Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the Charter

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Section 24(2) of the Canadian Charter of Rights and Freedoms grants courts the authority to exclude evidence obtained in a manner that infringes or denies any Charter rights or freedoms, provided the admission of such evidence would bring the administration of justice into disrepute. While the problem of deciding in what circumstances to exclude illegally obtained evidence has occupied both the Supreme Court of Canada and scholarly commentators, their efforts to date have been largely devoid of theory. This article seeks to remedy this situation by developing a single, coherent exclusionary theory. To this end, Professor Penney argues that the only worthwhile reason to exclude evidence under section 24(2) is to deter constitutional violations. A deterrence rationale allows for balance of the conflicting purposes of section 24(2): encouraging constitutional compliance and convicting the factually guilty.

In Part I, Professor Penney examines the most common justifications for exclusion of illegally obtained evidence–what he calls the "condonation" rationale, the "corrective justice" rationale, and the "deterrence" rationale–and concludes that deterrence is the only one that is normatively plausible. He further argues that the objective of the exclusionary rule should not be "maximum" deterrence, but "optimal" deterrence. In other words, evidence should be excluded only when the benefit of increased deterrence outweighs the cost of lost convictions. Part II of the article considers the available empirical evidence on the costs and benefits of the exclusionary rule and concludes that while an exclusionary rule can have a significant deterrent effect with few "lost convictions", its ability to deter is also limited by a number of phenomena, including most importantly, the complexity of constitutional rules governing investigative behaviour. In Part III, Professor Penney critiques Supreme Court section 24(2) jurisprudence in light of his exclusionary theory. Specifically, he argues that the Court should develop ways to deter violations of the Charter rights of third parties; that it should maintain its liberal approach to causation; that it should abandon both its "trial fairness" approach to self-incriminating evidence and its "balancing approach" to other evidence; and finally, that it should adopt a bright-line rule that encourages police to become reasonably well-informed about their constitutional obligations and signals to them that intentional and negligent violations will always result in exclusion. This approach would be consistent with both the wording of section 24(2) and much of the Court's jurisprudence. It would also go some way toward achieving a better balance between the rights-protection and truth seeking functions of section 24(2).

L'article 24(2) de la *Charte canadienne des droits et libertés* confère aux tribunaux le pouvoir d'exclure des éléments de preuve obtenus de manière contraire aux droits garantis par la *Charte*, si leur admission causerait préjudice à la bonne administration de la justice. La Cour suprême du Canada et les commentateurs ont examiné la question de savoir dans quelles circonstances de tels éléments de preuve devraient être rejetés. Toutefois, ces efforts ont été jusqu'à maintenant peu supportés par une réflexion théorique. Cet article se propose de remédier à cette situation en proposant une théorie de l'exclusion unifiée et cohérente. Le professeur Penney s'emploie à démontrer que la seule raison valable d'exclure des éléments de preuve en vertu de l'article 24(2) de la *Charte* est de décourager les violations constitutionnelles. Un principe fondé sur la dissuasion permet de réconcilier les objectifs opposés de l'article 24(2), à savoir d'encourager l'obéissance à la constitution de trouver coupables ceux qui le sont dans les faits.

Dans la première partie, l'auteur examine les motifs usuels pour l'exclusion de la preuve illégalement obtenue, qu'il regroupe en « raisons fondées sur l'excuse », « raisons de justice corrective » et « raisons de dissuasion ». Il conclut que seule la dernière est plausible d'un point de vue normatif. Il soutient également que le but de la règle d'exclusion n'est pas la dissuasion « maximale », mais plutôt la dissuasion « optimale ». Cela signifie qu'un élément de preuve ne devrait être exclu que lorsque le bénéfice d'une plus grande dissuasion surpasse le coût de condamnations perdues. La deuxième partie de l'article examine les données empiriques disponibles sur les coûts et bénéfices de la règle d'exclusion. L'anteur conclut que si celle-ci permet un effet dissuasif substantiel tout en occasionnant peu de « condamnations perdues », sa capacité à dissuader est limitée par un certain nombre de facteurs, parmi lesquels on comptera surtout la complexité des régles constitutionnelles gouvernant le comportement des enquêteurs. Dans la troisième partie, l'auteur se sert de sa théorie de l'exclusion pour critiquer la jurisprudence de la Cour suprême sur l'article 24(2). Il soutient en particulier que la Cour devrait développer des manières de décourager les violations des droits des tierces parties garantis par la *Charte*; qu'elle devrait maintenir son approche libérale sur les questions de causalité; qu'elle devrait abandonner à la fois son approche dite de « l'équité du procès » quant à la preuve auto-incriminante et son approche dite de « l'équilibre » quant aux autres catégories de preuve; et enfin qu'elle devrait édicter une règle stricte encourageant les corps policiers à être raisonnablement bien informés de leurs obligations constitutionnelles et leur indiquant que toute preuve obtenue en contravention intentionnelle ou négligente sera toujours rejetée. Cette approche serait à la fois conforme an texte de l'article 24(2) et à la plus part de la jurisprudence de la Cour. Elle contribuerait également à mieux équilibrer les fonctions de protection des droits et d'enquête de l'article 24(2).

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Introduction

Whether and in what circumstances courts should exclude illegally obtained evidence is one of the most hotly contested questions in criminal procedure and evidence law. It is not difficult to understand why. On the one hand, excluding reliable evidence on the basis that it was obtained improperly detracts from the truth-seeking function of criminal trials and makes it more likely that factually guilty defendants will evade conviction and punishment. Reflecting this concern, the common law traditionally denied the existence of any such power.[1] On the other hand, jurists have long argued that the absence of a power to exclude renders courts impotent to control or dissociate themselves from police misconduct.[2] Recent decades have thus witnessed a loosening of the common law position, and many jurisdictions now recognize a limited discretion to exclude improperly obtained evidence.[3]

But until the enactment of section 24(2) of the *Canadian Charter of Rights and Freedoms*,[4] only United States courts recognized a broad power to exclude evidence obtained in violation of constitutional norms. Section 24(2) was conceived against the backdrop of the American "exclusionary rule",[5] which in Canada is often (inaccurately) perceived to mandate exclusion in every instance of constitutional infringement.[6] 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.[7] Beyond that, the meaning of the provision is unclear. The Supreme Court of

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[1] See *Quebec (A.G.) v. Begin*, [1955] S.C.R. 593, 5 D.L.R. 394; *R. v. Wray*, [1971] S.C.R. 272, 11 D.L.R. (3d) 673. See generally Don Stuart, *Charter Justice in Canadian Criminal Law*, 3d ed. (Scarborough, Ont.: Carswell, 2001) at 466-69 [Stuart, *Charter Justice*].

[2] See Law Reform Commission of Canada, *Report on Evidence* (Ottawa: Information Canada, 1975) at 61-62.

[3] See *Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60, s. 78 (evidence may be excluded "if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."); *Lawrie v. Muir* (1949), [1950] J.C.A., [1949] S.L.T. 58 (H.C.J. Scot.); *Bunning v. Cross* (1978), 19 A.L.R. 641 (H.C.A.). See generally Steven Penney, "Unreal Distinctions: The Exclusion of Unfairly Obtained Evidence Under s. 24(2) of the *Charter*" (1994) 32 Alta. L. Rev. 782 at 784-95.

[4] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[5] See A. Anne McClellan & Bruce P. Elman, "The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24" (1983) 21 Alta. L. Rev. 205 at 234; Kenneth Jull, "Remedies for Non-Compliance with Investigative Procedures: A Theoretical Overview" (1985) 17 Ottawa L. Rev. 525 at 527-28.

[6] See *e.g. R. v. Collins*, [1987] 1 S.C.R. 265 at 280, 38 D.L.R. (4th) 508 [*Collins* cited to S.C.R.]; *R. v. Simmons*, [1988] 2 S.C.R. 495 at 532, 55 D.L.R. (4th) 673 [*Simmons* cited to S.C.R.].

[7] *Charter*, *supra* note 4. For discussions of the legislative history of the provision see McClellan & Elman, *supra* note 5 at 206-208; Stuart, *Charter Justice*, *supra* note 1 at 454-55, 476; David M. Paciocco, "The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule"

Canada has consequently devoted considerable energy to developing principles to guide trial judges in deciding when to exclude evidence on the basis of section 24(2). Commentators have subjected the complicated jurisprudence emerging from this effort to frequent and trenchant criticism.[8] This criticism, however, has been largely void of theory.[9] 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.[10] 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.[11] But few have attempted to prescribe an exclusionary regime that is tied to and justified by a single, coherent exclusionary theory.

This article represents such an attempt. I argue that the 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. This position is close to the contemporary American exclusionary rule,[12] which at least some of the Charter's architects sought

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(1990) 32 Crim. L.Q. 326 at 354 [Paciocco, "Judicial Repeal"]; Martin L. Friedland, "Controlling the Administrators of Criminal Justice" (1989) 31 Crim. L.Q. 280 at 292; James A. Stribopoulos, "Lessons From the Pupil: A Canadian Solution to the American Exclusionary Rule Debate" (1999) 22 B.C. Int'l. & Comp. L. Rev. 77 at 117-19.

[8] See *e.g.* R.J. Delisle, "*Collins*: An Unjustified Distinction" (1987) 56 C.R. (3d) 216 [Delisle, "*Collins*"]; Paciocco, "Judicial Repeal", *ibid.*; Richard Mahoney, "Problems with the Current Approach to s. 24(2) of the Charter: An Inevitable Discovery" (1999) 42 Crim. L.Q. 443; Carol A. Brewer, "*Stillman* and Section 24(2): Much To-Do About Nothing" (1997) 2 Can. Crim. L. Rev. 239; Peter Mirfield, "The Early Jurisprudence of Judicial Disrepute" (1988) 30 Crim. L.Q. 434; Stuart, *Charter Justice*, *supra* note 1 at 482-520; Stephen G. Coughlan, "Developments in Criminal Procedure: The 1996-97 Term" (1998) 9 Sup. Ct. L. Rev. 273; John A.E. Pottow, "Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24 (Part II)" (2000) 44 Crim. L.Q. 34 [Pottow, "Unified Approach"]; Paul L. Moreau, "*R. v. Stillman*", Case Comment (1997) 40 Crim. L.Q. 148 at 153.

[9] For an exception, see Jull, *supra* note 5. Richard Mahoney has gone so far as to argue that theory is irrelevant to the proper interpretation of section 24(2). It is improper, in his view, to substitute any theoretical framework for the plain language of the provision, which commands that exclusion be based on the repute of the justice system. See Mahoney, *ibid.* at 446-50. It seems clear to me, however, that the phraseology of section 24(2) is largely devoid of intrinsic meaning, and that inevitably some effort must be made to ground the provision in theory and policy.

[10] See *e.g.* Stuart, *Charter Justice*, *supra* note 1 at 480-520; Paciocco, "Judicial Repeal", *supra* note 7.

[11] See *e.g.* Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora, Ont.: Canada Law Book, 1994) c. 10 [Roach, *Constitutional Remedies*].

[12] See *United States v. Leon*, 468 U.S. 897 (1984) [*Leon*]; *Illinois v. Krull*, 480 U.S. 340 (1987) [*Krull*]; *Arizona v. Evans*, 514 U.S. 1 (1995) [*Evans*].

to avoid.[13] But having started down the exclusionary road, it is the only reasonable destination.

My argument proceeds as follows. In Part I, I evaluate the most common justifications for exclusion and conclude, as the United States Supreme Court has long maintained,[14] that deterrence is the only one that is normatively plausible. The other main exclusionary rationales—avoiding judicial condonation of police misconduct and compensating victims of overreaching—fail straightforward cost-benefit tests.

Concluding that deterrence is a normatively plausible justification for exclusion, however, gets us only part of the way. We must also demonstrate that in practice evidentiary exclusion is better able to achieve its objective than are its alternatives. That objective is not "maximum" deterrence (awarding remedies to deter as much misconduct as possible), but rather "optimal" deterrence (awarding remedies only when the benefit of increased deterrence outweighs the cost of lost convictions). We can assess the utility of the exclusionary remedy, then, by estimating its impact in inducing constitutional compliance *as discounted* by its effect in causing factually guilty defendants who would otherwise have been convicted to go free. Part II therefore considers the available empirical evidence on the benefits and costs of the American exclusionary rule. Contrary to the views of many, this evidence shows fairly definitively that exclusion has a substantial deterrent effect and causes few "lost convictions". It also demonstrates, however, that this deterrent effect is limited by a number of phenomena, including most importantly, the fact that some constitutional rules governing investigative behaviour are too complex for police to understand. This part also examines alternative methods of enforcing constitutional compliance, concluding that they would be less likely to achieve optimal deterrence than exclusion.

In Part III, I critique the Supreme Court of Canada's section 24(2) jurisprudence with the conclusions of Parts I and II in mind. I argue that the Court should develop ways to deter violations of the Charter rights of third parties and that it should maintain its liberal approach to causation. I also recommend that the Court abandon both its "trial fairness" approach to self-incriminating evidence and its "balancing" approach to other evidence. The trial fairness approach, which mandates the virtually automatic exclusion of self-incriminating evidence, relies on the discredited "corrective justice" exclusionary rationale and cannot be justified on deterrence grounds. The balancing approach, which decides the admissibility of evidence that is not self-incriminating by weighing the seriousness of the Charter violation against the seriousness of the offence and the importance of the evidence to conviction, is normatively plausible. But it does not produce enough *ex ante* certainty for optimal

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[13] See Paciocco, "Judicial Repeal", *supra* note 7 at 342.

[14] See *Elkins v. United States*, 364 U.S. 206 at 217 (1960); *United States v. Calandra*, 414 U.S. 338 at 347 (1974). See also *Stone v. Powell*, 428 U.S. 465 (1976) [*Powell*]; *United States v. Janis*, 428 U.S. 433 (1976); *Leon*, *supra* note 12; *Evans*, *supra* note 12; *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998).

deterrence; that is, it fails to deter many violations *ex ante* that a court applying an *ex post* balancing test would conclude warrant exclusion. Optimal deterrence instead requires a bright-line exclusionary rule that encourages police to become reasonably well-informed about their constitutional obligations and signals to them that intentional and negligent violations will always result in exclusion. It does not insist, however, that the Court adopt an automatic exclusionary rule. Optimal deterrence can be achieved by admitting evidence when (and only when) the violations that produced them were inadvertent and reasonable. This standard is compatible with the wording of section 24(2) as well as much (but not all) of the Court's jurisprudence relating to the "seriousness" of the constitutional violation.

I. Justifications for Excluding Illegally Obtained Evidence

Jurists have put forward three main justifications for excluding illegally obtained evidence: avoiding judicial condonation of police misconduct (the "condonation" rationale), compensating victims of violations to restore the status quo ante (the "corrective justice" rationale), and deterring constitutional violations (the "deterrence" rationale). The Supreme Court of Canada has directly or indirectly endorsed all three as reasons to exclude evidence under section 24(2) of the Charter. In *Collins*, it stated that while police misconduct "often has some effect on the repute of the administration of justice, ... s. 24(2) is not a remedy for police misconduct ... "[15] Rather, the provision's purpose is to prevent the "further disrepute" occasioned by the admission of evidence that would "deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies."[16] This statement explicitly refers to the condonation rationale. And as will be discussed in more detail later, the Court's approach to ensuring the "fairness" of the hearing, which requires the automatic exclusion of non-discoverable, self-incriminating evidence, is grounded in the corrective justice rationale.[17] Lastly, while the Court in *Collins* was skeptical of the use of exclusion to directly discipline police, in later cases it has stated that exclusion is designed in part to "oblige law enforcement authorities to respect the exigencies of the *Charter*" and to "promot[e] the decency of investigatory techniques ... "[18]

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[15] *Collins*, *supra* note 6 at 280-81.

