t is clear from the evidence that Mr. Orbanski did receive some information. In a very broad sense, some of the duties imposed on the police officer were met. Mr. Orbanski appears to have been given incomplete information about his own rights, but he understood what they were and declined to exercise them."[871] As a result, LeBel J. concluded that trial fairness had not been infringed, and that exclusion of the impugned evidence was not warranted on the other grounds of analysis set out in *Collins*.[872]

The fact scenario in *Orbanski* and LeBel J.'s assessment of those facts using the analysis set out in the *Therens/Collins/Stillman* regime serve as an illustrative counterpoint to how the new approach to s. 24(2) might be used to decide the case. *Orbanski* appears to involve a *prima facie* instance of a minimal rights violation. Rather than involving an outright derogation of a *Charter* right, the violation in *Orbanski* seems to have resulted from the actions of a "bungling

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[864] *Ibid.* at para. 8.
[865] *Ibid.* at para. 32.
[866] *Ibid.* at paras. 59-60.
[867] *Ibid.* at para. 79.
[868] *Ibid.* See paras. 85-104.
[869] *Ibid.* at paras. 92-93.
[870] *Ibid.* at para. 102.
[871] *Ibid.* at para. 103.
[872] *Ibid.* at para. 104.

constable". As LeBel J. notes, certain aspects of both the informational and implementational aspects of s. 10(b) were complied with by the officer at the roadside. More specifically, the officer informed the accused that he could contact counsel prior to performing the field sobriety tests (i.e. the informational aspect) and offered him use of a cellular telephone to accomplish this purpose (i.e. the implementational aspect). What the officer failed to do, however, was fully satisfy the informational branch by advising the accused about the availability of duty counsel and legal aid. There is nothing that immediately strikes one as egregious about such a violation, a fact that renders the evidential products of that violation at least a candidate for admission into the trial process.

If the new approach to s. 24(2) were applied to these facts, the focus would be on the assessment of how the rights violation impacts upon the core legal rights of the individual who was subjected to the investigation. Rather than looking to the nature of the evidence produced by the violation – which in this case is clearly non-discoverable and conscriptive – and then determining whether it is possible to admit that evidence at trial, the new approach would begin by carefully analyzing the elements of the rights violation itself, the results of which would then be used to determine admissibility. In *Orbanski*, the s. 10(b) violation does not appear to be overly serious on its face. However, it becomes far more serious when one considers the ease through which the officer could have avoided transgressing Orbanski's rights in the first place. Indeed, all that was required of the officer was for him to read a standard *Charter* caution to the accused. The caution consists of only a few short paragraphs, and it is standard practice throughout Canada for an investigating officer to read an approved version of that caution to an accused person verbatim, and out of the notebook that all police officers are required to carry. This is certainly not an onerous standard, and the officer's failure to abide by it indicates a fundamental lack of respect for the accused's core legal rights.

The investigating officer in *Orbanski* was clearly aware of the requirements of s. 10(b) insofar as he discharged a portion of his duty in that regard. His failure to entirely live up to the requirements of the section, and the ease with which he could have done so, strongly suggest that he consciously decided not to use the standard caution card, or that he negligently failed to do so. Under the new approach to exclusion, this investigatory behaviour would favour exclusion of the challenged evidence. Although the ultimate onus remains with the accused, in these circumstances the officer would be required to provide a strong reason justifying his decision to depart from the standard caution. It would not be sufficient for the officer to claim that he thought he had complied with the content of the section, nor would it be acceptable for him to

suggest that he did his best to fulfill the entirety of his duties. The fact that he failed to do so in circumstances where such success was objectively attainable effectively moves the *Charter* breach beyond the confines of the minimal violation category. Only in the extremely rare case would the failure to live up to an easily achievable *Charter* requirement nevertheless result in the admission of the evidence.

