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PUBLIC ATTITUDES TOWARD THE EXCLUSION OF EVIDENCE: SECTION 24(2) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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Section 24(2) of the Charter of Rights and Freedoms provides that evidence obtained in violation of the Charter shall be excluded if its admission "would bring the administration of justice into disrepute". The Supreme Court of Canada has stated that the rationale for section 24(2) is the maintenance of public respect for the administration of justice and that the standard for determining disrepute is not the personal values of the judge but rather the values of the ordinary reasonable Canadian.

A public opinion survey was designed to test the judiciary's claim that their decisions reflect community values. This article describes the survey methodology and analyzes the data on public attitudes towards the admissibility of evidence. A comparison of judicial and public opinion demonstrates that the public apply the same criteria as judges do and in a similar manner, but that the public appears less willing to exclude evidence in some circumstances where the courts would clearly require exclusion. This gap between public and judicial opinion on the admissibility of evidence brings into question the Supreme Court's stated rationale for section 24(2) and the standard for its application.

L'article 24(2) de la Charte des droits et libertés prévoit que les preuves obtenues en contravention de la Charte doivent être exclues si leur "utilisation est

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susceptible de déconsidérer l'administration de la justice''. La Cour suprême du Canada a déclaré que l'article 24(2) a pour raison d'être le maintien du respect public pour l'administration de la justice et que la norme à utiliser pour décider si l'administration de la justice est déconsidérée ne dépend pas des valeurs du juge mais plutôt des valeurs du Canadien raisonnable moyen.

On a préparé un sondage d'opinion publique dans le but de vérifier si les décisions des juges reflètent les valeurs de la société comme ils l'affirment. Dans cet article les auteurs décrivent la méthode utilisée dans le sondage et analysent les données sur l'attitude du public en ce qui concerne l'admissibilité des preuves. La comparaison entre l'opinion publique et les décisions judiciaires montre que le public applique les mêmes critères que les juges, et de la même façon, mais que le public semble moins enclin à exclure les preuves dans certains cas où les tribunaux demanderaient sans aucun doute leur exclusion. Cette différence entre l'opinion publique et l'opinion des juges sur l'admissibilité des preuves met en question la raison d'être de l'article 24(2) telle que donnée par la Cour suprême et la norme à appliquer pour son utilisation.

Introduction

Section 24(2) of the Canadian Charter of Rights and Freedoms¹ provides that where evidence is obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the court shall exclude such evidence if having regard to all the circumstances, the admission of it would bring the administration of justice into disrepute. Although the Supreme Court of Canada has stated that judges ought to apply the standards that would be applied by ordinary Canadians, the court has questioned the relevance and admissibility of public opinion surveys of what Canadians actually believe would (or would not) bring the administration of justice into disrepute. Instead the court has affirmed that the judiciary is the best institution to determine and apply the community standard.

This article describes and analyzes the results of a national survey on public attitudes towards the exclusion of evidence. The survey was designed to determine whether the public consider the same factors as the judiciary in determining the admissibility of evidence, to determine the kinds of police conduct that would bring the administration of justice into disrepute in the eyes of the average Canadian, and to examine the extent to which judicial decisions on such questions are consistent with public opinion.

¹ Canada Act 1982, c. 11 (U.K.), Schedule B (Constitution Act, 1982), Part 1, referred to hereinafter as the Charter. Section 24(2) states:

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

In this analysis we do not examine the issue of public opinion towards the admissibility of evidence only amongst those persons who perceived a violation of the Charter in the fact situation presented to them in the survey.² Because respondents would rationally consider the exclusion of evidence only when there was a violation, the percentage of respondents that decided to exclude the evidence was higher amongst the subgroup of respondents who perceived a Charter violation than it was amongst the total sample population. Neither do we examine the relationship between a willingness to admit or to exclude evidence and all the social and demographic factors that were documented in the survey.³ Further analysis of such relationships may reveal, for example, whether there are regional or gender differences in attitudes towards the admissibility of evidence and the extent to which support for the exclusion of evidence is more pronounced among more educated strata of the population, among those more familiar with the Charter or otherwise more favourably disposed towards the protection of civil liberties. Because of the amount of the data collected from the survey and the complexity of its analysis, these subjects will be examined in separate articles.

Part I of this article describes the rationale for the project and provides the relevant legal context for evaluating the survey results. Part II outlines the design of the survey and provides the necessary technical documentation.⁴ Parts III and IV consist of the presentation and analysis of the data generated by the survey: Part III addresses issues of knowledge about the Charter and attitudes towards some constitutional rights, and Part IV addresses the admissibility of evidence in the context of different crimes and methods of police investigation. Part V compares public and judicial opinion on the admissibility of evidence. We conclude by summarizing our findings and suggesting some of their possible implications for the interpretation and application of the Charter.