[16] *Ibid.* at 281. The idea that admitting illegally obtained evidence stains the integrity of the judiciary first gained prominence in the dissents of Justices Holmes and Brandeis in *Olmstead v. United States*, 277 U.S. 438 (1928). See also Robert M. Bloom, "Judicial Integrity: A Call for its Re-emergence in the Adjudication of Criminal Cases" (1993) 84 J. Crim. L. & Criminology 462.

[17] See discussion *infra* notes 116-17 and accompanying text.

[18] *R. v. Burlingham*, [1995] 2 S.C.R. 206 at paras. 25 and 50, 124 D.L.R. (4th) 7 [*Burlingham* cited to S.C.R.]. See also *R. v. Kokesch*, [1990] 3 S.C.R. 3 at 35, [1991] 1 W.W.R. 193 [*Kokesch* cited to S.C.R.]; *R. v. Stillman*, [1997] 1 S.C.R. 607 at para. 126, 185 N.B.R. (2d) 1 [*Stillman* cited to S.C.R.]; *R. v. Feeney*, [1997] 2 S.C.R. 13 at para. 82, 146 D.L.R. (4th) 609 [*Feeney* cited to S.C.R.]; *R. v. Buhay* (2003), 225 D.L.R. (4th) 624 at para. 70, 2003 SCC 30 [*Buhay* cited to D.L.R.].

We can dismiss the condonation rationale fairly easily. In the eyes of most citizens, excluding illegally obtained evidence harms the reputation of the justice system much more often than admitting it does.[19] There is no indication, moreover, that in the years before the Charter the absence of an exclusionary remedy fomented widespread disrespect for the system.[20] But even if we assume that the system's reputation is occasionally harmed by the admission of the evidentiary fruits of police misconduct (for example, where police have acted reprehensibly and the offence is not terribly serious), it is not because the use of such evidence in the proceedings is inherently unseemly. Rather, it is because admission represents a lost opportunity for deterrence. If there were no possibility that excluding evidence might deter future misconduct, then the costs of exclusion would clearly outweigh whatever marginal, ephemeral benefit that might be gained from avoiding judicial "complicity" in police impropriety. Factually guilty defendants would be more likely to be acquitted and future criminal suspects would be no less likely to endure abusive investigative practices. Indeed, divorced from considerations of deterrence (or possibly compensation, as I discuss in more detail below), the reputation of the justice system would likely suffer from any instance of exclusion, no matter how egregious the misconduct or trivial the offence. Admitting evidence in these (hypothetical) circumstances does not condone police misconduct. It simply recognizes that the violation cannot be undone, that exclusion would not prevent future misconduct, and therefore no purpose would be served in suppressing reliable evidence of guilt. To the extent that condonation rhetoric has any normative appeal, it is as a proxy for the deterrence rationale. It does not in itself justify the exclusion of illegally obtained evidence.

The corrective justice rationale is initially more appealing. It justifies the exclusion in order to compensate victims of overreaching and reinstate the status quo ante between the individual and the state.[21] The state should not be permitted, on this view, to benefit from violating criminal suspects' rights by using unconstitutionally obtained evidence to help convict them. The problem with this argument, however, is that evidentiary exclusion provides entirely too much compensation to criminal defendants. In the vast majority of cases, the exclusion of inculpatory evidence will be worth much more to defendants than avoiding the harm induced by constitutional violations. The exclusion of unconstitutionally obtained evidence makes it more likely that defendants will be acquitted. The social stigma, economic repercussions, and penal sanctions accompanying criminal conviction are generally extremely severe. If they could afford to do so, most defendants would be willing to pay

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[19] See Alan W. Byrant *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 33.

[20] See *R. v. Duguay* (1985), 50 O.R. (2d) 375 at 392, 18 C.C.C. (3d) 289 (Ont. C.A.), Zuber J., dissenting, aff'd [1989] 1 S.C.R. 93.

[21] See Jull, *supra* note 5 at 530-31; Kent Roach, "The Evolving Fair Trial Test Under Section 24(2) of the *Charter*" (1996) 1 Can. Crim. L. Rev. 117 [Roach, "Evolving"]; Roach, *Constitutional Remedies*, *supra* note 11 at paras. 10.30-10.60.

considerable sums to reduce the likelihood of suffering these consequences. These payments would in most cases far exceed the amount that defendants would accept, *ex ante*, as compensation for permitting the police to violate their Charter rights.[22] Excluding unconstitutionally obtained evidence, in other words, gives most defendants a windfall—the remedy is grossly disproportionate to the wrong.[23] Corrective principles only justify exclusion in those rare cases where the violation causes severe harm and the consequences of conviction are unusually benign.

If the foregoing analysis appears too crassly economic, then consider the corrective justice rationale through a moral lens. The immediate benefits of exclusion accrue to the factually guilty.[24] In most cases, the state's misconduct in violating the Charter pales in comparison to the accused's misconduct in committing a criminal offence.[25] Criminal procedural rights protect both the innocent and the guilty against investigative abuses, but this does not mean that the latter are as deserving of the state's concern and respect as the former. The Charter protects guilty suspects chiefly because police cannot be certain, *ex ante*, who is guilty and who is not.[26] 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

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[22] See Donald Dripps, "The Case for the Contingent Exclusionary Rule" (2001) 38 Am. Crim. L. Rev. 1 at 16-17 [Dripps, "The Case"].

[23] Exclusion also does nothing to compensate persons whose Charter rights are violated without producing inculpatory evidence, though such persons can theoretically seek compensation by other means. See Paciocco, "Judicial Repeal", *supra* note 7 at 335.

[24] While the exclusion of evidence under section 24(2) may benefit the innocent accused, it does so incidentally and arbitrarily. As I discuss at *infra* note 116, courts can exclude unreliable evidence that might lead to wrongful convictions without resort to section 24(2).

[25] Exceptions might arise when the accused's conduct is controversially criminal, such as the possession of "soft" drugs, and the police employ heavy-handed, privacy-invasive tactics.

[26] See *R. v. Edwards*, [1996] 1 S.C.R. 128 at para. 64, 26 O.R. (3d) 736, La Forest J., concurring [*Edwards* cited to S.C.R.] ("We 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."); Henry J. Friendly, "The Bill of Rights as a Code of Criminal Procedure" (1965) 53 Cal. L. Rev. 929 at 951 ("A defendant is allowed to prevent the reception of evidence proving his guilt not primarily to vindicate his right of privacy, since the benefit received is wholly disproportionate to the wrong suffered, but so that citizens generally ... may be 'secure ... against unreasonable searches and seizures.'"); *Brinegar v. United States*, 338 U.S. 160 at 181 (1949), Jackson J., dissenting ("Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.") See also Steven Penney, "A Concern for Innocence: Justice La Forest and the Criminal Law" in Rebecca Johnson *et al.*, eds., *Gérard V. La Forest at the Supreme Court of Canada: 1985-1997* (Winnipeg: The Supreme Court of Canada Historical Society / Canadian Legal History Project, 2000) 217 at 235 [Penney, "A Concern"].

in ways that would clearly violate the Charter if applied to non-offenders.[27] Criminal defendants have no right not to be convicted on the basis of illegally obtained evidence.[28] Excluding evidence to restore the status quo ante between criminals and the law abiding public, therefore, is morally unjustified. There is nothing wrong with compensating victims of police overreaching for the injuries they have suffered, even if those victims have committed crimes. The compensation should, however, be proportional to the harm caused by the violation. In the vast majority of cases, evidentiary exclusion would not be.

To summarize, whether measured in terms of ensuring judicial integrity or providing appropriate compensation to victims of overreaching, the benefits of exclusion are clearly outweighed by its social costs. Divorced from deterrence considerations, the reputation of the justice system would be better served by admitting illegally obtained evidence than by excluding it. And if constitutional remedies are supposed to compensate victims of investigative abuses, then monetary damages or other remedies would be more appropriate than evidentiary exclusion.

II. The Deterrent Effect of Exclusion and Its Alternatives

The merits of excluding evidence to deter constitutional violations are more difficult to assess. Deterring police from violating the rights of innocent suspects is undoubtedly a laudable objective. Excluding unconstitutionally obtained evidence may give some factually guilty defendants a compensatory windfall, but the deterrence rationale's proponents assert that this cost must be incurred in order to ensure constitutional compliance.[29]

We do not, however, want as much deterrence as we can get. As with criminal punishments, courts should aim for "optimal" and not "maximum" deterrence.[30] Sanctions for constitutional violations, in other words, should only be awarded when their social benefits (increased deterrence) outweigh their social costs (lost convictions). Many jurists have accordingly argued that deterrence does not justify exclusion.[31] They maintain that exclusion is not an especially effective deterrent; that its social costs are unacceptably high; and that there are other methods of deterring

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[27] See *e.g. Weatherall v. Canada (A.G.)*, [1993] 2 S.C.R. 872, 105 D.L.R. (4th) 210 (prison inmates subject to substantially reduced expectation of privacy).

[28] See Richard A. Posner, "Rethinking the Fourth Amendment" [1981] Sup. Ct. Rev. 49 at 51-53 [Posner, "Rethinking"].

[29] See Potter Stewart, "The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases" (1983) 83 Colum. L. Rev. 1365 at 1396.

[30] See Posner, "Rethinking", *supra* note 28 at 54-55. See generally Gary S. Becker, "Crime and Punishment: An Economic Approach" (1968) 76 Journal of Political Economy 169; Robert Cooter & Thomas Ulen, *Law and Economics*, 3d ed. (Reading, Mass.: Addison Wesley Longman, 2000) at 444-46.

[31] See *infra* notes 33-37.

constitutional violations that are likely to be at least as effective and do not entail the loss of reliable evidence and the acquittal of factually guilty defendants. Determining who is correct requires detailed empirical and theoretical analyses of the benefits and costs of the exclusionary remedy and its alternatives.

A. The Benefits and Costs of the American Exclusionary Rule

There is a long-standing debate over the degree to which evidentiary suppression influences police conduct. Deterrence theory dictates that legal sanctions can only influence behaviour when people understand the law intended to influence them, bring that understanding to bear on their conduct, and perceive that the costs of non-compliance outweigh its benefits.[32] Critics of the American exclusionary rule have accordingly argued that police are frequently unaware of the complex and ever-changing constitutional law regulating their investigative efforts;[33] are not informed of the suppression of evidence that they have collected;[34] fail to understand the reason for exclusion when informed of it;[35] and/or perceive that their interests are better served by non-compliance than by compliance, even when they know that non-compliance may result in evidentiary exclusion.[36] Critics also point to empirical studies purporting to show that the deterrent impact of the exclusionary rule is minimal.[37] Even many jurists

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[32] See Paul H. Robinson & John M. Darley, "Criminal Law as an Instrument of Behavioral Control: Should Deterrence Have a Role in the Formulation of Criminal Law Rules?" *Social Science Research Network Working Paper Series* (October 2002) at 24, online: Social Science Research Network Working Paper Series <http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID326681_code020912560.pdf?abstractid=326681>.

[33] See *e.g. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 at 417 (1971) [*Bivens*], Burger C.J., dissenting; Harry M. Mitchell Caldwell & Carol A. Chase, "The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About its Effects Outside the Courtroom" (1994) 78 Marq. L. Rev. 45 at 54-56; L. Timothy Perrin, H. Mitchell Caldwell & Carol A. Chase, "An Invitation to Dialogue: Exploring the Pepperdine Proposal to Move Beyond the Exclusionary Rule" (1999) 26 Pepp. L. Rev. 789 at 794; L. Timothy Perrin *et al.*, "If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule" (1998) 83 Iowa L. Rev. 669 at 676; Dallin Oaks, "Studying the Exclusionary Rule in Search and Seizure" (1970) 37 U. Chi. L. Rev. 665 at 730-31; James E. Spiotto, "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives" (1973) 2 J. Legal Stud. 243 at 274, 276.

[34] See Caldwell & Chase, *ibid.* at 55; Perrin *et al.*, *ibid.* at 675.

[35] See Caldwell & Chase, *ibid.*; Perrin *et al.*, *ibid.*

[36] See Caldwell & Chase, *ibid.* at 56; Perrin *et al.*, *ibid.*; Oaks, *supra* note 33 at 720-24; Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (New York: John Wiley & Sons, 1966) at 219-25.

[37] See Oaks, *supra* note 33; Spiotto, *supra* note 33; Perrin *et al.*, *ibid.*

who support exclusion have conceded that its deterrent effect has yet to be proven definitively.[38]

At first glance this skepticism seems justified. The empirical evidence is both conflicting and vulnerable to methodological critique. But if we strip away the partisan rhetoric and examine the data carefully, we can conclude with reasonable confidence that the American exclusionary rule has had a *significant* but *limited* deterrent effect on police overreaching. Perhaps the best evidence of the rule's impact is the dramatic increase in the use of warrants after *Mapp v. Ohio*,[39] the case that imposed the exclusionary rule on states that had not already adopted it as a matter of state law.[40] Since warrant-based searches are more likely to be constitutional than warrantless ones, we can infer greater compliance from an increase in the proportion of the former to the latter.[41] We can also infer a significant deterrent effect from the fact that successful suppression motions are exceptionally rare.[42] Further evidence of

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[38] See *e.g.* Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure*, 3d ed. (St. Paul, Minn.: West, 2000) at 115; Stuart, *Charter Justice*, *supra* note 1 at 474.

[39] 367 U.S. 643 (1961).

[40] See Michael J. Murphy, "Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments" (1966) 44 Tex. L. Rev. 939 at 941-42; Bradley C. Canon, "Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion" (1974) 62 Ky. L.J. 681 at 708-11; Sam J. Ervin, Jr., "The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment" [1983] Sup. Ct. Rev. 283 at 293. Researchers have also attempted to gauge the rule's deterrent effect by tracking changes to post-*Mapp* arrest and property seizure rates. See Oaks, *supra* note 33 at 707 (finding that adoption of the exclusionary rule initially had little effect on the number of arrests or on the amount of stolen property recovered by the police in Cincinnati, but may "have had a slight long range effect of indueing greater conformity in searches for stolen property."); Canon, *ibid.* at 703-707 (replicating Oaks' Cincinnati study in 13 cities and finding in many cases a significant decline in arrests after adoption of the exclusionary rule). It is unelear, however, whether these changes were caused by the adoption of the exclusionary rule. Other variables may have been responsible. See generally Oaks, *supra* note 33 at 713-15; Canon, *ibid.* at 698-702; Perrin *et al.*, *supra* note 33 at 711.