The new approach to s. 24(2) would also take into account the possibility that the officer's failure to fully adhere to the standard s. 10(b) caution was motivated by a conscious or subconscious desire to reduce the practical effect of the core legal right in question. In this case, the officer failed to inform Orbanski about the availability of free legal advice, which could simply have been the result of negligent police practice. However, it could also have been the result of a strategic method of undermining the substance of s. 10(b). Legal fees are often prohibitive, and the average person would likely rather avoid the expense if possible. To this end, the officer may have assumed that Orbanski would be less eager to contact counsel if he thought that doing so would come with a form of pecuniary penalty. In this way, there could have been a malicious intent to the officer's apparent "slip" in failing to advise the accused according to the terms set out by the Supreme Court in *R. v. Brydges*.[873] If this were the case, the violation of s. 10(b) could not legitimately be deemed minimal in nature. Once again, although the strict persuasive burden under the progressive approach continues to lie with the accused, the officer would in this case be required to provide evidence capable of vitiating the possibility of any such malicious intent. If the officer were not able to do so, exclusion would follow. Whether Orbanski would or would not have acted any differently had he been fully advised of his rights is immaterial to the question of whether his core legal rights were sufficiently respected by the subject officer in the course of the investigation and arrest process.

As this brief analysis shows, the reformed approach to s. 24(2) focuses on the core legal rights themselves, and whether or not the agent or agents of the state who are responsible for violating those rights nevertheless demonstrated sufficient respect for the role due process plays in creating and maintaining a fair criminal justice system. Under this new approach, it is the actual rights violation that is the determining factor under s. 24(2), not the form of evidence produced by that violation. The analytical trap set by the *Therens/Stillman/Collins* regime – the trial fairness branch – is dispensed with altogether. Instead, the analysis focuses on whether a particular rights violation can be categorized as sufficiently minimal in nature to warrant the

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[873] *Brydges*, *supra* note 861.

admission of evidence produced through its commission at the criminal trial of the victimized accused. This categorization will require the elicitation of a different sort of information than is currently produced in s. 24(2) applications. The accused necessarily bears the onus of demonstrating that disrepute could flow from admission of the impugned evidence, but this threshold will be set at an appropriately low level, namely that the violation was not of a minimal nature. Once this burden is satisfied, the rights violator will be forced to provide evidence to the contrary or settle for the fact that the evidence will be excluded under the reformed s. 24(2).

6.5.2. *Feeney* revisited

The Supreme Court of Canada's decision in *Feeney* is also based on factual circumstances that are useful for illustrating the differences between the current exclusionary regime and the new approach to s. 24(2). It will be recalled that *Feeney* involved alleged violations of the accused rights under ss. 7, 8, 9 and 10(b) of the *Charter*,[874] that the Supreme Court ultimately decided that the police had obtained the challenged evidence in violation of ss. 8 and 10(b), and that the majority concluded that the admission of that evidence would bring the administration of justice into disrepute.[875] The majority reached this conclusion by ruling that the initial police search of Feeney's trailer was performed in violation of s. 8, primarily because the police lacked a search warrant and there were no exigent circumstances to justify departure from this requirement.[876] The illegality of the police officers' initial entry into Feeney's trailer effectively rendered all subsequent searches illegal as well.[877] Furthermore, the majority found a violation of Feeney's s. 10(b) right to counsel as the police failed to provide the accused with a reasonable opportunity to contact a lawyer prior to embarking on their interrogation.[878] On the s. 24(2) issue, the majority excluded the conscripted statements in order to preserve the fairness of the accused's trial,[879] and ruled that the evidence seized from the trailer also had to be excluded as it was obtained through a serious breach of s. 8.[880] The unreasonable search was characterized as particularly serious because the police illegally entered the accused's home to make the arrest with the knowledge that they were doing so illegally.

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[874] *Feeney*, *supra* note 1, at para. 5.
[875] *Ibid.* at para. 5.
[876] *Ibid.* at paras. 51-52.
[877] *Ibid.* at para. 59.
[878] *Ibid.* at para. 57.
[879] *Ibid.* at para. 65.
[880] *Ibid.* at paras. 80-81.

For the purposes of the current analysis, the focus will be on the violation of s. 8 rather than the breach of s. 10(b) as the latter would be dealt with under the new approach to s. 24(2) in much the same way as that issue was resolved in the revisiting of *Orbanski*. Furthermore, it should be noted that the ultimate outcome in *Feeney* is by no means disagreed with. The police entered the accused's place of residence in violation of well-established warrant procedures without any reason for failing to secure a warrant. Under the new approach to s. 24(2) this form of police misconduct would clearly fall outside of the scope of investigatory abuse that could properly be characterized as minimal in nature. However, the new approach to exclusion would not characterize the form of police misconduct that occurred in *Feeney* as more serious solely because the s. 8 violation occurred in the context of the accused's home. Notions of private real property and home ownership simply have no place in the exclusionary analysis under the *Charter*. Indeed, such notions directly prejudice the socially and economically marginalized individuals to whom the justice system is already over-applied. Such individuals often reside in densely populated neighbourhoods that are commonly comprised of poorly maintained buildings, over-occupied apartment complexes and multiple family dwellings. There is also far less per capita home ownership in these neighbourhoods than in more socially advantaged areas, meaning that the former have significantly more transitory populations. Simply stated, individuals living in marginalized areas are more likely to be outside of their homes for a greater percentage of their daily lives because their homes are generally less desirable places to be than are the homes of individuals who reside in more socially advantaged and demographically stable neighbourhoods.