I. Rationale and Legal Context

It is commonplace that section 24(2) represents a compromise between the United States' rule of absolute exclusion and the traditional Anglo-

² An analysis of the structure of public attitudes amongst those who perceived a breach of the Charter is set out in M. Gold, A. Bryant, H. Stevenson and D. Northrup, *Public Perceptions of Justice* (Toronto: Centre for Research on Public Law and Public Policy, 1989).

³ An analysis of the socio-demographic make-up of the respondents is presented in H. Stevenson, M. Gold, A. Bryant and D. Northrup, *Public Opinion in Charter Land: Section 24(2) of the Canadian Charter of Rights and Freedoms as a Critical Test of Attitudes Towards Civil Liberties* (Toronto: Institute for Social Research, York University, 1989).

⁴ To obtain further technical information, write to the Institute for Social Research, York University, North York, Ontario.

Canadian rule that relevant evidence, however obtained, is admissible.⁵ What is the rationale for such a compromise?

The legislative history of section 24(2) has been discussed elsewhere, and need not be elaborated here.⁶ Although many rationales have been offered for the rule,⁷ the most commonly invoked is the maintenance and promotion of public respect for the administration of justice. As expressed by Le Dain J.:⁸

⁵ In *R. v. Simmons*, [1988] 2 S.C.R. 495, at p. 532, (1988), 55 D.L.R. (4th) 673, at p. 700, Dickson C.J.C. stated:

... the *Charter* enshrines a position with respect to evidence obtained in violation of *Charter* rights that falls between two extremes. Section 24(2) rejects the 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: see *R. v. Wray*, [1970] 4 C.C.C. 1, 11 D.L.R. (3d) 673, [1971] S.C.R. 272.

The conventional characterization of the American rule as one of absolute exclusion is misleading, given the numerous exceptions to the rule itself. See *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984), (good faith); *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232 (1976), (inevitable discovery). The Anglo-Canadian law has also long recognized an exception in cases of involuntary confessions; see *Boudreau v. R.*, [1949] S.C.R. 262, [1949] 3 D.L.R. 81, (1949), 7 C.R. 427; *R. v. Fitton*, [1956] S.C.R. 958, (1956), 6 D.L.R. (2d) 529, 24 C.R. 371.

⁶ It is generally understood that the genesis of s. 24(2) can be found in the following: *R. v. Wray*, [1970] 2 O.R. 3, [1970] 3 C.C.C. 122 (Ont. C.A.); Law Reform Commission of Canada, Report on Evidence (Ottawa: Information Canada, 1975); Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Second Report, Vol. 2, Freedom and Security Under the Law (McDonald Report) (Ottawa: Supply and Services Canada, 1981), pp. 1036-1047; *Rothman v. R.*, [1981] 1 S.C.R. 640, (1981), 121 D.L.R. (3d) 578, 20 C.R. (3d) 97. See D. Gibson, *Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms* (1983), 61 Can. Bar Rev. 377.

⁷ One rationale would be the deterrence of police conduct. See McDonald Report, *ibid.* This is the dominant rationale for the United States rule. Some members of the Supreme Court have stated that the deterrence of police conduct ought not to be a consideration in the interpretation and application of s. 24(2). See *R. v. Collins*, [1987] 1 S.C.R. 265, at pp. 275, 280-281, (1987), 38 D.L.R. (4th) 508, at pp. 519, 523, 56 C.R. (3rd) 193, at pp. 204, 208 (per Lamer J.), while others have invoked deterrence as a reason for excluding evidence. "To do otherwise than reject this evidence on the facts and circumstances in this appeal would be to invite police officers to disregard *Charter* rights of the citizen and to do so with an assurance of impunity"; Estey J. in *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 622, (1985), 18 D.L.R. (4th) 655, at p. 663, 45 C.R. (3d) 97, at p. 108. See also, Finlayson J.A. in *R. v. Woolley* (1988), 63 C.R. (3d) 333, at p. 346, 25 O.A.C. 390, at p. 401 (Ont. C.A.): "There can be no more effective remedy for an accused than to have illegally-obtained evidence ruled inadmissible, nor any more salutary reprimand to the authorities than to deprive them of the fruits of an illegal investigative process."

Another rationale that has been suggested is the preservation of the integrity of the judicial system. See Dickson C.J.C. in *R. v. Simmons*, *supra*, footnote 5, at pp. 534 (S.C.R.), 701 (D.L.R.); see also Law Reform Commission of Canada, *op. cit.*, footnote 6, pp. 61-62.