[41] The data, it should be noted, discloses an absolute increase in warrant usage. It does not reveal whether the proportion of warrant-based searches has increased. Some scholars have therefore attributed the spike in warrants to an increase in all types of searches induced by rising drug-related crime rates. See Steven R. Schlesinger, "The Exclusionary Rule: Have Proponents Proven That It Is a Deterrent to Police?" (1979) 62 Judicature 404 at 407. This conelusion is belied, however, by both the intensity and immediaey of the post-*Mapp* warrant explosion. See Dripps, "The Case", *supra* note 22 at 15. There is little reason to think, moreover, that in the absence of the exclusionary rule an increase in the frequency of searches would lead to a significant increase in warrant usage. Without the prospect of exclusion, police have little incentive to obtain a warrant. See Canon, *supra* note 40 at 714.

[42] See Canon, *supra* note 40 at 708-709; Peter F. Nardulli, "The Societal Cost of the Exclusionary Rule: An Empirical Assessment" [1983] Am. Bar Found. Res. J. 585 [Nardulli, "Empirical Assessment"]; Thomas Y. Davies, "A Hard Look at What We Know (and Still Need to Learn) About the 'Costs' of the Exclusionary Rule: The NIJ Study and Other Studies of 'Lost' Arrests" [1983] Am. Bar Found. Res. J. 611; General Accounting Office, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions: Report of the Comptroller General of the United States* (Washington, D.C.: U.S. General Accounting Offiee, 1979); Richard Van Duizend, L. Paul Sutton & Charlotte A. Carter,

the exclusionary rule's deterrent impact can be garnered from surveys questioning police and other justice system officials about their perceptions and practices. Almost all of these studies show that these officials believe that the rule exerts significant deterrent force and that they behave accordingly.[43]

This research also reveals, however, that the rule's deterrent effect is far from perfect. As deterrence theory would predict, compliance is often hindered by informational deficits and unfavourable cost-benefit calculations. The greatest barrier

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The Search Warrant Process: Preconceptions, Perceptions, Practices (Williamsburg, Va.: National Center for State Courts, 1985). But see National Institute of Justice, *The Effects of the Exclusionary Rule: A Study in California* (Washington, D.C.: The National Institute, 1983). It must be pointed out, however, that this measure does not account for violations that do not result in the laying of charges. See William C. Heffernan & Richard W. Lovely, "Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law" (1991) 24 Mich. J.L. Reform 311 at 320-21.

[43] See Michael Katz, "The Supreme Court and the States: An Inquiry into *Mapp v. Ohio* in North Carolina: The Model, the Study, and the Implications" (1966) 45 N.C. L. Rev. 119 at 134 (substantial majority of prosecutors, defence lawyers, and judges surveyed believed the exclusionary rule is an effective deterrent); Myron W. Orfield, Jr., "The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers", Comment (1987) 54 U. Chicago L. Rev. 1016 [Orfield, "Exclusionary Rule and Deterrence"] (survey of police finding significant compliance due to exclusionary rule); Van Duizend, Sutton & Carter, *ibid.* at 120 ("[T]be exclusionary rule, though seldom invoked, serves as an incentive for many police officers to follow the limits imposed by the Fourth Amendment as defined in their jurisdiction."); Craig D. Uchida & Timothy S. Bynum, "Search Warrants, Motions to Suppress and 'Lost Cases': The Effects of the Exclusionary Rule in Seven Jurisdictions" (1991) 81 J. Crim. L. & Criminology 1034 at 1065 ("Our interviews indicated that police were willing to follow guidelines established by the Constitution, the district attorney's office, and the courts when writing search warrant applications."); Myron W. Orfield, Jr., "Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in The Chicago Criminal Courts" (1992) 63 U. Colo. L. Rev. 75 at 91 [Orfield, "Deterrence, Perjury"] (survey of defence lawyers, prosecutors, and judges finding siguificant deterrence); Milton Loewenthal, "Evaluating the Exclusionary Rule in Search and Seizure" (1981), 49 UMKC L. Rev. 24 at 29-30 (participant-observer study finding that police accept exclusionary rule as necessary to deter violations); Perrin *et al.*, *supra* note 33 at 720-21, tbl. 1 (80 per cent of police surveyed consider possibility of exclusion to be either the "primary" or an "important" concern in conducting investigations) and 732 (majority of police believed that "the interests of the criminal justice system are well served by excluding unlawfully seized evidence"); Heffernan & Lovely, *ibid.* at 347-48 (85 per cent of police surveyed indicate willingness to comply with their understanding of search and seizure law). See also Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security Under the Law: Second Report*, vol. 2 (Ottawa: The Commission, 1981) at 1041 ("It can now be said, at least in this country and in regard to the R.C.M.P., that the attitude of members of that Force ... is to regard the absence of critical comment by the judiciary as tacit approval of forms of conduct that might be unlawful.") But see Skolnick, *supra* note 36 at 215-29 (participant-observer study of one department finding that police compliance with constitution not greatly influenced by exclusionary rule).

There has been no empirical study to date of the deterrent effect of exclusion under section 24(2) of the Charter. A study of the implementation of two Supreme Court of Canada criminal procedural decisions by one police force concluded, however, that "police have managed to cope with new requirements imposed by the *Charter* and have effectively implemented changes to standard procedures" (Kathryn Moore, "Police Implementation of Supreme Court of Canada Charter Decisions: An Empirical Study" (1992) 30 Osgoode Hall L.J. 547 at 577).

to deterrence is legal complexity. The more complex the rules governing criminal investigation, the less likely it is that police will understand them and apply them correctly on the ground.[44] Police find it particularly difficult to apply rules associated with warrantless searches, especially where the impact on privacy interests is only moderate.[45] They have much less difficulty applying straightforward regulations, such as the *Miranda* rules dictating the content of pre-interrogation warnings.[46] It is also apparent that in a significant minority of cases police are unwilling to obey the rules even when they know what is expected of them.[47] They may fail to comply because they believe that some other objective (such as restoring order, preserving safety, removing contraband, "clearing" cases, or harassing undesirables) is more important than obtaining evidence for prosecution.[48] Or they may believe that any evidence that they obtained illegally will be admitted as a result of police perjury or judicial reluctance to exclude.[49]

None of this should be particularly surprising. Logic and intuition suggest that the prospect of evidentiary suppression and the concomitant loss of convictions must have some impact on police behaviour.[50] Exclusion may not affect police as acutely as monetary sanctions or imprisonment, but it does matter. It influences police conduct directly by serving as a basis for performance evaluations or spurring training

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[44] See Heffernan & Lovely, *supra* note 42 at 322-24. See also Moore, *ibid.* at 552, 572.

[45] See Heffernan & Lovely, *supra* note 42 at 322-23. Heffernan & Lovely presented three groups of individuals (police, criminal lawyers, and laypersons), with six search and seizure scenarios derived from Supreme Court cases and asked them to decide whether the intrusion by the police was legal. The problems were "difficult" in the sense that they involved warrantless search powers and relatively innocuous privacy intrusions. In the researcher's estimation the legality of the intrusion in each scenario was "not clear cut" (*ibid.* at 328-29). Individuals in each group were also required to respond to a series of multiple-choice questions on search and seizure law. The average score (out of 16) for police officers was 8.3, compared to 10.3 for lawyers and 7.0 for laypersons. *Ibid.* at 334, tbl. 3. See also Perrin *et al.*, *supra* note 33 at 727-28 (administering similar tests to police and finding that police answered 65 per cent of questions correctly; the control group of law students averaged 70 per cent). Of course, these studies do not tell us the extent to which police responses to hypothetical scenarios mirror their actual behaviour in the field. See Gregory D. Totten, Peter D. Kossoris and Ebbe B. Ebbesen, "The Exclusionary Rule: Fix It, But Fix It Right—A Critique of 'If It's Broken, Fix It: Moving Beyond the Exclusionary Rule'" (1999), 26 Pepp. L. Rev. 887 at 897-98.

[46] *Ibid.* at 339, tbl. 7. See also Perrin *et al.*, *supra* note 33 at 728, tbl. 6.

[47] Heffernan & Lovely, *ibid.* at 348 (indieating that in 15 per eent of cases police indicated that they would proceed with search in presented scenario despite their determination that it was prohibited).

[48] See Skolnick, *supra* note 36 at 220; "The Effect of *Mapp v. Ohio* on Police Search-and-Seizure Practices in Narcotics Cases", Comment (1968) 4 Colum. J.L. & Soc. Probs. 87 at 99-101.

[49] See Orfield, "Deterrence, Perjury", *supra* note 43 at 82-83; Christopher Slobogin, "Testifying: Police Perjury and What To Do About It" (1996), 67 U. Colo. L. Rev. 1037 at 1057-59; Gabriel J. Chin & Scott C. Wells, "The 'Blue Wall of Silence' as Evidence of Bias and Motive to Lie: A New Approach to Policy Perjury" (1998), 59 U. Pitt. L. Rev. 233 at 248-50; *Terry v. Ohio*, 392 U.S. 1 at 14 (1968); Oaks, *supra* note 33 at 683-84.

[50] See Dripps, "The Case", *supra* note 22 at 15 ("[B]asic assumptions about rational behavior suggest that the rule ought to deter, just as the admission of evidence of subsequent remedial measures in tort suits is thought—without empirical support of any kind—to deter needed repairs.")

efforts.[51] It also helps to influence behaviour indirectly by shaping and reinforcing norms of legality and propriety. Legal prohibitions influence behaviour not simply by ensuring that the costs of illegality outweigh its benefits,[52] but also by influencing the development of internal moral codes, shaping preferences, and providing a basis for informal community and peer group sanctions.[53] As Heffernan and Lovely explain, "[e]xclusion provides officers with a day-to-day reminder of the importance of adherence to the law."[54]

In summary, we can confidently conclude that *as a general matter* the exclusion of unconstitutionally obtained evidence has an appreciable impact on constitutional compliance.[55] We can also say with assurance, however, that the exclusionary remedy does not deter all violations. It is particularly unlikely to deter when police believe that their conduct is legal, give less priority to obtaining a conviction than to some other law enforcement objective, or when they believe that evidence may be admitted despite the violation.

The social costs of exclusion are easier to calculate. Almost all studies of the American exclusionary rule have found that the proportion of convictions lost due to

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[51] The empirical literature supports the intuition that evidentiary exclusion induces police to increase training efforts. See Orfield, "Exclusionary Rule and Deterrence", *supra* note 43 at 1036-48; Craig M. Bradley, "The 'Good Faith Exception' Cases: Reasonable Exercises in Futility" (1985) 60 Ind. L.J. 287 at 291-92; Murphy, *supra* note 40 at 941; Heffernan & Lovely, *supra* note 42 at 337-38; Wayne R. LaFave, "Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication" (1990) 89 Mich. L. Rev. 442 at 448. Empirical studies also confirm the intuition that greater training leads to greater compliance. See Heffernan & Lovely, *supra* note 42 at 336-37.

[52] There is skepticism among some criminal law scholars regarding the deterrent effect of criminal sanctions. See *e.g.* David M. Paciocco, *Getting Away with Murder: The Canadian Criminal Justice System* (Toronto: Irwin Law, 1999) at 28-35 [Paciocco, *Getting Away with Murder*]. But among empirical researchers there is a strong consensus that, on the whole, punishments exert a substantial deterrent effect. The real question is whether any particular policy innovation (typically increased enforcement or penalties) will add measurably to the existing preventive effect. See David J. Pyle, *The Economics of Crime and Law Enforcement* (New York: St. Martin's, 1983) at 55, 57-58; Daniel Nagin, "Criminal Deterrence Research at the Outset of the Twenty-First Century" (1998) 23 Crime & Just. 1 at 1-3.

[53] See generally Johannes Andenaes, *Punishment and Deterrence* (Ann Arbor: University of Michigan Press, 1974) at 110-26; Kenneth G. Dau-Schmidt, "An Economic Analysis of the Criminal Law as a Preference-Shaping Policy" [1990] Duke L.J. 1; Paul H. Robinson & John M. Darley, "The Utility of Desert" (1997) 91 Nw. U. L. Rev. 453 at 468-78; Louis Michael Seidman, "Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control" (1984) 94 Yale L.J. 315 at 336-38; Neal Kumar Katyal, "Deterrence's Difficulty" (1997) 95 Mich. L. Rev. 2385 at 2442-49; Dan M. Kahan, "Social Meaning and the Economic Analysis of Crime" (1998) 27 J. Legal Stud. 609.

[54] Heffernan & Lovely, *supra* note 42 at 351.

[55] See *Powell*, *supra* note 14 at 492 ("[W]e have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it.")

evidentiary exclusion is very low.[56] Most researchers estimate the rate of lost convictions to be between one and two per cent.[57] Given the large number of criminal cases, the number of lost convictions in absolute terms is far from insignificant. Society bears a considerable cost each time a factually guilty defendant is set free because unconstitutionally obtained evidence is excluded.[58] That cost, however, should not be exaggerated. The criminal is rarely set free because the constable blundered.[59]

It seems, then, that unlike the condonation and corrective justice rationales, the deterrence rationale is a good justification for excluding unconstitutionally obtained evidence. The American experience teaches us that exclusion exerts a significant deterrent effect and generates few lost convictions. The next question is whether there are any alternatives to exclusion that are likely to achieve an even better balance between deterring constitutional violations and convicting the factually guilty. If there are, then despite the advantages of the exclusionary remedy we would be better off interpreting section 24(2) of the Charter in a manner that would rarely result in exclusion.

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[56] A General Accounting Office study found that successful suppression motions were made in only 1.3 per cent of federal cases in Chicago. Dismissals or acquittals were granted in approximately half of those cases. This does not account, of course, for instances where cases are dropped before formal charges are laid because prosecutors believe that evidence necessary for conviction would very likely be excluded. The GAO study found, however, that only 0.4 per cent of cases were declined for this reason. The researchers thus concluded that the costs of the exclusionary rule in terms of lost convictions were minimal. See General Accounting Office, *supra* note 42 at 10-14. A similar study conducted by the National Institute of Justice ("NIJ") found, however, that 4.8 per cent of all felony arrests were dropped due to tainted evidence. National Institute of Justice, *supra* note 42 at 1. The NIJ study was criticized by Davies, who re-analyzed the data and concluded that only 0.8 per cent of felony arrests were rejected on the basis of illegal searches. He found that the proportion of lost cases was between 0.3 and 2.35 per cent. See Davies, *supra* note 42. More recent studies have confirmed these findings. See Nardulli, "Empirical Assessment", *supra* note 42 at 606-607 (study of 7,500 felony cases in three states finding that less than 0.69 percent of cases were lost due to exclusion of physical evidence); Van Duizend, Sutton & Carter, *supra* note 42 at 119 ("a properly administered and supervised search warrant review proeess can protect privacy and property rights without significantly interfering with the ability of police officers to conduct thorough and effective investigations of criminal activity."); Uchida & Bynum, *supra* note 43 at 1064-66 (only 1.5 per cent of search warrant cases lost due to exclusion); Peter F. Nardulli, "The Societal Costs of the Exclusionary Rule Revisited" [1987] U. Ill. L. Rev. 223 at 234 (study of 2,759 Chicago cases found that approximately 1.77 per cent were lost due to exclusion).