As a result of these social realities, adding the notion of private property and the sanctity of an individual's home to the analysis under s. 24(2) has the effect of reducing the core legal rights afforded to the socially marginalized. These individuals, who are generally more likely to over-selected for police investigations, are also more likely to be targeted by the police while they are outside their homes. In this context, the seriousness of an unconstitutional police investigation cannot be justifiably intensified by the fact that it occurred in a private home because this type of intensification simultaneously vitiates the seriousness of those rights violations that occur in other areas, such as passenger vehicles, on city sidewalks, or outside of high schools or night clubs. The reduction in the seriousness of the rights violations that occur in these contexts has a disproportionately negative effective on the racially and economically disadvantaged individuals who are more likely to encounter the criminal justice system. The new approach to s. 24(2) would therefore dispense with notions of private real property and the

sanctity of the individual home insofar as those notions detract from the core legal rights of individuals to whom their benefits generally do not apply.

If the new approach to s. 24(2) were applied to *Feeney*, the result would undeniably be the same as it was under the Supreme Court of Canada's current approach to exclusion. However, according to the reformed methodology, exclusion would result because the s. 8 violation in question occurred in a manner that could not be legitimately characterized as minimal in nature. In entering the accused's home without a warrant, and without the exigent circumstances that could possibly render a warrantless search necessary or justified in certain situations, the police failed to respect the accused's core legal rights, and therefore failed to undertake their duties in a sufficient manner. They simply selected the investigatory method that was the most easily accessible to them in the circumstances, and the one that was most likely to allow them to achieve the investigatory end that they desired to achieve, namely the arrest of a criminal suspect. The rights violation is also beyond the minimal range as the police made their investigatory selection with absolutely no regard for how the resulting search would impact upon the accused or his core legal rights. Though it may have been difficult in the circumstances for the police to quickly obtain a warrant before entering the home, there is absolutely no indication that they even considered doing so prior to commencing their search of the home. Any complications that may have accompanied the obtaining of a warrant are thus immaterial to the issue of exclusion.

Under the reformed approach to s. 24(2), the evidence challenged in *Feeney* on the basis of the s. 8 violation would necessarily have been excluded from the accused's trial. This result is inevitable not because the police violated the sanctity of the suspect's home in the course of their investigation, but because they violated the *Charter* rights of the accused in circumstances where the could easily have avoided doing so. Indeed, had the police stopped to consider how their investigation would impact upon the accused and his core legal rights, they surely could have determined how to employ their undeniably extensive police powers in a manner that would have rendered their investigation legal. If they did not have sufficient information to obtain a valid search warrant, then they ought to have continued their investigation until they had compiled the required evidence. The fact that the police executed an illegal and unconstitutional investigatory procedure in circumstances where it was entirely possible to proceed legally renders the resulting *Charter* violation serious in nature, and thus considerably beyond a truly minimal transgression of the core legal rights. Under the new approach to s. 24(2), this would be sufficient to exclude the challenged evidence, rendering it unnecessary to incorporate aspects such as the sanctity of

the private home into the exclusionary analysis, particularly when doing so decreases the practical effectiveness of the core legal rights of the socially and racially marginalized.

6.5.3. *L.B.* revisited

As discussed earlier, the Ontario Court of Appeal's decision in *L.B.* is representative of a recent jurisprudential trend in which Canadian courts are increasingly willing to condone illegal police behavior insofar as it secures evidence of firearms offences. Such crimes are currently considered particularly serious in light of the present moral panic regarding urban gun crime, which is predominantly associated with racialized individuals living in poor neighborhoods. In this context, unconstitutional police investigations are condoned in the current jurisprudential trend either through the direct narrowing of the core legal rights of the accused, or through use of the current s. 24(2) test, which can be used to decrease the practical effectiveness of those rights as they apply to persons implicated in particular crimes. In essence, the Ontario Court of Appeal employed both methods of condonation in *L.B.*, ruling first that because the police had not detained the accused, the protections set out in ss. 9 and 10(b) had not been triggered.[881] Second, Moldaver J.A. held that even if the officers had violated L.B.'s *Charter* rights, those violations would not have been of sufficient severity to exclude the evidence under s. 24(2),[882] and that exclusion would in fact have a far more negative impact on the repute of the administration of justice than would admission.[883]