⁸ *R. v. Therens*, *supra*, footnote 7, at pp. 652 (S.C.R.), 686 (D.L.R.), 132 (C.R.).

The central concern of s. 24(2) would appear to be the maintenance of respect for and confidence in the administration of justice, as that may be affected by the violation of constitutional rights and freedoms.

The core idea is simple. An effective and stable legal system must enjoy the support of the public. To admit unconstitutionally obtained evidence where that would bring the system into disrepute in the eyes of the public would be to compromise the public's support for the legal system. Conversely, to exclude evidence under circumstances where this would bring the administration of justice into disrepute would again undermine public support of the legal system.⁹ Hence the "compromise" reflected in section 24(2).¹⁰

In applying section 24(2), courts have invoked a number of factors as relevant in determining whether the admission or exclusion of evidence would bring the administration of justice into disrepute. Following *Le Dain J. in R. v. Therens*,¹¹ it is convenient to group them under the headings of the seriousness of the offence and the seriousness of the breach of the Charter.¹²

In general terms, the more serious the offence, the more likely it is that a court will admit unconstitutionally obtained evidence.¹³ The position that the seriousness of the offence should always argue in favour of

⁹ "The converse question is, what will the suppression of the truth do to the repute of the administration of justice?"; *Zuber J.A. in R. v. Duguay* (1985), 18 D.L.R. (4th) 32, at p. 48, 50 O.R. (2nd) 375, at p. 392, 18 C.C.C. (3d) 289, at p. 305 (Ont. C.A.). "There are cases where the circumstances satisfy that even if the evidence is 'tainted' by some breach of Charter rights the refusal to admit that evidence may cause greater injury to the State and society and to the administration of justice than its admission. In other words, in such cases the refusal to admit the evidence may be more likely to bring the administration of justice into disrepute."; *MacKinnon A.C.J.O. in R. v. Duguay, ibid.*, at pp. 41 (D.L.R.), 384 (O.R.), 298 (C.C.C.).

¹⁰ *In R. v. Simmons, supra*, footnote 5, at pp. 534 (S.C.R.), 701 (D.L.R.), *Dickson C.J.C.* states: "The decision to exclude evidence always represents a balance between the interests of truth on one side and the integrity of the judicial system on the other."

¹¹ *Supra*, footnote 7.

¹² *In R. v. Therens, ibid.*, at pp. 652 (S.C.R.), 686 (D.L.R.), 132 (C.R.), *Le Dain J.* described the judicial inquiry as follows: "... the two principal considerations in the balancing which must be undertaken are the relative seriousness of the constitutional violation and the relative seriousness of the criminal charge."

¹³ For example, the Appeal Division of the Nova Scotia Supreme Court suggested that where the charge is relatively minor, as in charges for possession of "soft" drugs in small amounts, evidence is more likely to be excluded than in cases where the kinds and amounts of drugs are more serious; see *R. v. Stevens* (1984), 7 C.C.C. (3d) 260, at p. 264, 1 D.L.R. (4th) 465, at p. 469 (N.S. App. Div.). See also *R. v. Lajoie* (1984), 4 D.L.R. (4th) 491, at p. 503, 8 C.C.C. (3d) 353, at p. 365 (N.W.T.S.C.). Similarly, the British Columbia Court of Appeal observed that exclusion would be more likely in a shoplifting case than in a murder case; *R. v. Hamill* (1985), 13 D.L.R. (4th) 275, at p. 297, 14 C.C.C. (3d) 338, at p. 360. Indeed, although courts of appeal have emphasized that the seriousness of the offence is only one of many factors to be considered, a number of cases can only be understood as turning almost exclusively on the fact that

admissibility has been criticized by some academics¹⁴ and more recently, by the Supreme Court of Canada in *R. v. Collins*.¹⁵ The fact remains, however, that it is a factor that courts have taken, and probably will continue to take into account in a wide variety of cases.

There is no ambiguity as to the relevance of the breach of the Charter. As the breach of the Charter increases in severity, evidence is more likely to be excluded.¹⁶ A number of considerations have been articulated as relevant to the seriousness of the Charter breach. They include: (i) whether the breach was wilful or inadvertent, often expressed in terms of whether the police acted in good faith;¹⁷ (ii) the extent to which the Charter right was infringed, often expressed in terms of whether the breach was of a trivial or technical nature;¹⁸ (iii) whether the Charter

the offence was so serious as to justify admitting the impugned evidence; see *R. v. Nielsen and Stolar* (1985), 16 C.C.C. (3d) 39, 30 Man. R. (2d) 81 (Man. C.A.).