[57] See sources cited *ibid.*

[58] The exclusionary rule may also produce other social costs, such as the wasted resources generated by meritless suppression motions, the promotion of police perjury, and the narrowing of constitutional rights to avoid exclusion. See Caldwell & Chase, *supra* note 33 at 49-54; Perrin *et al.*, *supra* note 33 at 677-78. I discuss the latter two "costs" at *infra* note 78 and accompanying text and *infra* notes 139-40 and accompanying text, respectively.

[59] I allude to Justice Cardozo's famous statement in *People v. Defore*, 150 N.E. 585 at 587 (N.Y.), cert. denied 270 U.S. 657 (1926) ("The criminal is to go free because the constable has blundered.")

B. Alternatives to Exclusion

Few critics of the exclusionary rule argue that the constitutional rules regulating police investigative practices should not be enforced. Instead, they maintain that other mechanisms are as capable of deterring police overreaching as exclusion.[60] Most recognize, however, that conventional criminal, civil, and administrative remedics have not been effective in deterring misconduct.[61] They have therefore proposed new schemes (or reforms to existing ones) that would provide stronger incentives for police to refrain from overreaching.[62] These alternative schemes, their proponents claim, would achieve at least as much deterrence as the cxclusionary rule without producing lost convictions.[63]

There is little evidence, however, that the legislative and administrative will that would be required to implement these alternatives is presently strong.[64] Efforts to restrict police power rarely generate political or popular support.[65] Enforcing the rights of criminal suspects is an intrinsically countermajoritarian exercise,[66] primarily because the victims of police overreaching are disproportionately members of disfavoured minorities.[67] Evidentiary exclusion does not require political innovation and is effected by officials who are relatively insulatcd from majoritarian political pressures.[68]

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[60] See *e.g.* Caldwell & Chase, *supra* note 33 at 67-68; Posner, "Rethinking", *supra* note 28.

[61] See Oaks, *supra* note 33 at 673-74; Silas J. Wasserstrom & Louis Michael Seidman, "The Fourth Amendment as Constitutional Theory" (1988) 77 Geo. L.J. 19 at 83; Caleb Foote, "Tort Remedies for Police Violations of Individual Rights" (1955) 39 Minn. L. Rev. 493; Stewart, *supra* note 29 at 1387-88. But see Posner, "Rethinking", *supra* note 28 at 58-62 (arguing that with modest reforms, conventional tort law remedies are sufficient to optimally deter fourth amendment violations).

[62] See *e.g.* Perrin *et al.*, *supra* note 33 at 744-53; Akhil Reed Amar, "Fourth Amendment First Principles" (1994) 107 Harv. L. Rev. 757 at 811-19; *Bivens*, *supra* note 33 at 421-24, Burger C.J., dissenting.

[63] See sources cited *ibid.*

[64] See Carol S. Steiker, "Second Thoughts About First Principles" (1994) 107 Harv. L. Rev. 820 at 848-50; Laurie L. Levenson, "Administrative Replaeements: How Much Can They Do?" (1999) 26 Pepp. L. Rev. 879 at 882; Dripps, "The Case", *supra* note 22 at 2.

[65] See Steiker, *ibid.* at 850-51.

[66] See Antonio Lamer, "Protecting the Administration of Justice From Disrepute: The Admissibility of Unconstitutionally Obtained Evidence in Canada" (1998) 42 St. Louis U. L.J. 345 at 354-55.

[67] See Steiker, *supra* note 64 at 850; Morgan Cloud, "Pragmatism, Positivism, and Principles in Fourth Amendment Theory" (1993) 41 UCLA L. Rev. 199 at 284; Wasserstrom & Seidman, *supra* note 61 at 94; Richard V. Ericson, *Reproducing Order: A Study of Police Patrol Work* (Toronto: University of Toronto Press, 1982) at 200-201; Commission on Systemic Racism in the Ontario Criminal Justice System, *Report* (Toronto: Queen's Printer, 1995); Julian V. Roberts & Anthony N. Doob, "Race, Ethnicity and Criminal Justice in Canada" in Michael Tonry, ed., *Ethnicity, Crime and Immigration: Comparative and Cross-National Perspectives*, vol. 21 (Chicago: University of Chicago Press, 1997) 469 at 519; David M. Tanovich, "Using the *Charter* to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40 Osgoode Hall L.J. 145; *R. v. Brown* (2003), 64 O.R. (3d) 161 at para. 9, 173 C.C.C. (3d) 23.

[68] See generally *Leon*, *supra* note 12 at 930, Brennan J., dissenting.

Even if alternatives to exclusion could be implemented without political initiative (for example, by substituting non-exclusionary section 24(1) remedies for exclusion under section 24(2)),[69] no alternative is likely to be superior to exclusion in optimizing the balance between deterrence and truth-seeking. Non-exclusionary remedies are very likely to generate either too little or too much deterrence. To avoid underdeterrence, alternative remedies must impact police interests severely enough to influence their future conduct. Most Charter violations would warrant only modest compensatory damages.[70] Few victims would find it worthwhile to incur the costs required to obtain these awards.[71] As a result, police would likely consider damage awards a minor cost of doing business.[72] In theory, this problem can be overcome by the use of such mechanisms as class actions, administrative hearings, and non-compensatory remedies (such as punitive damages, statutory liquidated damages, and injunctions).[73] But such initiatives would require significant legislative or judicial innovation, and it is not clear that they would be financially, administratively, or politically feasible.[74]

Any scheme attempting to avoid the underdeterrence problem, moreover, would likely overdeter by chilling legitimate investigative methods.[75] As discussed, the complexity of the law governing investigative practices generates high rates of inadvertent error. Police make two types of unintentional mistakes. The first occurs when they incorrectly believe that an intrusion is legal and proceed to collect evidence illegally. The second occurs when police incorrectly believe that an intrusion is illegal and therefore forego an opportunity to lawfully obtain evidence. The first type of error is likely to be common under both exclusionary and non-exclusionary schemes.[76] The second type of error, in contrast, is much more likely to

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[69] See J.A.E. Pottow, "Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24 (Part III)" (2000) 44 Crim. L.Q. 223. See generally Stuart, *Charter Justice*, *supra* note 1 at 458-61.

[70] See Daniel J. Meltzer, "Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General" (1988) 88 Colum. L. Rev. 247 at 284.

[71] Other barriers to this type of litigation stem from the fact that victims of police overreaching are often poor, ignorant of their rights, fearful of police reprisals, and incarcerated. *Ibid.*

[72] See Heffernan & Lovely, *supra* note 42 at 363.

[73] See Perrin *et al.*, *supra* note 33 at 744-51; Amar, *supra* note 62 at 814-16; Posner, "Rethinking", *supra* note 28 at 62-64.

[74] See Levenson, *supra* note 64.

[75] See Stewart, *supra* note 29 at 1399 ("Unless the administrative sanctions imposed on officers for violating the fourth amendment are harsh, officers may reasonably decide to resolve close questions—and perhaps less close questions as well—against compliance with constitutional requirements. And, if administrative sanctions are too harsh, officers may refrain from beneficial law enforcement activities.")

[76] It is possible that a sufficiently vigorous non-exclusionary remedial scheme could prompt police to significantly improve their training efforts. But it is very likely that the error rate would still be substantial. See Heffernan & Lovely, *supra* note 42 at 362 ("Even with substantial training, our results suggest that police officers are likely to be mistaken about a quarter of the time about the legality of intrusions where specific rules of search and seizure are involved.")

occur under a non-exclusionary regime. Consider what is likely to happen when police believe that an intrusion is probably legal, but are not certain. If the penalty for error is evidentiary exclusion, they are likely to proceed with the intrusion, especially if they believe that there is no other way to obtain the evidence that is more likely to be found constitutional. The worst that can happen is that a court will decide that they were wrong and exclude the evidence.[77] If the evidence would not likely have been available in any event, then police have lost nothing. But if the consequences of error include fines, damage awards, or impediments to career advancement, police may not be prepared to risk even a modest risk of violation. They may therefore forego legal intrusions and fail to obtain evidence necessary for conviction.[78] Fear of non-exclusionary sanctions, in other words, may cause police to steer far clear of the sometimes blurry boundary between legal and illegal conduct, prompting them to use only those methods that they believe are patently constitutional. Some might applaud this result, believing that police should not act unless they are absolutely certain of the legality of their conduct. But given criminal procedure's inevitable complexity, such a mindset would likely deter too many legal intrusions.

The overdeterrence problem could be lessened to some degree by granting police immunity for "good faith" errors (i.e., violations committed when police were reasonably confident of the legality of their conduct). But this would severely undercut the capacity of sanctions to promote training, which we know significantly increases constitutional compliance.[79] If police know that an honest belief in the legality of an intrusion immunizes them from potential sanctions, then they will be inclined to remain ignorant of their constitutional obligations. Exclusion, in contrast, can be used to sanction inadvertent errors (thereby increasing compliance) without fear of chilling legitimate tactics. The exclusionary rule gives police an incentive to learn as much law as possible; but it does not dissuade them from taking reasonable, calculated risks in the face of legal uncertainty. What is often characterized as a weakness of the exclusionary rule—its inability to deter marginal violations—turns out to be one of its strengths. Given the unfortunate inevitability of complexity-induced error, we are better off with a remedy that leaves a few marginal violations undeterred than with one that is likely to either grossly under or overdeter.

Alternative sanctions, then, face daunting obstacles of implementation and optimization. But let us imagine, if only for the sake of argument, that we could implement an alternative regime that deters constitutional violations at least as well as exclusion without deterring an unacceptable proportion of legal intrusions. Would it really represent much of an advance over the exclusionary remedy? Alternative

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[77] Empirical evidence confirms that police are very unlikely to face civil or criminal liability or internal discipline for committing non-obvious and non-egregious constitutional violations. See Heffernan & Lovely, *supra* note 42 at 328-29, 350.

[78] See Loewenthal, *supra* note 43 at 31-32; Totten, Kossoris & Ebbesen, *supra* note 45 at 908; Heffernan & Lovely, *supra* note 42 at 362-63; Dripps, "The Case", *supra* note 22 at 17; Jull, *supra* note 5 at 539.

[79] See *supra* note 53 and accompanying text.

sanctions promise to deter overreaching without diminishing the probability of convicting the factually guilty. But as many jurists have noted, if alternative sanctions deterred effectively, then police would never discover evidence that could only have been obtained illegally.[80] Just as with the exclusionary rule, the deterrent impact of the sanctions would cause factually guilty suspects to escape conviction. A non-exclusionary regime would generate fewer lost convictions than exclusion, of course, because even strong sanctions cannot deter all violations. But the quantum of this benefit is only marginal. As discussed, the empirical record indicates that very few convictions of the factually guilty are lost because of evidentiary exclusion.[81] Given the weaknesses of alternative sanctions, attempting to reap this meagre benefit is not worth the effort. The unfortunate reality is that protecting constitutional rights entails significant social costs.[82] Roughly speaking, the relationship between constitutional compliance and the acquisition of evidence to convict the factually guilty is zero-sum. Non-exclusionary remedies may foster less popular discontent with the criminal justice system by better "hiding" the costs of constitutional compliance, but they do not eliminate them.[83] More compliance equals less evidence, no matter what the remedy for violations.

Alternative sanctions are not the answer. While we could in theory imagine a non-exclusionary regime that provided the incentives necessary for optimal deterrence,[84] in practice the obstacles to achieving sueh a result are far too great. Despite its flaws, the exclusionary remedy gets us closer to optimal deterrence than any alternative is likely to do. Admittedly, exclusion cannot deter when the purpose of the intrusion is not to obtain admissible evidence. Non-exclusionary sanctions should be available to deter these intrusions and compensate victims, but as an adjunct to—not a replacement for—evidentiary exclusion.[85] Exclusion also cannot

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[80] See Richard A. Posner, "An Economie Approach to the Law of Evidence" (1999) 51 Stan. L. Rev. 1477 at 1533 (If alternative sanctions deterred violations, "there would not be any fruits, and so there would be no net gain from thc standpoint of accuracy in adjudication."); Yale Kamisar, "'Comparative Reprehensibility' and the Fourth Amendment Exclusionary Rule" (1987) 86 Mich. L. Rev. 1 at 47-48 ("A society whose officials obey the fourth amendment in the first place (because of an effeetive tort or other 'direct alternative' remedy) 'pays the same "price"' as the society whosc officials cannot use thc evidence they acquired because they obtained it in violation of the fourth amendment. *Both* societies convict fewer criminals."); Stewart, *supra* note 29 at 1392 (noting that while the exclusionary rule often deprives courts of relevant evidence, that evidence frequently "would not have been obtaincd had the police officer complied with the demands of thc fourth amendment in the first place.")

[81] See *supra* notes 58-61 and accompanying text.

[82] Sce Steiker, *supra* note 67 at 820; Stewart, *supra* note 29 at 1393; *Leon*, *supra* note 12 at 941, Brennan J., dissenting; Jull, *supra* note 5 at 526.

[83] See Caldwell & Chase, *supra* note 33 at 51-52; Kamisar, *supra* note 80 at 47.

[84] See *e.g.* Posner, "Rethinking", *supra* note 28 at 58-62.

[85] See Stewart, *supra* note 29 at 1396 (though thc exclusionary rule is "powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal" this "does not suggest that the rule is not a necessary remedy, only that it is not a sufficient one.")

deter when police are prepared to lie in an effort to avoid exclusion. But neither can alternative remedies. Police facing the prospect of monetary or professional sanctions are at least as likely to falsely deny misconduct than those facing the possibility of evidentiary exclusion.[86] Lastly, exclusion cannot deter when police incorrectly believe that their conduct is legal. But again, neither can alternative remedies. Consequently, in developing an interpretive framework for section 24(2) of the Charter, courts should not rely on the capacity of non-exclusionary remedies to deter violations. If 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.

III. Deterrence and Section 24(2) of the Charter

I have argued to this point that deterrence is the only justification for excluding unconstitutionally obtained evidence; that the empirical record shows that the deterrent effect of exclusion is significant but limited; and that alternative methods of inducing police to respect constitutional guarantees are neither feasible nor desirable. What would section 24(2) doctrine look like if it respected these conclusions? Put simply, it would require judges to: (i) exclude *only* when doing so is likely to have a significant deterrent effect; and (ii) exclude in *every* such case. In other words, evidence should never be excluded pursuant to section 24(2) for any reason other than deterrence. Conversely, it should be an error for a judge to admit evidence on the basis that deterrence could be achieved by other means or that deterrence should be sacrificed to achieve some other objective.

As I discuss in the remainder of this article, the Supreme Court of Canada's section 24(2) jurisprudence strays considerably from these dictates. But the foundations of a deterrence-based approach are there. It is possible, without doing intolerable violence to either constitutional text or *stare decisis*, to strip away that which is incompatible with deterrence and begin building an exclusionary doctrine that pursues an optimal accommodation between our need to prevent constitutional violations and our need to convict the guilty. I elaborate this argument below in the course of examining the jurisprudence associated with section 24(2)'s key components, which require applicants to establish that: (i) they have standing to bring the application; (ii) the evidence that they are seeking to exclude was "obtained in a manner" that violated a Charter right; and (iii) the admission of the evidence could "bring the administration of justice into disrepute."

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[86] See Levenson, *supra* note 64 at 881 ("There is absolutely no evidence that a police officer will be any less motivated to lie in an administrative hearing, where their reputation and job position are at risk, than in a criminal proceeding where the court threatens to exclude evidence.")