If the new approach to s. 24(2) were applied to facts in *L.B.*, the Ontario Court of Appeal would be prevented from reaching this ruling. The reformed test would force the Court of Appeal – and all other courts in Canada – to confront not only those aspects of police investigations that are currently considered to bring the administration of justice into disrepute, but also those techniques that would be deemed to cause the accrual of disrepute if the social injustices exemplified by the system are first acknowledged, and then rejected. One such invalid police investigatory technique is the practice of racial and ethnic profiling. It is through this method of investigation that socially marginalized individuals are selected for enhanced surveillance and investigation based on certain of their irrelevant and immutable personal characteristics. Though no specific allegations were made that the investigation in *L.B.* was racially motivated in this manner,[884] the circumstances surrounding the accused's arrest strongly suggest that he came to

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[881] *L.B.*, *supra* note 20, at para. 72.
[882] *Ibid.* at para. 76.
[883] *Ibid.* at para. 79.
[884] *Ibid.* at paras. 58-59, 77.

the attention of the police because of both his race and his geographical location. Under the reformed approach to s. 24(2), this factor could not be overlooked.

In reality, L.B.'s arrest and eventual conviction were the direct products of the practice of racial, economic and geographical profiling. First, it must be acknowledged that there is a general tendency throughout Canada for the police to focus their proactive investigations on racially marginalized individuals residing in lower income neighbourhoods. Second, when the police first observed L.B., there was simply no objective reason to suspect that he was involved in any form of criminal wrongdoing. At best, the police could reasonably have suspected that he was engaged in truancy, given his age, the time of day, and the day of the week. As a young male, he fit the description of a high school student. Considering it was early afternoon on a weekday, the officers could have suspected that he ought to have been in class instead of sitting outside the school with his friend. Obviously, truancy is not a police matter, and thus cannot reasonably provide a basis on which the officers could have legitimately began any investigation of L.B., particularly one designed to determine whether he was engaged in criminal activity. In this context, the notion that L.B. was investigated on the basis of a "police instinct" or a "hunch" independent of racial profiling becomes implausible. Indeed, any such subconscious instinct or hunch was undeniably and inextricably linked to the fact that he was a young black male located in a neighbourhood in which young black males are considered to be commonly engaged in crime. Thus even such instinct or hunches are invalid reasons for the commencement of a criminal investigation.

Moreover, the fact that on this occasion, the police hunch eventually detected the presence of a handgun does not in any way mitigate the investigatory misconduct that led to that discovery. To suggest that it does is to implicitly condone every occasion on which a racially marginalized individual is arbitrarily selected for an investigation that does not discover any incriminating evidence. One cannot help but wonder how many factually innocent, racially marginalized individuals are questioned and investigated by police simply because of their physical appearance and geographical location. As argued earlier, the overwhelming majority of such instances will never come to light due to the onus placed upon the individual to independently seek a remedy through either the civilian complaint procedures that exist within police forces themselves, or in a civil court. The reduced likelihood that these processes will result in any tangible outcome further reduces their utility in detecting and punishing this form of

police misconduct.[885] Simply stated, the condonation of racial profiling in cases such as *L.B.* is tantamount to condoning the entire process of disproportionate policing that racially and economically marginalized individuals in Canada are subjected to on a routine basis. For every one L.B., there could potentially be hundreds of innocent individuals subjected the same unjust investigatory behaviour on the part of police. The reformed approach to the *Charter's* exclusionary rule would necessarily take these possibilities into account when determining the criteria to be included in the relevant test.