¹⁴ See D. Gibson, *So What Can Be Done About It? An Overview of Charter Remedies*, in G.-A. Beaudoin (ed.), *Charter Cases 1986-87* (Yvon Blais, 1987), pp. 225, 260-261; M. Proulx, *Redéfinir les rapports de force au procès criminel: l'effet de la règle d'exclusion de l'article 24(2) de la Charte canadienne des droits et libertés* (1986), 20 R.J.T. 109.

¹⁵ *Supra*, footnote 7, at pp. 286 (S.C.R.), 527 (D.L.R.), 212 (C.R.). In *Collins*, *ibid.*, Lamer J. distinguished between cases where the admission of evidence would affect the *fairness* of the trial, and cases where it would not. In the former case, the seriousness of the offence is a factor that argues for exclusion, while in the latter case it argues for admissibility. It is beyond the scope of this study to attempt to analyze the meaning of this distinction. The fairness factor achieved prominence after the survey was conducted; see Dickson C.J.C. in *R. v. Simmons*, *supra*, footnote 5, at pp. 533 (S.C.R.), 700-701 (D.L.R.). For useful commentary, see R.J. Delisle, *Collins: An Unjustified Distinction* (1987), 56 C.R. (3d) 216; B. Elman, *Collins v. The Queen: Further Jurisprudence on Section 24(2) of the Charter* (1987), 25 Alta. L. Rev. 477.

¹⁶ *R. v. Collins*, *supra*, footnote 7, at pp. 286 (S.C.R.), 527 (D.L.R.), 212 (C.R.).

¹⁷ A finding of good faith tends to contribute to a decision to admit impugned evidence on grounds that its admission would not bring the administration of justice into disrepute, all other things being equal. See *R. v. Hamill*, [1987] 1 S.C.R. 301, (1987), 38 D.L.R. (4th) 611, [1987] 3 W.W.R. 726. On the other hand, where the violation was characterized as deliberate and wilful, the likelihood is that the evidence would be excluded, all other things being equal; *Clarkson v. R.*, [1986] 1 S.C.R. 383, (1986), 26 D.L.R. (4th) 493, 50 C.R. (3d) 289. Although this does represent the tendency in the cases, the caselaw contains a fair degree of disagreement on the relative weight that one should attach to the factor of good faith. See *R. v. Gladstone* (1986), 22 C.C.C. (3d) 151, [1985] 6 W.W.R. 504, Anderson J.A., at pp. 174 (C.C.C.), 529-530 (W.R.R.), and Lambert J.A., at pp. 165 (C.C.C.), 520 (W.R.R.) (B.C.C.A.). Recently, Martin J.A. in *R. v. Harris and Lighthouse Video Centres Limited* (1987), 35 C.C.C. (3d) 1, at pp. 13-29, 20 O.A.C. 26, at pp. 35-46 (Ont. C.A.), examined the "good faith" doctrine in the context of s. 8 and s. 24(2) of the Charter.

¹⁸ In *R. v. Collins*, *supra*, footnote 7, at pp. 286 (S.C.R.), 527 (D.L.R.), 212 (C.R.), Lamer J. put it as follows: "In my view, the administration of justice would be brought into disrepute by the exclusion of evidence. . . because of a trivial breach of the Charter."

violation involved the threat or use of force;¹⁹ (iv) the nature of the constitutional right infringed;²⁰ (v) the nature of the constitutional interest infringed;²¹ (vi) whether the evidence could have been obtained in some other way that would not have violated the Charter;²² (vii) whether the breach was necessary to prevent the destruction of evidence, or where it was otherwise impossible to comply with the Charter.²³

¹⁹ Regarding the use of force, see *R. v. Genest*, [1989] 1 S.C.R. 59, and *R. v. Rao* (1984), 46 O.R. (2d) 80, at p. 90, 12 C.C.C. (3d) 97, at p. 107 (Ont. C.A.). The threat or use of force has always vitiated a confession at common law; see *Boudreau v. R.* and *R. v. Fitton*, *supra*, footnote 5.

²⁰ Although most cases decided under s. 24(2) do not appear to distinguish between the different rights and freedoms set out in the Charter for the purpose of determining the admissibility of evidence, there is reason to view the right to counsel as enjoying some preeminence in the case-law. In *R. v. Collins*, *supra*, footnote 7, at pp. 284-285 (S.C.R.), 526 (D.L.R.), 211 (C.R.), Lamer J. noted that breaches of the right to counsel will often produce evidence that, if admitted, would undermine the fairness of the trial, and should generally lead to the exclusion of the evidence. In *R. v. Therens*, *supra*, footnote 7, at pp. 652-653 (S.C.R.), 686-687 (D.L.R.), 133 (C.R.), Le Dain J. reached a similar conclusion: "The application of these factors [the seriousness of the charge and the seriousness of the constitutional violation] to a denial of the right to counsel involves, in my view, a different balance because of the importance of that right in the administration of criminal justice. In my opinion, the right to counsel is of such fundamental importance that its denial in a criminal law context must *prima facie* discredit the administration of justice."