A. Standing

Section 24(2) applications occur in the context of proceedings under section 24(1) of the Charter. Section 24(1) states that persons whose Charter rights have been infringed may apply for a remedy. The Supreme Court of Canada has interpreted this to mean that defendants may only seek exclusion if *their* rights were denied, and not if the evidence was obtained by violating the rights of third parties.[87] As a matter of plain language interpretation this conclusion may be inevitable. But the Court's holding limits the capacity of the exclusionary remedy to deter investigative abuses, especially in search and seizure eases.[88] For example, police who believe that evidence against a suspect might be obtained at a location where that suspect has no reasonable expectation of privacy may with relative impunity commit egregious violations of the privacy of persons who do have such an expectation.[89]

There may be ways to surmount this problem. One is to interpret Charter rights expansively to protect the privacy and security of persons without a direct proprietary interests in the location searched.[90] Another is to find that admitting evidence obtained by violating a non-defendant's rights would be "unfair" or constitute an abuse of process.[91] Whatever method is used, courts should have some means of excluding evidence to deter police from violating the rights of innocent third parties. As Justice La Forest has noted, to focus exclusively on the rights of the accused is "to accord greater protection to the right of privacy to the accused or other wrongdoer than to a person against whom there may be no reasonable suspicion of wrongdoing."[92] Though section 24's wording may limit its remedial scope to violations of applicants' rights, the purpose of exclusion is not to achieve corrective

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[87] See *R. v. Wijesinha*, [1995] 3 S.C.R. 422 at para. 66, 127 D.L.R. (4th) 242; *Edwards*, *supra* note 26 at paras. 45, 51-56.

[88] See Roach, *Constitutional Remedies*, *supra* note 11 at paras. 10.450-10.570. See also Jonathan Dawe, "Standing to Challenge Searches and Seizures Under the *Charter*: The Lessons of the American Experience and Their Application to Canadian Law" (1993) 52 U.T. Fac. L. Rev. 39 at 68-71.

[89] See generally *Edwards*, *supra* note 26, La Forest J., concurring.

[90] See *R. v. Belnavis*, [1997] 3 S.C.R. 341, 34 O.R. (3d) 806 [*Belnavis* cited to S.C.R.], La Forest J., dissenting; Dawe, *supra* note 88 at 53-56, 60-61.

[91] See Ursula Hendel & Peter Sankoff, "*R. v. Edwards*: When Two Wrongs Just Might Make a Right" (1996) 45 C.R. (4th) 330. The Supreme Court has repeatedly held that evidence that is not obtained in a manner that violated a Charter right may be excluded where admitting it would be "unfair". The Court has variously described the source of this exclusionary discretion as arising from the common law and sections 7, 11(d), and 24(1) of the Charter. See *R. v. Harrer*, [1995] 3 S.C.R. 562 at paras. 21-24, 128 D.L.R. (4th) 98 (recognizing common law discretion—constitutionalized by section 11(d) of the Charter—to exclude evidence where admission would undermine right to a fair trial); *R. v. Terry*, [1996] 2 S.C.R. 207 at para. 25, 135 D.L.R. (4th) 214 (abusively-obtained evidence may be excluded under sections 7 or 11(d) of the Charter); *R. v. White*, [1999] 2 S.C.R. 417 at paras. 86-89, 174 D.L.R. (4th) 111 (evidence excluded under section 24(1) where admission would violate self-incrimination principle protected by section 7); *Buhay*, *supra* note 18 at para. 40 ("[E]ven in the absence of a *Charter* breach, judges have a discretion at common law to exclude evidence obtained in circumstances such that it would result in unfairness if the evidence was admitted at trial.")

[92] *Edwards*, *supra* note 26 at para. 64, La Forest J., concurring.

justice for criminals. Rather, it is to deter violations of rights generally. If this cannot be accomplished under the aegis of section 24(2), then courts should employ other means.

B. "Obtained in a Manner"

In addition to establishing standing, defendants seeking exclusion under section 24(2) must also demonstrate that the evidence was "obtained in a manner" that infringed one of their Charter rights.[93] Applicants do not need to establish a strict causal connection between the violation and the discovery of the evidence; it is sufficient if the violation and discovery are part of "a single transaction".[94] There need only be, in other words, a non-remote, temporal connection between the two events.[95] The mere presence of a causal connection, however, may not be sufficient.[96] Courts must consider the presence and strength of both temporal and causal connections in determining "on a case-by-case basis" whether the discovery of the evidence was linked closely enough to the violation to justify exclusion.[97]

If the purpose of exclusion is to deter constitutional infringements, then the Court has been wise to permit exclusion in the absence of a causal connection between violations and evidentiary fruits. Insisting on causation would blunt section 24(2)'s deterrent force. The Court noted in *Strachan*, for example, that a causation requirement would in most cases prevent the exclusion of physical evidence obtained after a violation of the section 10(b) right to counsel.[98] Consider the following scenarios, assuming that applicants must prove causation to exclude evidence under section 24(2). Police conducting a search of a suspect's residence for physical evidence believe that there is also a reasonable prospect of obtaining a confession. Police in this scenario have a strong incentive to comply with section 10(b). If they did not, then a court would likely find that any confession obtained was causally related to the violation. The suspect would be able to show, in other words, that she might not have confessed had the police properly cautioned her.[99] Now suppose that

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[93] *R. v. Therens*, [1985] 1 S.C.R. 613 at 648, 18 D.L.R. (4th) 655 [*Therens* cited to S.C.R.].

[94] *R. v. Strachan*, [1988] 2 S.C.R. 980 at 1005, 56 D.L.R. (4th) 673 [*Strachan* cited to S.C.R.].

[95] *Ibid.* at 1005-1006. See also *Therens*, *supra* note 93 at 649, Le Dain J., dissenting; *Kokesch*, *supra* note 18 at 19; *R. v. Grant*, [1993] 3 S.C.R. 223 at 254-55, 84 C.C.C. (3d) 173 [*Grant* cited to S.C.R.]; *R. v. Wiley*, [1993] 3 S.C.R. 263 at 278, 84 C.C.C. (3d) 161 [*Wiley* cited to S.C.R.]; *R. v. Plant*, [1993] 3 S.C.R. 281 at 299, 145 A.R. 104 [*Plant* cited to S.C.R.]; *R. v. Bartle*, [1994] 3 S.C.R. 173 at 208, 118 D.L.R. (4th) 83 [*Bartle* cited to S.C.R.]; *R. v. Goldhart*, [1996] 2 S.C.R. 463 at paras. 33-36, 136 D.L.R. (4th) 502 [*Goldhart* cited to S.C.R.].

[96] See *Goldhart*, *ibid.*

[97] *Ibid.* at para. 40.

[98] *Strachan*, *supra* note 94 at 1003-1005.

[99] The Court has been very reluctant to find that self-incriminating evidence would have been obtained even if police had complied with section 10(b), casting the burden to establish this on the prosecution. See *Bartle*, *supra* note 95 at 211-13; *R. v. Harper*, [1994] 3 S.C.R. 343 at 354, 118 D.L.R. (4th) 312.

police either have no need for a confession or do not believe they can obtain one. They would consequently be free to deny the suspect access to counsel in order to isolate, intimidate, or harass her in the course of conducting the search.[100] The abuse would not have in any way contributed to the discovery of the evidence.

Requiring defendants to prove causation would also encourage police to violate the Charter to obtain evidence in support of warrant applications. In *Grant*, *Wiley*, and *Plant*, police used information obtained from unconstitutional perimeter searches to obtain warrants to search residences for illegal drugs.[101] In each case, however, the Court determined that the warrants could have been issued absent the tainted evidence.[102] As police could have obtained the drugs without violating the Charter, a "but for" causation requirement would have likely precluded exclusion. Police collecting evidence in support of warrant applications would consequently have little reason to forego constitutionally dubious techniques. If an issuing justice or reviewing court determines that the technique violated the Charter, then police would be in no worse a position than they would have been had they not used it.

This analysis also suggests that courts should be reluctant to conclude that temporal or causal connections between violations and the obtaining of evidence are too "remote" to engage section 24(2). A broad interpretation of the "obtained in a manner" requirement allows courts to sanction and deter misconduct that does not directly or immediately lead to the discovery of evidence. There may, however, be a point at which the connection is so tenuous that exclusion may have little deterrent effect. If violations are only remotely related to the obtaining of evidence, then police may not perceive that they are being sanctioned for specific transgressions. They may consequently view exclusion as arbitrary and fail to adjust their investigative practices. Excluding evidence unconnected to overreaching may also lead to a failure of marginal deterrence by diminishing the incentive of police to comply with the Charter after they become aware that they have committed a violation. In *R. v. Upston*,[103] for example, police failed to inform a suspect of his section 10(b) rights immediately after detaining him. They did so later, however, and he subsequently confessed. The Court determined that the statement was not "obtained in a manner" that infringed the Charter because there was no causal connection between the violation and the confession.[104] A better justification for the decision is that exclusion would have diminished section 24(2)'s capacity to deter subsequent constitutional

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[100] A causal connection requirement would also do little to dissuade police from conducting intrusive, unconstitutional searches in circumstances where there is little expectation of discovering evidence, such as routine strip searches of suspects arrested for impaired driving. See generally *R. v. Flintoff* (1998), 16 C.R. (5th) 248 at paras. 28-34, 126 C.C.C. (3d) 321 (Ont. C.A.).

[101] *Grant*, *supra* note 95; *Wiley*, *supra* note 92; *Plant*, *supra* note 95.

[102] *Grant*, *ibid.* at 253-54; *Wiley*, *ibid.* at 277; *Plant*, *ibid.* at 299.

[103] [1988] 1 S.C.R. 1083, 63 C.R. (3d) 299.

[104] This holding is inconsistent with the Court's later decision in *Strachan*, *supra* note 94, which held that exclusion does not always require defendants to establish a causal connection between the violation and the discovery of the evidence.

violations. If police had believed that their initial violation would have resulted in the exclusion of any subsequently obtained evidence, they would have had little reason to belatedly comply with section 10(b).

It is difficult to state precisely when a temporal or causal connection between a violation and the obtaining of evidence is so tenuous that exclusion will not likely deter future misconduct. But focusing on the likely impact of exclusion on police behaviour both before and after trial promises to provide more concrete guidance to courts than relying solely on the evasive concept of remoteness.

C. *Bringing the Administration of Justice into Disrepute*

Once defendants establish that evidence was obtained in manner that infringed one of their Charter rights, they must then prove that its admission could "bring the administration of justice into disrepute."[105] As is well known, the Supreme Court has instructed trial judges to consider three sets of factors in making this determination: those relating to the fairness of the trial, the seriousness of the violation, and the effect of exclusion on the repute of the administration of justice.[106] If admitting the evidence would threaten trial fairness, then the evidence will generally be excluded.[107] If it would not, then admissibility turns on a balancing of factors in the latter two categories. Courts must weigh the seriousness of the violation against the seriousness of the crime and the importance of the evidence.[108] The outcome of this balancing process is difficult to predict, but in many cases results in admission.[109]

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[105] Though the English version states "*would* bring the administration of justice into disrepute," in *Collins* (*supra* note 6 at 287) the Court determined that the correct translation of the French version of the provision ["*est susceptible de déconsidérer l'administration de la justice*"] is "*could* bring the administration of justice into disrepute" [emphasis added].

[106] See *Collins*, *supra* note 6; *R. v. Law*, [2002] 1 S.C.R. 227 at para. 33, 245 N.B.R. (2d) 270 [*Law* cited to S.C.R.].

[107] See *Collins*, *supra* note 6 at 284; *R. v. Broyles*, [1991] 3 S.C.R. 595 at 619, 120 A.R. 189 [*Broyles*]; *Stillman*, *supra* note 18 at paras. 72, 110, 118-19. See also Stuart, *Charter Justice*, *supra* note 1 at 493, 507. In many cases the Court has gone on to consider the seriousness of the violation and the effect of exclusion even after concluding that admitting the evidence would compromise trial fairness. In only a few of these cases has the Court admitted the evidence.

[108] See *Buhay*, *supra* note 18 at para. 51; David M. Paciocco, "*Stillman*, Disproportion and the Fair Trial Dichotomy under Section 24(2)" (1997) 2 Can. Crim. L. Rev. 163 at 172-73 [Paciocco, "Fair Trial Dichotomy"]; Roach, "Evolving", *supra* note 21 at 119; David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 3d ed. (Toronto: Irwin Law, 2002) at 300-309.

[109] See Don Stuart, "Eight Plus Twenty-Four Two Equals Zero" (1998) 13 C.R. (5th) 50 [Stuart, "Eight"]; Stuart, *Charter Justice*, *supra* note 1 at 504, 513-16. A recent study found that courts exclude non-conscriptive evidence obtained in violation of sections 8 or 9 of the Charter in approximately 50 per cent of cases. See Nathan J.S. Gorham, "Eight Plus Twenty-Four Two Equals Zero-Point-Five" (2003) 6 C.R. (6th) 257.

1. Evidence Affecting Trial Fairness: Automatic Exclusion

The Court's trial fairness doctrine reflects its especial concern for unconstitutional self-incrimination. Admitting self-incriminating evidence obtained from Charter violations is "unfair", according to the Court, because it violates the "case-to-meet" principle, which requires that the prosecution establish its case without the compelled participation of the accused.[110] The definition of the evidentiary category triggering this concern for unfair self-incrimination has shifted over the years.[111] It currently consists of evidence that is both "conscriptive" and "non-discoverable".[112] Conscriptive evidence arises only when the accused "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."[113] Evidence is "non-discoverable" if it could not have been obtained by legal, non-conscriptive means.[114]

There are two ways to interpret this doctrine. The conventional approach views the case-to-meet principle as justifying the exclusion of evidence apart from any concern for deterring police misconduct. The wrong remedied by exclusion, in other words, is the *admission at trial* of unconstitutionally obtained, self-incriminating evidence.[115] Deterring misconduct involved in *obtaining* evidence is the job of the second group of *Collins* factors—those relating to the seriousness of the violation.

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[110] See *Burlingham*, *supra* note 18 at para. 145, Sopinka J. ("The participation of the accused in providing incriminating evidence involving a breach of *Charter* rights is the ingredient that tends to render the trial unfair as he or she is not under any obligation to assist the Crown to secure a conviction."); *R. v. Ross*, [1989] 1 S.C.R. 3 at 16, 46 C.C.C. (3d) 129 ("Any evidence obtained, after a violation of the *Charter*, by conscripting the accused against himself through a confession or other evidence emanating from him would tend to render the trial process unfair.")

[111] See Roach, *Constitutional Remedies*, *supra* note 11 at paras. 10.430-10.440.

[112] *Stillman*, *supra* note 18.