Under the new s. 24(2) regime, then, the challenged evidence in *L.B.* would be properly excluded at trial. When the social contexts of Canadian criminal justice and police investigations are properly taken into account, all forms of investigation that are motivated by racial profiling are necessarily deemed in violation of ss. 8 or 9 of the *Charter*. The reformed test for exclusion would explicitly acknowledge that race-based crime is a social construct, one that is in part created by the very over-investigation of marginalized racial and ethnic groups by the police that helps to render the criminal justice system unjust in the first place. The expanded concept of disrepute would be triggered by any attempt to use s. 24(2) to justify the over-policing of certain social groups by suggesting that it leads to the more efficient detection of their criminal activities. This type of purely crime-control inspired end does not justify the invalid means through which it is achieved. Because investigations involving racial profiling are clearly motivated by a discreet and systemic form of racial bias that serves to increase the negative impact that the disproportionate application of criminal justice has on the socially marginalized, the *Charter* breaches that occur as a result of such investigations would fall well outside the range of violations that could be characterized as truly minimal, and would therefore inevitably cause disrepute to accrue to the administration of justice. This in turn would mean that the new s. 24(2) would be triggered into operation, and the challenged would be thereby excluded.

6.6. Conclusion to Chapter 6

The social reality of Canada's criminal justice system requires the abandonment of the Supreme Court's current approach to s. 24(2). If the *Charter's* core legal rights are to adequately protect all elements of Canadian society from abusive investigations, the development of a new methodology for determining when evidence ought to be excluded from a criminal trial is needed. This reformed approach to exclusion need not be hindered by either the "original intentions" doctrine of constitutional interpretation, or the purported necessity of balancing

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[885] See e.g. Tanovich, *supra* note 224, at pp. 9-11.

policy interests with the rights of the accused. Neither of these arguments justifies a narrow interpretation of s. 24(2), nor one that affords the marginalized individuals to whom the mechanism of criminal justice is disproportionately applied. Judicial consideration of the circumstances in which exclusion will occur must dispense with its current concentration on the artificial distinction between conscriptive and non-conscriptive evidence. This preoccupation is invalid as it effectively ignores both the importance of the *Charter's* core legal rights and the social context in which those rights exist by shifting the focus away from the actual *Charter* violation and onto the type of evidence that it produces.

The reformed approach to s. 24(2) must be primarily concerned with ascertaining the limited range of violations that can be properly characterized as so minimal that the admission of evidence thereby secured would not negatively impact upon the justice system's fragile reputation. As a result, the judicial interpretation of s. 24(2) must be substantially reconfigured so that its concentration lies in identifying the infrequent circumstances in which unconstitutionally obtained evidence can justifiably be admitted at trial rather than continuing the current practice of discerning the few situations in which such evidence is necessarily excluded. This reform will ensure that the core legal rights have the practical effect of safeguarding all individuals – including those who are over-policed and over-prosecuted – from abusive treatment by the investigatory arm of the state.

Chapter 7. Conclusion

The Supreme Court of Canada's development of the *Charter's* exclusionary rule for unconstitutionally obtained evidence has been extremely controversial. The Court's three leading decisions on the interpretation and application of operative section – s. 24(2) – have generated a vast body of subsequent judicial treatment produced by various trial and appellate courts throughout the country. This body of case law is rife with contradictions, idiosyncrasies, and logical inconsistencies. The leading cases on exclusion have also received a considerable degree of highly critical academic commentary, and a largely negative response from the media and the general public. Much of the criticism of the Court's s. 24(2) jurisprudence is limited to assessing the specifics of the leading cases, often with a particular focus on the results of individual Supreme Court decisions. Despite the volume of commentary, its scope has been somewhat limited. In general, the related criticism lacks an analysis of the social realities in which s. 24(2) exists and operates. Given that the importance of circumstantial context to the section's application, such analysis is essential. If the true nature of the Supreme Court's exclusionary rule is to be ascertained, the subject must be approached critically using a methodology that examines the practical context in which s. 24(2) operates, as well as one that analyzes the decision-making process used by judges when deliberating upon the vague wording of *Charter's* exclusionary mechanism.

When viewed in its operational context, it is clear that s. 24(2) must be interpreted in a broad and progressive manner if it is to have any meaningful practical impact. First, the Canadian criminal justice system has evolved out of an English system characterized by its illegitimate focus on overt class oppression. The relevant statistics indicate that the contemporary criminal justice system in Canada is deeply repressive, and has a radically disproportionate application to the economically and socially marginalized. Given its origins and operational tendencies, the Canadian criminal justice system serves to maintain the social injustices inherent in the system itself, and broader society in general. Despite the apparent nature of this fact, the Supreme Court's current interpretation of the *Charter* and s. 24(2) has the effect of legitimizing the overtly unjust aspects of the justice system. It is in this context, then, that the validity of the Supreme Court's development of the *Charter's* exclusionary mechanism must be judged.