²¹ For example, an unconstitutional search of a person's body will tend to be viewed as more serious than an unconstitutional demand to produce a driver's licence; see *R. v. Ladouceur* (1987), 46 M.V.R. 1, at p. 29, 35 C.C.C. (3d) 240, at p. 265 (Ont. C.A.); *R. v. Dymert*, [1988] 2 S.C.R. 417, (1988), 55 D.L.R. (4th) 503. Similarly, courts have underlined that an unconstitutional search of a private home is especially serious in light of the expectations of privacy one has in one's own home; see Lamer J. in *R. v. Hamill*, *supra*, footnote 17, at pp. 307 (S.C.R.), 616 D.L.R., 731 (W.W.R.): "... the object of the unreasonable search was a dwelling-house, which renders the violation more serious. . . ."

²² Lamer J. in *R. v. Collins*, *supra*, footnote 7, at pp. 285 (S.C.R.), 527 (D.L.R.), 212 (C.R.).

²³ For example, the Ontario Court of Appeal has suggested that an otherwise warrantless search might be justified where a situation of urgency prevented the police from obtaining prior authorization; *R. v. Rao*, *supra*, footnote 19, at pp. 106 (O.R.), 123 (C.C.C.). Similarly, the Alberta Court of Appeal allowed evidence to be admitted where the actions of the police were motivated by urgency and a concern to prevent the destruction of evidence; *R. v. Dumas* (1986), 23 C.C.C. (3d) 366, at p. 372, 41 Alta. L.R. (2d) 348, at p. 353. See also *R. v. Komadowski*, [1986] 3 W.W.R. 657, (1986), 27 C.C.C. (3d) 319 (Man. C.A.). Other courts have noted a lack of any situation of urgency as a factor in their decision to exclude evidence; see, *R. v. Lerke* (1986), 24 C.C.C. (3d) 129, at p. 141, 25 D.L.R. (4th) 403, at p. 415 (Alta. C.A.); *R. v. Manninen*, [1987] 1 S.C.R. 1233, (1987), 41 D.L.R. (4th) 301, 58 C.R. (3d) 97.

The alternative measures available to the police and the circumstances of urgency often considered relevant to the seriousness of the breach, are better viewed as relevant to the possible justifications for breaching the Charter, and not to the extent to which the Charter has been breached. For a similar view, see Gibson, *op. cit.*, footnote 14, pp. 260-261. In addition to these factors, courts have invoked other considerations, such as whether

What standards should judges apply in determining whether evidence obtained in violation of the Charter should be admitted or excluded? The judicial response to this question has been clear and unequivocal. The standards are not the personal values of the individual judge but are the standards that would be applied by the ordinary reasonable Canadian. In articulating these standards, courts purport to be reflecting the views of the ordinary reasonable Canadian. In the words of Lamer J.:²⁴

The concept of disrepute necessarily involves some element of community views, and the determination of disrepute thus requires the judge to refer to what he conceives to be the views of the community at large.

Notwithstanding this reference to the views of the community, some members of the Supreme Court of Canada have questioned the relevance and admissibility of empirical evidence of public opinion on the question of what would (or would not) bring the administration of justice into disrepute. Four reasons for rejecting opinion survey evidence have been advanced.

First, it is said that the evidence would not be reliable. Section 24(2) requires a judgment to be based upon all the circumstances, and no survey could convey all of the necessary facts and circumstances about a case so as to allow the necessary balancing exercise to be understood.²⁵ Second, the costs associated with conducting public surveys would reduce the availability of the remedy provided by section 24(2), the court assuming that the costs of the survey would have to be borne by the person whose rights had been violated.²⁶ Third, despite his general reference to "the views of the community at large", Lamer J. thought that the public's views may or may not be reasonable, and hence should not be dispositive of what brings the administration of justice into disrepute.²⁷

the impugned evidence is necessary to substantiate the charge. In many cases, however, courts have excluded evidence even when it resulted in the acquittal of the accused. No clear pattern or principle can be discerned (compare: *R. v. Dymont*, *supra*, footnote 21, and *R. v. Simmons*, *supra*, footnote 5).

²⁴ In *R. v. Collins*, *supra*, footnote 7, at pp. 281-282 (S.C.R.), 523-524 (D.L.R.), 208-209 (C.R.), Lamer J. cites with approval the following approach advanced by Professor Yves-Marie Morissette, *The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What to Do and What Not to Do* (1984), 29 McGill L.J. 521, at p. 538, namely: "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case?."