[113] *Ibid.* at para. 80. It is fairly clear that the *Stillman* Court's reference to the "use of the body" refers to either the use of a suspect's body for identification (e.g., for fingerprinting or an identification lineup) or the extraction of bodily substances, and not to the mere participation of the accused in the discovery of pre-existing "real" evidence. See especially *ibid.* at paras. 77, 94, 98, 113. See also *Feeney*, *supra* note 18 at para. 64; *R. v. Fliss*, [2002] 1 S.C.R. 535 at para. 77; *Law*, *supra* note at para. 34; *Buhay*, *supra* note 18 at para. 49. See also Peter Cory, "General Principles of *Charter* Exclusion" (National Criminal Law Program, July 1997, Halifax) [unpublished] at 12-13. But see *R. v. M.(M.R.)*, [1998] 3 S.C.R. 393 at paras. 87-89, 166 D.L.R. (4th) 261, Major J., dissenting. Courts of appeal have almost unanimously favoured this "narrow" interpretation of *Stillman*. See *e.g. R. v. Davies* (1998), 127 C.C.C. (3d) 197 (Y.T.C.A.), leave to appeal to S.C.C. denied, [1998] S.C.C.A. No. 460; *R. v. Lewis* (1998), 38 O.R. (3d) 540 at 551-52, 13 C.R. (5th) 34 (Ont. C.A.); *R. v. Ellrodt* (1998), 130 C.C.C. (3d) 197 (B.C.C.A.); *R. v. Richardson* (2001), 153 C.C.C. (3d) 449 at paras. 19-22, 43 C.R. (5th) 371 (B.C.C.A.). These decisions are *contra R. v. Young* (1997), 34 O.R. (3d) 177, 8 C.R. (5th) 343 (Ont. C.A.). It should also be noted that "conscriptive" evidence includes "derivative" evidence; that is, evidence that is discovered as a result of conscription: *Stillman*, *supra* note 18 at paras. 99-101; *Feeney*, *supra* note 18 at paras. 67, 69-70.

[114] See *Stillman*, *ibid.* at paras. 108-10; *Feeney*, *ibid.* at para. 65.

[115] See *Law*, *supra* note 106 at para. 34 ("The concept of trial fairness is ultimately concerned with the *continued* effects of unfair self-incrimination on the accused ... " [emphasis added]).

The Court has accordingly stated that section 24(2)'s purpose is not only to prevent constitutional violations but also to "preclude improperly obtained evidence from being admitted to the trial process when it impinges upon the fairness of the trial."[116]

This conception of the Court's fair trial test is grounded on the corrective justice rationale.[117] It attempts to prevent the harms associated with self-incrimination by restoring the status quo ante between the suspect and the state.[118] But as I have discussed, corrective justifications for exclusion are instrumentally and morally dubious. When police infringe the Charter to obtain self-incriminating evidence, they violate the privacy and dignity of both innocent and guilty suspects.[119] Exclusion is justified to prevent this. But only factually guilty suspects suffer from any additional harm generated by the admission of self-incriminating evidence at trial.[120] It may be psychologically painful to witness the admission of self-incriminating evidence, but how is it is any more painful than witnessing the admission of any other kind of inculpatory evidence? Even if we assume that the admission of illegally obtained, self-incriminating evidence causes factually guilty defendants some measure of discrete psychological distress, that distress is almost always outweighed by the state's interest in securing their conviction. Like other applications of the corrective justice rationale, this interpretation of the Court's trial fairness doctrine perversely values the interests of guilty defendants in avoiding conviction over society's interest in securing it.

The second way of reading the Court's trial fairness doctrine is to view it as treating constitutional violations resulting in self-incriminating evidence as particularly serious and therefore warranting automatic exclusion in order to further

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[116] *Burlingham*, *supra* note 18 at para. 25.

[117] See Roach, "Evolving", *supra* note 21 at 123; Roach, *Constitutional Remedies*, *supra* note 11 at para. 10.280.

[118] This is why the court has limited the trial fairness category to evidence that is both conscriptive and non-discoverable. The problem is not simply the unconstitutional conscription of the suspect, it is the use at trial of the fruits of that conscription that the state could not have obtained by other means.

[119] To the extent that some Charter rights, such as section 10(b), serve as prophylactic protections against false confessions and wrongful convictions, they especially benefit the innocent.

[120] It is true that some evidence obtained by unconstitutional conscription, such as that resulting from coerced confessions, is inherently unreliable. But not all such evidence is unreliable. Some conscriptive evidence, such as DNA identification evidence derived from bodily samples, may be especially reliable. Even unconstitutionally obtained statements can be reliable, for example, those taken after violations of section 10(b) in non-coercive circumstances. So the near automatic exclusionary rule for evidence affecting trial fairness cannot be justified by reliability concerns. It is questionable, moreover, whether reliability ought to play any role in section 24(2) determinations. In most cases, judges can exclude unreliable self-incriminating evidence under the voluntary confession rule. See Mahoney, *supra* note 8 at 456-57. Where that rule does not apply, evidence may be excluded on the basis that its prejudicial effect outweighs its probative value. See *R. v. Sweitzer*, [1982] 1 S.C.R. 949 at 953, 37 A.R. 294; *R. v. Corbett*, [1988] 1 S.C.R. 670, 41 C.C.C. (3d) 385, La Forest J., dissenting on other grounds; *R. v. Potvin*, [1989] 1 S.C.R. 525, 47 C.C.C. (3d) 289, La Forest J., concurring; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 83 D.L.R. (4th) 193; *R. v. Arp*, [1998] 3 S.C.R. 339, 166 D.L.R. (4th) 296.

deterrence.[121] Charter violations that create self-incriminating evidence are not categorically more serious, however, than those that do not.[122] Some methods of obtaining self-incriminating evidence are highly invasive of privacy and dignity, such as interrogations involving physical or psychological coercion and takings of bodily samples without authorization or cause. But others are not. For example, police may obtain a confession after infringing a suspect's right to counsel without employing any coercive interrogation techniques; indeed, without even *questioning* the suspect. This is not to say that section 10(b)'s requirements are not warranted as prophylactics against abuse and false confessions. Nor does it mean that excluding uncoerced confessions cannot be justified on deterrence grounds. But the "uncoerced confession" example does demonstrate that some Charter violations producing self-incriminating evidence do not cause serious harm.[123] Have police who obtain a breath sample after neglecting to inform a suspect of duty counsel's telephone number committed a more serious wrong than those who burst into a suspect's residence with their guns drawn to secure the premises in anticipation of obtaining a search warrant?[124] Is a warrantless search involving the plucking of a single hair from the head of a suspect for DNA analysis more abusive than one involving a rectal scarch

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[121] This reading is incompatible, it should be noted, with the Court's discoverability doctrine. If the aim of exclusion is to deter constitutional violations, then the fact that the evidence could have been obtained otherwise is at best irrelevant. See Stuart, *Charter Justice*, *supra* note 1 at 513.

[122] See Steven Penney, "What's Wrong With Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-*Charter* Era (Part II)" 48(3) Crim. L.Q. [forthcoming in 2004] [Penney, "Self-Incrimination (Part II)"]. The Court regularly characterizes violations producing self-incriminating evidence as serious without any evidence that police acted in an abusive manner. See Roach, *Constitutional Remedies*, *supra* note 11 at paras. 10.1700-1710, 10.1740.

[123] Some would argue that violations of the right to counsel are inherently serious, not only because the right helps to prevent abuse and false confessions, but also because it protects against nnwitting self-incrimination. See *e.g. Therens*, *supra* note 93 at 652-53, Le Dain J., dissenting ("[T]he right to counsel is of such fundamental importance that its denial in a criminal law context must *prima facie* discredit the administration of justice.") This is simply a reiteration, however, of the corrective justice rationale for exclusion. The violation is serious, on this view, not because the means used to obtain the evidence are cruel or abusive, but because suspects are faced with the prospect of being convicted by their "own" evidence. As discussed, this is not a compelling rationale for exclusion. The law permits unwitting self-inerimination, moreover, in a variety of circumstances, including undercover operations and electronic surveillance, as well as in permitting suspects to be questioned even if they have only a "limited cognitive capacity" to nnderstand the right to counsel or are incapable of making a best-interests decision as to whether to speak (*R. v. Whittle*, [1994] 2 S.C.R. 914 at 941, 116 D.L.R. (4th) 416) and in permitting police to use considerable psychological pressure, manipulation, and trickery in interrogations (see *R. v. Oickle*, [2000] 2 S.C.R. 3, 187 N.S.R. (2d) 201). See generally Penney, "Self-Incrimination (Part II)", *ibid.*

[124] Compare *Bartle*, *supra* note 95 (breath sample, taken after police failed to inform suspect of toll-free telephone number for duty counsel, excluded on basis that its admission would affect trial fairness and despite the fact that eounsel's advice was of marginal utility in the circumstances) with *Silveira*, *supra* note 18 (police raided suspect's residence without a warrant and placed his family members under "house arrest" for over an hour while awaiting the issuance of a warrant; drugs obtained did not affect trial fairness and the violation was not sufficiently serious to warrant exclusion). See also Stuart, *Charter Justice*, *supra* note 1 at 517.

for concealed narcotics? Again, deterrence may justify exclusion in each of these cases. As will be discussed further on, deterrence dictates that certain types of Charter violations tending to generate self-incriminating evidence should almost always trigger exclusion, but this result flows solely from the capacity of exclusion to deter this type of violation, and not from the self-incriminating character of the evidence produced.

The idea that constitutional violations producing self-incriminating evidence are intrinsically egregious is belied, moreover, by the existence and constitutionality of laws compelling self-incriminating information from criminal suspects.[125] Courts have upheld numerous provisions requiring suspects to submit to takings of bodily samples and impressions.[126] In these cases, the only questions have been whether the laws require police to establish adequate grounds for suspicion and conduct the procedures in a minimally intrusive manner. If compelled self-incrimination is acceptable when subject to regulatory safeguards, then how can we conclude that unconstitutional conscription is so inherently abusive that its evidentiary products must always be suppressed? The fact that these same judicially upheld legislative provisions do not provide any evidentiary immunity proves, moreover, that the admission at trial of compelled, self-incriminating evidence is not intrinsically "unfair".

To summarize, neither deterrence nor any other rationale supports the automatic exclusion of self-incriminating evidence under section 24(2) of the Charter. Further, there is no reason for courts to even consider whether evidence is "self-incriminating", "conscriptive", or "discoverable".[127] The Court's trial fairness analysis is unjustifiable

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[125] See Paciocco, "Fair Trial Dichotomy", *supra* note 108 at 169; Pottow, "Unified Approach", *supra* note 8 at 54; Steven Penney, "What's Wrong With Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-*Charter* Era (Part III)" 48(4) Crim. L.Q. [forthcoming in 2004].

[126] The *Criminal Code*'s impaired driving provisions give police power to demand breath and in some circumstances blood samples for alcohol analysis. It is an offence to fail to comply with any of these demands. See *Criminal Code*, R.S.C. 1985, c. C-96, s. 254. The Supreme Court of Canada has rejected attacks on these provisions based on Charter sections 8, 9, and 10(b). See *R. v. Thomsen*, [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 411; *R. v. Hufsky*, [1988] 1 S.C.R. 621, 40 C.C.C. (3d) 398. The Ontario Court of Appeal has recently rejected the argument that roadside alcohol screening infringes section 7's protection against self-incrimination: *R. v. Thompson* (2001), 52 O.R. (3d) 779, 151 C.C.C. (3d) 339. The Supreme Court has also upheld the mandatory fingerprint and photograph identification provisions in section 2 of the *Identification of Criminals Act*, R.S.C. 1985, c. I-1. See *R. v. Beare*, [1988] 2 S.C.R. 387, 55 D.L.R. (4th) 481. It has also recently been decided that the *Criminal Code*'s DNA warrant provisions, which authorize police to compel suspects to provide bodily samples for identification purposes do not violate the Charter. See *R. v. S.A.B.*, 2003 SCC 60.

[127] As discussed, the Court's discoverability doctrine hinges on the corrective justice rationale and is therefore unsustainable. As I discuss at *infra* note 164 and accompanying text, the fact that evidence could have been obtained legally should in some circumstances militate in favour of exclusion. The scrapping of the trial fairness category also eliminates the need to determine whether facially non-conscriptive evidence is causally "derived" from conscriptive evidence such that it should be considered to affect trial fairness. In the absence of trial fairness considerations, the question of whether evidence is "derivative" is subsumed into the "obtained in a manner" inquiry.

and should therefore be scrapped. Self-incriminating evidence should be treated the same as all evidence and excluded only to further deterrence.

2. Evidence Not Affecting Trial Fairness: The Balancing Approach

As mentioned, when trial fairness is not implicated, the Supreme Court of Canada has instructed trial courts to decide section 24(2) applications by weighing the seriousness of the violation against the negative impact of exclusion on the reputation of the justice system. The more serious the violation, the more likely it is that its evidentiary fruits will be excluded. Conversely, the more serious the crime and the more important the evidence to securing a conviction, the more likely it is that the evidence will be admitted. Among these factors, the seriousness of the violation is the most weighty.[128] The assessment of the violation's seriousness turns primarily on whether it "was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant."[129] Other considerations include whether there was an urgent need to preserve evidence,[130] whether the evidence could have been obtained legally,[131] and the extent to which the violation unjustifiably invaded the suspect's privacy.[132] Factors such as offence seriousness and evidentiary importance have received less jurisprudential attention and likely play a secondary role in deciding admissibility. Some commentators have even suggested that they do no real work in section 24(2) determinations.[133] Nonetheless, courts regularly consider these factors and they likely make a difference in at least some cases.[134]

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[128] See Stuart, *Charter Justice*, *supra* note 1 at 499.

[129] *Therens*, *supra* note 93 at 652.

[130] See *R. v. Silveira*, [1995] 2 S.C.R. 297 at para. 150, 23 O.R. (3d) 256; *R. v. Wong*, [1990] 3 S.C.R. 36 at 59, 60 C.C.C. (3d) 460 [*Wong* cited to S.C.R.].

[131] The Supreme Court's jurisprudence on this point has been somewhat contradictory. In *Collins*, (*supra* note 6 at 285) the Court indicated that the availability of constitutional means heightens the seriousness of the offence by demonstrating a "blatant disregard for the *Charter*." See also *Grant*, *supra* note 95 at 260; *Law*, *supra* note 106 at para. 38; *Buhay*, *supra* note 18 at paras. 52, 56, 63. Conversely and consistently, it has also held that the fact that there was no other way to obtain the evidence diminishes the seriousness of the offence. See *R. v. Thompson*, [1990] 2 S.C.R. 1111 at 1155, 73 D.L.R. (4th) 596 [*Thompson*]; *Wong*, *supra* note 130 at 59. But in one case the Court held that a violation is *less* serious where police could have obtained the evidence constitutionally. See *R. v. Duarte*, [1990] 1 S.C.R. 30 at 59-60, 71 O.R. (2d) 575 [*Duarte* cited to S.C.R.].

[132] *R. v. Dyment*, [1988] 2 S.C.R. 417, 73 Nfld. & P.E.I.R. 13 [*Dyment* cited to S.C.R.]; *Buhay*, *supra* note 18 at para. 52; *R. v. Caslake*, [1998] 1 S.C.R. 51 at para. 34, 123 Man. R. (2d) 208 [*Caslake*]; *Belnavis*, *supra* note 90 at para. 40.

[133] See R.J. Delisle, "*Mellenthin*: Changing the *Collins* Test" (1992) 16 C.R. (4th) 286 at 290; Robert Harvie & Hamar Foster, "Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of the Criminal Law Under the *Charter*" (1992) 24 Ottawa L. Rev. 39 at 46, n. 23; Stuart, *Charter Justice*, *supra* note 1 at 506; Brewer, *supra* note 8 at 250.