The Supreme Court of Canada has long employed tendencies in keeping with dominant ideological trends when dealing with the exclusion of relevant and reliable evidence obtained illegally or in violation of due process rights. The core principles of the Supreme Court's current interpretation and application of the section can still be found by examining the three leading

decisions: *Therens*, *Collins*, and *Stillman*. The major aspects of these rulings can be accurately condensed into a number of guiding principles. First, the accused bears the burden of proving that the admission of evidence could bring the administration of justice into disrepute. Second, s. 24(2) is triggered only when the impugned evidence's obtainment is temporally linked to the related *Charter* violation. Third, disrepute is to be gauged by employing the reasonable person test. Fourth, the factors to consider when ascertaining disrepute are: those that relate to trial fairness, those that involve the seriousness of the rights violation, and those that concern the effects of exclusion. Fifth, evidence must be initially categorized as either conscriptive or non-conscriptive. If conscriptive, its admission will generally bring the administration of justice into disrepute unless the Crown can prove that it was inevitably or independently discoverable. If the evidence is non-conscriptive, it will generally not affect trial fairness, and its admissibility will depend on the second and third *Collins* factors. Finally, there is no automatic exclusionary rule for conscriptive evidence that tends to affect trial fairness.

The Supreme Court's development of these steps was by no means inevitable. The vague wording of s. 24(2) ensured that significant judicial interpretation would be required before it could be applied in practice. It is the Court's decision-making process in this regard that has generated the bulk of the controversy pertaining to the exclusionary rule. The Court's interpretation and application of s. 24(2) is commonly viewed as overly broad and excessively pro-accused. The mainstream media and crime control commentators argue that the Supreme Court has created an exclusionary rule that unjustifiably favours criminals over victims, and that uses legal technicalities to consistently free the guilty. The pervasiveness of this view distracts from the reality that the Supreme Court's exclusionary rationale is characterized by logic inspired by the crime control mentality. A critical analysis of the Court's interpretation of s. 24(2) demonstrates that the current rule is founded on concepts and ideals with which the judiciary can subjectively identify. Even when most controversial, the Court's s. 24(2) decisions adhere to fundamentally conservative perspectives. The jurisprudence is firmly – even if subconsciously – designed to ensure the admission of all tangible evidence of criminal culpability.

The current interpretation of s. 24(2) has had severely negative practical consequences. The Supreme Court's leading decisions on exclusion leave violations of the core legal rights without meaningful remedies, thus robbing those rights of their meaning in the majority of contexts to which they apply. The current test is also prone to misuse in times of moral panic, and is thus often invoked to decrease the due process protections afforded to particularly targeted

individuals in particularly controversial circumstances. Furthermore, the Supreme Court's jurisprudence on exclusion allows the police to freely engage in investigations that violate the *Charter* provided that their behaviour is excused by the Court's presumption of good faith police conduct. As these negative repercussions indicate, the Supreme Court's development of Canada's exclusionary rule does not adequately ensure that the *Charter's* core legal rights are backed up with effective remedies, particularly insofar as those rights apply in the context of a criminal justice system that is disproportionately applied to the socially powerless.

Given the repressive and disproportionately applicable nature of Canada's criminal justice system, the subjective attitudes with which the Supreme Court interprets unclear constitutional provisions, and the negative effects that the contemporary exclusionary rule has on the criminal justice process, the current approach to s. 24(2) must be abandoned. In order for the *Charter's* core legal rights to be taken seriously, the current *Therens/Collins/Stillman* regime must be replaced by a new methodology for determining when evidence ought to be excluded from a criminal trial. This reform will require a radically redefinition of the concept of disrepute as it is used in the s. 24(2) context. The new definition will necessarily take the social context of Canadian criminal justice into account, as well as the practical environment in which the core legal rights, and therefore s. 24(2), are commonly applied. This new approach will then highlight the protection and enhancement of the core legal rights for all individuals by focusing on the limited range of violations that can be excused as purely technical in nature. This reform of the *Charter's* exclusionary rule will ensure that the core legal rights will adequately safeguard all individuals investigated by police, including those who are involved in officially defined crime. In so doing, this reform will seek to ensure that the core legal rights and s. 24(2) exist as more than mere tools of legitimization for the injustices inherent in Canada's current system of criminal justice.

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