²⁵ See Le Dain J. in *R. v. Therens*, *supra*, footnote 7, at pp. 653 (S.C.R.), 687 (D.L.R.), 133 (C.R.).

²⁶ *Ibid.*, at pp. 653-654 (S.C.R.), 687 (D.L.R.), 133-134 (C.R.), Le Dain J.

²⁷ *R. v. Collins*, *supra*, footnote 7, at pp. 281 (S.C.R.), 523-524 (D.L.R.), 208-209 (C.R.).

Members of the public generally become conscious of the importance of protecting the rights and freedoms of accused only when they are in some way brought closer to the system either personally or through the experience of friends or family.²⁸

Finally, Lamer J. stated that the Charter "is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority".²⁹ For these reasons, the court affirmed that the judiciary is the institution best suited to determine the relevant community standards, and to apply section 24(2) in light of those standards.³⁰

It may be that judges are best situated to determine what does and does not bring the administration of justice into disrepute, and that their decisions do, in fact, reflect community standards. And yet, absent some measure of what public opinion actually is on the subject, it is impossible to evaluate this claim by the judiciary. In light of the stated rationale for section 24(2), it appears crucial that the judiciary's claim be tested empirically. That was the object of the national survey that we undertook, to which we now turn.

II. Study Design

A. The design of the questionnaire

The purpose of the survey was to determine how a representative sample of Canadians thought about the exclusion of evidence at trial when that evidence was obtained by police in a manner that may have violated the Charter, and whether the public considered the same factors and applied them in a similar fashion as do the courts in determining questions of the admissibility of evidence.³¹ These research objectives posed a challenge for the design of the survey instrument.

Consider, for example, the different considerations that have been held to relate to the seriousness of the breach of the Charter: whether the breach was wilful or inadvertent, whether the breach involved the use of force, the nature of the constitutional interest affected, and so on.³² In

²⁸ *Ibid.*, at pp. 282 (S.C.R.), 524 (D.L.R.), 209 (C.R.).

²⁹ *Ibid.*

³⁰ See Le Dain J. in *R. v. Therens*, *supra*, footnote 7, at pp. 653-654 (S.C.R.), 687 (D.L.R.), 133 (C.R.). Lamer J. in *R. v. Collins*, *supra*, footnote 7, at pp. 283 (S.C.R.), 525 (D.L.R.), 210 (C.R.), described the task of the presiding judge in the following terms: "He should not render a decision that would be unacceptable to the community when that community is not being wrought with passion or otherwise under passing stress due to current events."

³¹ Because decisions on the admissibility of evidence, whether made by judges or members of the public, are not made in isolation from other factors, we wished also to ascertain Canadians' knowledge of and support for the Charter and public attitudes on civil liberties, police powers and other law and order issues. We assume that a person's general attitudes towards the Charter and individual rights, and more generally towards the police and other institutions of the state, will influence his or her decisions about admitting or excluding evidence unconstitutionally obtained.

³² See text, *supra*, at pp. 6 to 7.

many fact situations before the courts, one or more of these factors may be present. For instance, where the police deliberately use force to prevent an accused (under arrest) from speaking to his lawyer and the accused subsequently confesses, judges may exclude the confession on the basis of one or more of the above considerations. But if this fact situation were put in a questionnaire and the respondents were asked whether the confession should be admitted or excluded, their answers would reveal neither the consideration(s) they relied upon for their decision, nor the importance of those considerations relative to one another. Nor would they reveal the role played by the seriousness of the offence in their decision to admit or exclude the evidence. By combining the use of case summaries or vignettes³³ with the survey technique of computer assisted telephone interviewing (CATI),³⁴ we were able to design and administer a survey instrument capable of obtaining information about these complex relationships.

A vignette is different from a standard survey question in the amount of detail and contextual framework provided to the respondent. The use of vignettes allowed us to vary the facts so as to change the levels of seriousness of the breach and the seriousness of the offence, and to isolate some of the considerations relevant to those factors. In this way we could identify the considerations that influenced the public's decisions to admit or exclude evidence, and determine the way they interacted in their judgments as to what would bring the administration of justice into disrepute.

The survey instrument presented three vignettes from the criminal law context: a drinking and driving offence, a drug case, and a case of violence against the person.³⁵ An example will illustrate how the vignettes were used in the survey.

Two police officers arrest a man for beating up a young child. The police tell the man he has the right to remain silent and to contact his lawyer. He says he wants

³³ For a review of the use of vignettes, see, The Factorial Survey Approach: An Introduction, in P. Rossi and S. Nock (eds.), *Measuring Social Judgments: The Factorial Survey Approach* (1982); and C.S. Alexander and H.J. Becker, *The Use of Vignettes in Survey Research* (1978), 42(1) *Public Opinion Quarterly* 93.