[134] See *e.g. Grant*, *supra* note 95 at 261 ("the negative effect of the exclusion of the evidence and the good faith of the officers outweighed the seriousness of the violations ... "). See also *R. v.*

The Court's balancing approach is superficially compelling. It purports to give courts the capacity to make fine-tuned valuations of competing social interests, excluding when necessary to deter egregious violations and admitting when the need for evidence is most pressing.[135] As David Paciocco puts it, the balancing approach (or as he calls it, the "principle of proportionality") "enables the complex mix of competing interests to be measured on a case by case basis."[136] "Sometimes the costs [of exclusion]," Paciocco continues, "simply outweigh the benefits."[137] Balancing appears, in other words, to be the best method of achieving optimal deterrence.

Closer examination reveals, however, that it is not. Like many other *ex post facto*, "all of the circumstances" inquiries, the balancing approach fails to give police the *ex ante* certainty necessary for optimal deterrence.[138] As discussed, exclusion cannot deter unless police understand the limits of their investigative powers. The more complex and uncertain the rules, the less likely it is that police will obey them. The same logic applies to the sanctions that the law imposes for non-compliance. Police are less likely to be deterred from violating the Charter when the test for exclusion is complex and uncertain rather than clear and predictable. Under the Court's balancing approach, police know that deliberate, flagrant violations are likely to result in exclusion. But where the unconstitutionality of an intrusion is not obvious, the balancing approach gives them little reason to refrain from intruding. At the moment when they are contemplating intruding, they will often have little idea as to whether a court will characterize the violation (if it is a violation) as serious.[139] They may also be unable to assess whether the crime they are investigating is serious, both because the nature of the crime (if it is a crime) may not be fully known at the time and because they may not be able to accurately predict whether a court will agree with their characterization.[140] Similarly, it will often be very difficult for police to predict whether a court will eventually find that the evidence they are seeking is important to obtaining a conviction. With all of this uncertainty, police will often decide to commit the intrusion, rationally calculating that there is a decent chance that a court will

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Colarusso, [1994] 1 S.C.R. 20 at 78, 110 D.L.R. (4th) 297 [*Colarusso*] (emphasizing the "appalling circumstances in which the underlying offence ... was committed."). To reiterate, the Supreme Court has been clear that the seriousness of the charge and the importanee of the evidence cannot be used to justify the admission of evidence found to threaten the fairness of the trial. See *Collins*, *supra* note 6 at 286; *Burlingham*, *supra* note 18 at 242.

[135] See Paciocco, "Fair Trial Dichotomy", *supra* note 108 at 172-75, 181; Don Stuart, "*Stillman*: Limiting Search Incident to Arrest, Consent Searches and Refining the Section 24(2) Test" (1997) 5 C.R. (5th) 99 at 108; Don Stuart, "Questioning the Discoverability Doetrine in Section 24(2) Rulings" (1996) 48 C.R. (4th) 351 at 356; Paciocco, *Getting Away with Murder*, *supra* note 49 at 172-73.

[136] Paciocco, "Fair Trial Dichotomy", *ibid.* at 172.

[137] *Ibid.*

[138] See generally Penney, "A Concern", *supra* note 26 at 235-36; Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56 U. Chicago L. Rev. 1175.

[139] See Levenson, *supra* note 64 at 884.

[140] The Supreme Court has yet to develop coherent standards for determining offence seriousness under section 24(2) of the Charter. See Roach, *Constitutional Remedies*, *supra* note 11 at para. 10.1910.

decide either that the intrusion did not violate the Charter or that, on balance, the section 24(2) factors weigh in favour of admission. Such calculations are particularly likely when police believe that it would be difficult to obtain evidence by constitutional means. In such cases police have little to lose by overreaching, even if there is a good chance that evidence will be excluded. They are only likely to be deterred if they believe that exclusion is virtually certain.[141]

We can see, then, that the *ex ante* uncertainty inhering in the Court's balancing approach undercuts the ability of exclusion to deter all but the most flagrant violations. From an *ex post facto* perspective, it seems reasonable to weigh the costs and benefits of exclusion through an assessment of the severity of the violation, the seriousness of the offence, and the importance of the evidence. But from an *ex ante* point of view it does not. The balancing approach fails to deter violations in many cases where a court would have determined, *ex post*, that the violation warranted exclusion.

Optimal deterrence is much more likely to be achieved by a bright-line rule that makes it clear to police that violations will almost always result in exclusion. Such a rule would substantially increase constitutional compliance in criminal investigations. And as the American experience demonstrates, it would not cause many guilty defendants to be set free.[142] Some commentators have argued, however, that robust exclusionary regimes simply encourage courts to narrow the scope of constitutional rights to avoid lost convictions.[143] Rights may indeed be interpreted more broadly when unconstitutionally obtained evidence is likely to be admitted than when it is likely to be excluded. The true level of protection afforded by constitutional rights, however, depends not only on how broadly they are defined, but also on how likely they are to be respected. A regime that generously interprets rights but rarely excludes evidence obtained in violation of those rights does not provide much protection against overreaching. Disparities between rights definition and enforcement also obscure the trade-offs that constitutional criminal procedure must inevitably make between competing interests. If courts determine, for example, that for a particular type of search, crime control should prevail over privacy, then they should declare

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[141] For some, this may beg the question as to whether deterrence is possible in any case where police believe that sought-after evidence cannot be found by constitutional means. It is. Where exclusion is substantially certain to flow from an intrusion, police will generally (but of course not always) forego the evidence, either to conserve resources (Why engage in a costly intrusion when its evidentiary fruits will almost inevitably be suppressed?) or to avoid formal or informal non-exclusionary sanctions for non-compliance (Why risk such consequences, even if they are unlikely to be imposed, when there is no advantage to be gained by committing the violation?).

[142] See discussion *supra* notes 56-59 and accompanying text.

[143] See Paciocco, "Fair Trial Dichotomy", *supra* note 108 at 174; Pottow, "Unified Approach", *supra* note 8 at 64-67; George C. Thomas III & Barry S. Pollack, "Saving Rights from a Remedy: A Societal View of the Fourth Amendment" (1993) 73 B.U.L. Rev. 147 at 147; Perrin *et al.*, *supra* note 33 at 677; Stribopoulos, *supra* note 7 at 131-38.

such searches constitutional.[144] They should not be saying, "there is a right to privacy in these circumstances, but we are not willing to stop police from violating it."

The only question, then, is whether to adopt a rule mandating the exclusion of all unconstitutionally obtained evidence (the "absolute rule") or one that permits exclusion when prosecutors are able to demonstrate that exclusion would fail to deter because the violation was inadvertent and reasonable (the "good faith rule"). The latter is obviously more consistent with section 24(2)'s text and legislative history. It is also more compatible with existing section 24(2) doctrine. And properly conceived, it is at least as likely to achieve optimal deterrence as the absolute rule. Recall that deterrence requires the subjects of regulation to know and understand the law. If police are not aware that a particular investigative tactic might violate the Charter, then they have no reason to refrain from using it.[145] The logic of deterrence also dictates, however, that misconduct should only be excused when ignorance of the law is reasonable.[146] Otherwise police will have an incentive to remain oblivious to their constitutional obligations.[147] Police should not be held to have acted in good faith, therefore, unless at the time of violation they honestly and reasonably believed that they were complying with the Charter.[148] It is important, moreover, to limit the good faith exception to cases where *all* government actors involved in a criminal investigation have made reasonable, good faith efforts at constitutional compliance, including prosecutors giving advice to police and judicial officers issuing search and arrest warrants. Constitutional criminal procedure can be very complex and police often reasonably rely on authorities with greater expertise to define the boundaries of their power. If intentional or negligent mistakes by those authorities do not result in exclusion, then they will have little reason to resist pressure to grant police maximum investigative liberty.[149] Courts should deny section 24(2) applications, therefore, only

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[144] This is in essence the "reasonable expectation of privacy" test that defines the bounds of privacy protection under both section 8 of the Charter and the fourth amendment. See *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 55 A.R. 291; *Katz v. United States*, 389 U.S. 347 (1967).

[145] See *Powell*, *supra* note 14 at 540, White J., dissenting ("When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect.")

[146] See Stuart, "Eight", *supra* note 109 at 62-63.

[147] See Jull, *supra* note 5 at 549.

[148] The reasonableness requirement also eliminates the difficulty in proving that police were aware that their behaviour violated the Charter. It is much easier for police officers to lie about their states of mind than their conduct.

[149] My proposal, it should be noted, is in this sense broader than the specific good faith exceptions to the exclusionary rule that the United States Supreme Court has developed in its recent fourth amendment jurisprudence. See *Leon*, *supra* note 12 (no exclusion where police reasonably rely on warrant subsequently determined to have been issued in the absence of probable cause); *Krull*, *supra* note 12 (no exclusion where police reasonably rely on statute authorizing search where statute subsequently determined to violate fourth amendment); *Evans*, *supra* note 12 (no exclusion where officer reasonably relied on police record containing clerical error in effecting an unconstitutional arrest). In particular, the *Leon* warrant exception does not apply to judges and magistrates issuing warrants. The Court reasoned that there was no basis "for believing that exclusion of evidence seized

when prosecutors establish that all those responsible for the violation honestly and reasonably believed that they were complying with the Charter. Excluding evidence in these circumstances would not further deterrence.[150] It would, on the other hand, potentially allow factually guilty defendants who would otherwise have been convicted to go free. Even if this were to occur only rarely, it is a substantial social cost that should not be incurred in the absence of any countervailing benefit.

American critics of the good faith exception to the exclusionary rule have argued that suppression can deter even when police have acted on a reasonable but mistaken belief in the constitutionality of their actions.[151] Excluding evidence in these circumstances, the argument runs, has a long-term, general deterrent effect. It gives law enforcement officials an incentive to devote greater care to ensuring that their policies, procedures, and practices minimize the possibility of constitutional infringement to the greatest extent possible.[152]

But as long as courts assess the reasonableness of all facets of the state's investigative apparatus—including both the actions of police directly responsible for committing the violation as well as any policies, practices, training, legal advice, or judicial authorization that may have contributed to it—then excluding the fruits of reasonable mistakes would have little deterrent impact.[153] Moreover, there is very likely an "uneliminable" margin of error among "even well-trained officers" in

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pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate" (*Leon*, *supra* note 12 at 916). The argument in favour of requiring prosecutorial reasonableness is admittedly stronger than that requiring magisterial reasonableness. Unlike prosecutors, justices issuing warrants are required to be independent and impartial. Empirical evidence suggests, however, that the *ex parte* nature of warrant applications may result in systemic bias in favour of police interests. See Casey Hill, Scott Hutchison & Leslie Pringle, "Search Warrants: Protection or Illusion?" (2000) 28 C.R. (5th) 89; Wayne R. LaFave, "'The Seductive Call of Expediency': *United States v. Leon*, Its Rationale and Ramifications" [1984] U. Ill. L. Rev. 895 at 906-909 [LaFave, "Expediency"]. Subjecting issuing justices to the possibility of the exclusionary remedy seems likely to attenuate this bias. It also dissuades police from judge-shopping and from uncritically relying on justices' determinations of probable grounds. See generally *Leon*, *supra* note 12 at 955-56, Brennan J., dissenting, and 974-76, Stevens J., dissenting; Stewart, *supra* note 29 at 1403. But see Donald Dripps, "Living with *Leon*" (1986) 95 Yale L.J. 906 at 929-33.

[150] See Cloud, *supra* note 67 at 267.

[151] See *Leon*, *supra* note 12 at 953-55, Brennan J., dissenting.

[152] See LaFave, "Expediency", *supra* note 148 at 910.

[153] As Dickson J. (as he then was) put it in discussing the virtues of strict versus absolute liability for regulatory offences:

> If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? (*R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 at 1311, 85 D.L.R. (3d) 161).

applying the most complex criminal procedural rules.[154] Ideally, police would have perfect knowledge of existing Charter requirements and accurately predict the resolution of outstanding constitutional questions. But in reality we cannot reasonably expect them to. Excluding evidence obtained by unintentional, non-negligent error not only fails to deter, it is also likely to increase police frustration with courts and the Charter, exacerbate the police perjury problem, and damage the reputation of the criminal justice system.

Admittedly, the good faith approach cannot prevent judges who resist exclusion from applying the reasonableness standard too meekly. Adopting the absolute rule, however, would not prevent this. Recalcitrant judges would simply fail to find a constitutional violation.[155] The good faith rule does not have to be applied perfectly, moreover, in order to deter effectively. Because many judges *would* hold them to a rigorous standard, police would have ample incentive to maximize training and avoid negligent errors.

It could also be argued that by employing a reasonableness standard, the good faith approach is as incapable of generating *ex ante* certainty as the Supreme Court's balancing approach. But unlike the balancing test, the good faith approach does not permit courts to weigh competing interests. The only circumstances considered are those relating to the intentionality and reasonableness of police conduct. The good faith approach sends a clear signal to police that *all* evidence derived from intrusions that they knew or should have known were unconstitutional will be excluded, even where they have not behaved egregiously and the evidence is needed to obtain a conviction for a serious crime. A rule mandating exclusion in every case is unlikely to achieve much more deterrence than this.[156]

How, then, should courts go about determining whether violations were inadvertent and reasonable? Many of the Supreme Court's "seriousness of the

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[154] Heffernan & Lovely, *supra* note 42 at 345 (suggesting this margin of error lies between 20 and 30 per cent). See also discussion *supra* notes 47-48 and accompanying text.

[155] See Orfield, "Deterrence, Perjury", *supra* note 43 at 118.

[156] Some commentators have suggested that the good faith exception eliminates defence lawyers' incentive to bring forward novel constitutional claims. See Stephen G. Coughlan, "Good Faith and Exclusion of Evidence under the *Charter*" (1992) 11 C.R. (4th) 304. Defence lawyers' ethical obligations, however, oblige them to advance any argument that has a reasonable prospect of success. In most cases where police have violated the Charter, there will at least be a plausible argument that their mistake was unreasonable. In cases where it is obvious that exclusion will be denied on good faith grounds, courts can award remedies under section 24(1) of the Charter (such as damage or cost awards or modest reductions in sentence) to provide the necessary incentive. See generally Stuart, *Charter Justice*, *supra* note 1 at 459-60 (discussing cases endorsing non-exclusionary remedies for Charter breaches); John Pottow, "Constitutional Remedies in the Criminal Context: A Unified Approach to Section 24" (2000) 43 Crim. L.Q. 459 at 487 ("[T]here is no reason why ... an applicant seeking only exclusion of a given piece of evidence should not be taken as presumptively asking for a lesser, monetary award if the judge concludes that outright exclusion is excessive."); Caldwell & Chase, *supra* note 33 (proposing sentence reductions as incentive for fourth amendment claims where exclusion not available).

violation" factors are relevant. "Deliberate" violations should obviously result in exclusion. The more "flagrant" the intrusion into a clearly protected interest (such as bodily integrity or residential privacy), the more likely it is that a court will conclude that police either knew or should have known that it infringed the Charter. Conversely, "technical" violations are more likely to be characterized as unintentional, non-negligent errors. It would be a mistake, however, to consider these factors in order to determine the intrinsic "seriousness" of the violation, as measured, for example, by the degree of harm it caused to the defendant. Courts should only consider them to help decide whether the violation was inadvertent and reasonable (and hence undeterrable). When police infringe the Charter intentionally or negligently, deterrence requires that evidentiary fruits be suppressed no matter how trivial the violation may appear. Conversely, unintentional, reasonable violations should not result in exclusion even when they cause serious harm.

Much of what the Court has said about "good faith" is compatible with this approach. It has upheld the admission of non-conscriptive evidence obtained by police conducting searches pursuant to legislation,[157] policy directives,[158] widely used practices,[159] legal advice,[160] and lower court decisions that were later held to violate the Charter.[161] It has also excused violations by police who relied in good faith on the validity of search warrants.[162] In many cases, moreover, it has insisted that good faith reliance on these authorities be reasonable.[163] But it has not always done so, holding in numerous cases that "inadvertent" or "careless" (but arguably negligent) mistakes did not warrant exclusion.[164] The Court should clarify, therefore, that the "good faith" exception applies only to non-negligent violations.

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[157] See *R. v. Sieben*, [1987] 1 S.C.R. 295, 38 D.L.R. (4th) 427; *R. v. Hamill*, [1987] 1 S.C.R. 301, 38 D.L.R. (4th) 611; *Grant*, *supra* note 95; *Wiley*, *supra* note 95; *Plant*, *supra* note 95.

[158] See *R. v. Simmons*, [1988] 2 S.C.R. 495, 55 D.L.R. (4th) 673; *R. v. Jacoy*, [1988] 2 S.C.R. 548, [1989] 1 W.W.R. 354; *Caslake*, *supra* note 132.

[159] See *Colarusso*, *supra* note 134; *ibid.*

[160] See *Wong*, *supra* note 130.

[161] See *Thompson*, *supra* note 131.

[162] *R. v. Goncalves*, [1993] 2 S.C.R. 3, 135 A.R. 397, rev'g (1992), 81 C.C.C. (3d) 240 (Alta. C.A.); *R. v. Erickson*, [1993] 2 S.C.R. 649, 81 C.C.C. (3d) 447, aff'g (1992), 125 A.R. 68, 72 C.C.C. (3d) 75 (Alta. C.A.).

[163] See *e.g. Duarte*, *supra* note 131 at 60 (police misunderstanding of law was "entirely reasonable"); *Wong*, *supra* note 130 at 59; *R. v. Genest*, [1989] 1 S.C.R. 59 at 87, 45 C.C.C. (3d) 385 (no evidence of bad faith but "defects in the search warrant were serious and the police officers should have noticed them"); *Dyment*, *supra* note 132 at 440 ("no evidence that the respondent's rights were knowingly breached," but "lax police procedures cannot be condoned"); *Kokesch*, *supra* note 18 at 32 ("Either the police knew they were trespassing, or they ought to have known. Whichever is the case, they cannot be said to have proceeded in 'good faith', as that term is understood in s. 24(2) jurisprudence."); *Buhay*, *supra* note 18 at para. 59 ("[T]he officer's subjective belief that the appellant's rights were not affected does not make the violation less serious, unless his belief was reasonable.")

[164] See *e.g. R. v. Wise*, [1992] 1 S.C.R. 527 at 545, 70 C.C.C. (3d) 193 (use of expired search warrant indicated "carelessness" but not bad faith); *Grant*, *supra* note 95 at 253 (police

The Court should also direct trial judges to apply the good faith exception to self-incriminating evidence. As discussed, the fact that unconstitutionally obtained evidence is self-incriminating does not justify its exclusion. Deterrence principles dictate, however, that certain types of Charter violations that tend to produce self-incriminating evidence should generally trigger exclusion. It should be easy for police, for example, to comply with their informational obligations under section 10 of the Charter. Apart from cases where courts retrospectively amend those obligations,[165] violations should rarely be excused as honest, non-negligent errors. But other types of section 10 violations may sometimes be characterized as reasonable, inadvertent mistakes, for example where police incorrectly conclude, after considering all of the circumstances, that a suspect they are questioning is not detained and is therefore not entitled to be cautioned.[166]

Of course, the same principles should apply to violations of Charter rights, such as section 8, that typically produce non-conscriptive evidence. Exclusion should result when police violate clear search and arrest rules, for example when they arrest suspects in their residences without warrants and in the absence of exigent circumstances.[167] But where police violate less precise rules, such as those governing whether, considering all of the circumstances, there is a "reasonable expectation of privacy" in a context that has not yet been considered by the courts, admission may well be justified.[168] If liberty or privacy appears unjustifiably compromised by the admission of evidence in these circumstances, courts should be faulted for crafting indeterminate substantive rules and not for excusing police for blamelessly failing to follow them. As I have repeatedly stressed, the prospect of evidentiary exclusion can do little to deter police misconduct unless it is reasonably clear, *ex ante*, what constitutes misconduct. This should prod courts to craft substantive constitutional criminal procedure rules precisely, avoiding whenever possible the indeterminacy endemic to *ex post facto*, "all of the circumstances" inquiries.

As mentioned, the Court has also held that a violation is more serious if its evidentiary fruits could have been obtained by legal means. Under the deterrence-based approach, the availability of legal alternatives should only be considered insofar as it is relevant to good faith. When the legality of an intrusion was uncertain *ex ante*, the existence of an obviously lawful alternative strongly indicates that the decision to proceed was unreasonable. Police should be expected to forego constitutionally questionable methods in favour of clearly legal ones. Conversely,

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"inadvertently" failed to inform issuing justice of previous warrantless perimeter search; no evidence of "bad faith"); *Plant*, *supra* note 95 at 298 (misstatement to issuing justice exaggerating specificity of informant's tip was "good faith, albeit erroneous, attempt to draft the information concisely," not "deliberate attempt to mislead").

[165] See *e.g. Broyles*, *supra* note 107; *Bartle*, *supra* note 95.

[166] See *R. v. Moran* (1987), 36 C.C.C. (3d) 225, 21 O.A.C. 257; *R. v. Hicks*, [1990] 1 S.C.R. 120, 54 C.C.C. (3d) 575 aff'g (1988) 64 C.R. (3d) 68, 42 C.C.C. (3d) 394 (Ont. C.A.).

[167] See *e.g. Feeney*, *supra* note 18.

[168] See generally *Duarte*, *supra* note 131.

when there are no apparent legal alternatives, a court is more likely to determine that the violation was inadvertent and reasonable. This does not mean, of course, that courts should justify obvious improprieties when there is no other means of obtaining evidence.[169] Neither does it excuse police agencies from making reasonable efforts to ensure adequate officer training. It simply recognizes the fact that even well-trained officers will encounter situations in which the bounds of legality are not clearly marked, and that when alternative legal means are unavailable the prospect of exclusion is unlikely to dissuade them from intruding.

The presence of exigent circumstances, on the other hand, which the Court has held mitigates a violation's seriousness, should rarely be a relevant factor in section 24(2) determinations. As I have argued, if in certain circumstances an intrusion into the liberty or privacy interests protected by a Charter right is justified by countervailing interests, then courts should interpret that right to permit the intrusion. Allowances for exigency should therefore be built into the definition of rights, as the Court has done in permitting warrantless searches and arrests to prevent physical harm or the imminent loss of evidence.[170] But if circumstances are not urgent enough to justify what would otherwise be a violation, then perceived exigency should not weigh in favour of admission. Otherwise, exclusion loses its capacity to deter intrusions *ex ante* that courts would find were unjustified *ex post*. It is precisely when police feel the need to act urgently that exclusion is most needed to deter overreaching. Again, the only exceptions to this should arise when the constitutional rules governing police conduct in the circumstances are unclear. Police who are reasonably unsure as to whether an intrusion is legal are especially unlikely to be deterred by the prospect of exclusion if they also believe that there is an urgent need to act.

Conclusion

Interpreting section 24(2) of the Charter is no easy task. Like many other constitutional provisions, it is expressed in broad and indeterminate language. That language, moreover, was the product of an ambiguous compromise between the traditional common law inclusionary rule and the American constitutional exclusionary rule.[171] About all that can be discerned from the provision's phraseology

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[169] See *Kokesch*, *supra* note 18 at 29 ("Where the police have nothing but suspicion and no legal way to obtain other evidence, it follows that they must leave the suspect alone, not charge ahead and obtain evidence illegally and unconstitutionally.")

[170] See *Grant*, *supra* note 95 (warrantless search power read down to require exigent circumstances); *Feeney*, *supra* note 18 (exigent circumstances exception to warrant requirement for residential arrests); *R. v. Godoy*, [1999] 1 S.C.R. 311, (1998), 41 O.R. (3d) 95 (warrantless entry of residence to ensure safety is permitted in response to emergency calls). See also *Strachan*, *supra* note 94 at 999 (immediate section 10(b) warning requirement may be deferred until police achieve control over "potentially volatile situation").

[171] See *Simmons*, *supra* note 6 at 532 ("[T]he *Charter* enshrines a position with respect to evidence obtained in violation of *Charter* rights that falls between two extremes. Section 24(2) rejects the

and legislative history is that they support neither an absolute inclusionary nor absolute exclusionary regime.

Working out a sensible framework for section 24(2) determinations consequently requires a thorough immersion in theory. An examination of the various rationales for excluding unconstitutionally obtained evidence leads to an ineluctable conclusion: deterring constitutional violations is the only defensible reason to exclude. The United States Supreme Court has recognized this for many decades and few contemporary American jurists question it.[172] While initially reluctant to do so, our own Supreme Court seems increasingly prepared to concede that deterrence is an important aim of exclusion. It is now time for it to take the final step and admit that it is the only one.

Once we recognize that deterrence is the only compelling justification for exclusion, we can then go on to determine the circumstances in which exclusion constitutes a net social benefit. The empirical record demonstrates that exclusion is an effective (though far from perfect) deterrent and that it produces very few lost convictions. As many critics of the exclusionary rule have shown, it is possible to imagine a non-exclusionary regime that would come closer to optimal deterrence than the exclusionary remedy. But alternative schemes are unlikely to be implemented, and if implemented, would probably either underdeter (if sanctions are weak) or overdeter (if sanctions are strong) in comparison to exclusion. The great advantage of the exclusionary rule is that it provides a substantial deterrent against intentional and negligent constitutional violations without chilling legitimate investigative methods. What it cannot do, however, is prevent the honest and reasonable mistakes that are inevitably produced by the complexity and uncertainty of the constitutional law governing criminal investigations.

With these insights in mind, constructing a sensible framework for section 24(2) determinations becomes fairly straightforward. While the plain language of section 24(2) may not support the exclusion of evidence to deter violations of the Charter rights of third parties, other avenues are and should be made available to do so. Deterrence also requires that courts be permitted to exclude even in the absence of a causal connection between the violation and the discovery of the evidence. The deterrence rationale does not, however, support the differential treatment of "conscriptive" and "non-conscriptive" evidence. Constitutional violations producing self-incriminating evidence are not inherently more egregious than those that do not. It is time for the Supreme Court to finally abandon its trial fairness analysis. Deterrence theory suggests, furthermore, that the Court stop attempting to balance the seriousness of the violation against the seriousness of the offence and importance of

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American rule that automatically excludes evidence obtained in violation of the Bill of Rights ... It also shuns the position at common law that all relevant evidence is admissible no matter how it was obtained ... ").

[172] This is not to say, of course, that many do not question *how* the court has applied the deterrenee rationale.

the evidence. The balancing approach is intuitively appealing, because it appears to strike a reasonable compromise between irreconcilable interests. But it is simply too indeterminate to provide police with enough *ex ante* certainty to prevent unjustifiable violations. Balancing appears moderate, but in practice it fails to deter all but the most obvious and egregious abuses. Optimal deterrence requires a bright-line rule mandating exclusion for all but reasonable, inadvertent infringements.

Adopting a deterrence-based approach would not necessarily require a radical overhaul of existing section 24(2) jurisprudence. Trial fairness is undoubtedly a cornerstone of the Court's approach to section 24(2). But while its conceptual foundations are flawed, many of its outcomes can be supported on deterrence grounds. Violations of the informational requirements of section 10(b), for example, will rarely be justified as reasonable, inadvertent errors. There is consequently no reason to fear that the deterrence approach will permit trial courts to sacrifice the right to counsel to crime control interests, even in cases where the violation appears trivial in relation to the seriousness of the crime and importance of the evidence. The deterrence approach is also consistent with many of the Court's decisions involving non-conscriptive evidence. Most of the "seriousness of violation" factors can be viewed as proxies for inadvertence or reasonableness. And the relative lack of attention that courts have payed to the "effect of exclusion" factors may in part be explained by an unexpressed recognition that applying them robustly would severely blunt section 24(2)'s deterrent impact.

Taking deterrence seriously does not mean, moreover, that courts must abandon the notion that section 24(2) represents a compromise between competing values or admit unconstitutionally obtained evidence only rarely.[173] The good faith exception recognizes that police often perform their difficult work in an atmosphere of legal uncertainty, and that even well-intentioned and well-trained officers will make mistakes in the heat of the moment. Exclusion can have little deterrent force in these circumstances. But when the rules are clear, and police intentionally or negligently violate them, exclusion is the only practical means we have to persuade them to improve their behaviour. In these circumstances, sacrificing deterrence to obtain a conviction—even in cases when the sacrifice appears worthwhile—dramatically undercuts the capacity of exclusion to deter when we would want it to.

Perhaps it is naive to think that the Supreme Court will adopt a deterrence-based approach to section 24(2) anytime soon. It has invested considerable energy and institutional prestige into the current regime, and only a few years have passed since

[173] Nor does it require that we straightforwardly import American jurisprudence into our own. As I have mentioned, in requiring all state actors involved in the criminal investigative process to act reasonably, the "good faith" exception to exclusion that I have proposed is in one sense narrower than the American rule. But in another (perhaps more important) seuse, it is broader. Unlike the American doctrine, which to date only excuses violations generated by reasonable reliance on facially valid warrants, statutes, and official records, my proposal would excuse all non-negligent infringements. See *supra* note 149.

it authoritatively reconfirmed the status quo in the face of widespread calls to reconsider it.[174] It is possible, however, that the Court's reluctance to depart from section 24(2) orthodoxy has stemmed in part from a dearth of compelling alternatives. Commentators have proposed eliminating the automatic exclusionary rule for evidence affecting trial fairness[175] or scrapping the trial fairness category altogether and relying exclusively on the "seriousness of the violation" and "effect of exclusion" factors.[176] None of these proposals, however, represents an advance over the murky, underdeterring "all of the circumstances" balancing test. The proposal outlined here promises to achieve something closer to an optimal compromise between rights-protection and truth-seeking than any of these alternatives. Hopefully, the Court will see fit to adopt it.

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[174] After hearing oral argument in *Stillman*, *supra* note 18, the Court ordered a re-hearing to "invite a re-consideration of established principles as regards the application of s. 24(2) ... ". Stuart, *Charter Justice*, *supra* note 1 at 508, n. 408.

[175] See *e.g.* Delisle, "*Collins*", *supra* note 8; Paciocco, "Fair Trial Dichotomy", *supra* note 108.

[176] See *e.g.* Mahoney, *supra* note 8; Stuart, *Charter Justice*, *supra* note 1 at 519-20.