³⁴ A discussion of CATI may be found in *Statistical Methods Research*, 1983. A copy of the survey instrument may be obtained from the Institute for Social Research, York University.

³⁵ These vignettes were chosen for several reasons: (1) the nature of these offences is generally understood by the public; (2) the caselaw suggested that each of these offences is often associated with a particular Charter right—drunk driving with the right to counsel, drug cases with the right to be secure from unreasonable search or seizure, and violence against the person with the right to counsel and the common law confessions rule; (3) the seriousness of the offence and of the breach of the right could be manipulated realistically; (4) the courts had made or will probably make rulings on these Charter rights in the context of these offences; and (5) the courts had made evidentiary rulings in similar circumstances prior to the enactment of the Charter.

to speak to his lawyer. After he calls his lawyer, the police tell him things might get rough if he does not confess now. The man confesses committing the crime to the policeman. Without the confession, the man will not be convicted. Do you think the judge should ALLOW or NOT ALLOW the evidence to be used in court?

The vignette more closely simulates real world situations than do abstract questions, and it captures some of the complexity of situations facing judges when they must decide to admit or exclude evidence from court. Importantly, the use of CATI enables the details or circumstances in the vignette to be randomly allocated to respondents. Thus, an alternative version of the vignette may have a different crime, different victim and/or a different breach of the suspect's rights. In fact, there were eighteen different versions of this vignette presented to respondents.³⁶ Although each respondent received only one version of a vignette, the circumstances were *independently* and *randomly* allocated to respondents.

The systematic variation of the factual circumstances allows for analysis that can determine the effect of each factor and the interactions among the various factors. For example, by varying the relative seriousness of the offence, we can see how this factor affects decisions on admissibility, holding all other factors constant. By varying the relative seriousness of both the offence and the breach, we can also see how these two factors interact in judgments on admissibility.

In the first vignette (a drinking and driving offence) and in the third vignette (a personal violence offence) the respondents were asked whether the judge should admit or exclude the results from the breathalyzer test (vignette #1) and the confession (vignette #3). Moreover, some randomly selected respondents were also informed that the judge had to consider whether to exclude the evidence "because the accused's rights were violated". In the second vignette (a drug offence), instead of asking the respondents what the judge should do, they were randomly informed that the judge either admitted or excluded the evidence, then they were asked if they agreed or disagreed with the judge's decision.

Regardless of the respondent's decision on the admissibility of the evidence, the respondent was asked next that if the judge had done the opposite of what she or he thought the judge should do, would she or he "think less of our system of justice"? This was our way of asking whether "the admission of the evidence would bring the administration of justice into disrepute". Respondents were also asked whether the accused's rights had been violated and, if so, to rank the seriousness of such violation. Finally, the survey asked respondents to rank the relative seriousness of the crime for which the accused was being tried.

In addition to facilitating the construction of the vignettes, CATI was used to vary randomly the wording of selected questions in the

³⁶ See text, at pp. 31-34.

survey to test the effect of such changes on responses. For example, there were two forms of the question on what effect respondents thought the Charter would have on the system of justice. The first form asked whether the Charter would have a "positive effect, a negative effect, or no effect on the way the system of justice works". The second form varied from the first in that the interviewer specifically added a "not sure" option after asking about the effect of the Charter.³⁷ As detailed below, such changes often shifted the distribution of responses.

Because we assumed that some respondents would be relatively unaware of the Charter or otherwise not very knowledgeable about it, we wished to inform accurately all respondents on the scope of some Charter rights prior to questioning them about their attitudes on the exclusionary rule. Accordingly, the respondents received an information question on the Charter provision that would later be the subject matter of a vignette.³⁸

B. *The mechanics of the interview*

Each interviewer had a computer monitor, a keyboard linked to the computer, and a telephone headset. When the interviewer activated the computer, the computer program indicated the telephone number to be dialed, and recorded the telephone number, time, date, and other such information, of the interview. The computer was also programmed to vary randomly the context of the vignettes and to vary randomly the questions. Accordingly, each respondent received one version of a vignette and one of the alternative forms of a question. The interviewer then asked the respondent the question as it appeared on the computer monitor, and immediately recorded the answer which was stored in the memory of the computer. The computer was also programmed to select the subsequent question depending on the respondent's answer.

C. *Sample design and response rate*

The sample for the study was designed to represent the adult population of the ten Canadian provinces who speak one of the official languages and reside in private households. Exclusions from the population include those who are under eighteen years of age, live in one of the two territories, could not complete the survey in English or in French, or live in institutions (educational or penal institutions, old age homes, and group homes). Because the mode of data collection for the survey

³⁷ The question stated in part: "or you are not sure what effect the Charter will have on the system of justice."

³⁸ Early in the survey and prior to the presentation of the third vignette concerning the confession of an accused in custody, the survey asked each respondent the following question: "When the police arrest someone, the Charter says they must stop questioning that person and not interfere when they attempt to contact a lawyer. Do you think this is the way the law should be?"

was by telephone, the 1.8 per cent of the households in Canada that do not have telephones were eliminated from the sample population.³⁹

Use of a random digit dialing (RDD) procedure gives all households, not just those listed in telephone directories, an equal and known probability of selection.⁴⁰ The telephone numbers selected for the survey were distributed among the provinces according to their share of the population. This distribution allows for unbiased estimates of the country as a whole⁴¹ and for comparisons between the more populated provinces. However, this distribution precludes the possibility of making provincial estimates for the less populated provinces.

³⁹ Statistics Canada: Catalogue 56-203, 1985. A two stage probability selection process was utilized to select the respondents for the survey. The first stage of the sample selection process involved the random selection of households. The appropriate sampling frame for the first stage of the selection process is a complete listing of all the telephone numbers in Canada. Because unlisted numbers (not published in the directory by the telephone owner's choice) and numbers for persons who have recently moved are not included in the directory, and because persons who do not have their numbers in the telephone directory are not a random subset of the population, telephone directories are not an acceptable surrogate for a listing of all telephone numbers. The second stage of the sample selection is the random selection of an adult household member as the respondent. This was completed by selecting the household member who had the most recent birthday.

⁴⁰ All telephone numbers in Canada consist of a three digit area code, a three digit central office code (the first three digits), and a suffix (the last four digits of a telephone number). It is possible to determine which area codes, central office codes, and suffixes are in use by referring to telephone and city directories. With this knowledge, it is possible to determine the range of all possible numbers for Canada. For example, within area code 416, the central office code of 221 has 10,000 possible telephone numbers (221-0000 to 221-9999). The use of Random Digit Dialing (RDD) is expensive, as nonresidential numbers must be screened out of the sample. Based on previous work, it can be estimated that approximately sixty per cent of the randomly generated numbers will be households and that interviews will be completed in about sixty-five per cent of these households. Given the target number of 800 completed interviews, it was necessary to draw a sample of 2200 telephone numbers for the survey ($2200 \times .60$ (proportion of households) $\times .65$ (proportion of households willing to participate)).

⁴¹ The sampling error for 842 observations is 3.4 per cent. The standard error is calculated using the following formula: $1.96 \times \sqrt{P \times Q/n}$ where 1.96 represents a 95 per cent confidence interval (19 times out of 20), P and Q are the observed distribution for a variable and n is the number of observations. For a question with a 50/50 distribution and 842 observations, the computation is $1.96 \times \sqrt{.50 \times .50/n} = 1.96 \times \sqrt{.0002969} = .0337721$ or 3.4 per cent. Variations in sample size and the observed distribution for a question will result in variations in the sampling error. For example, six of the 842 respondents did not answer the question "[H]ave you heard of the Canadian *Charter of Rights?*" and seventy-six per cent of those who answered said they had heard of the Charter. For this question, the sampling error is calculated as $1.96 \times \sqrt{.76 \times .24/836}$. Completion of the calculation gives a result of 2.9 per cent. For a discussion on the calculation of sampling error, see L. Kish, *Survey Sampling* (1965).

The survey was administered to 842 adults across Canada.⁴² The 66.7 per cent response rate⁴³ compares favourably with other national telephone surveys.⁴⁴

III. *General Attitudes Towards the Charter*

A preliminary assumption in the design of this research was that respondents' knowledge of and general attitudes towards the Charter would affect their evaluation of the Charter's exclusionary rule. Although this article does not present an analysis of these relationships, some of the basic findings deserve to be underlined.⁴⁵ Accordingly, we begin with these general attitudes before turning to more specific attitudes on the admissibility of evidence.

Table 1 shows the distribution of responses to three introductory questions about the Charter. According to the estimate derived from question 1.1, 75.7 per cent of Canadians have heard of the Charter.⁴⁶ Of those who have heard of the Charter, 77.7 per cent believe that, "generally speaking, it has been a good thing for Canada" (question 1.2), meaning that those who knew about and thought the Charter a good thing represented only 58.8 per cent of the total population.

A similar estimate of positive attitudes towards the Charter is suggested by the responses to question 1.3A concerning the Charter's effect "on the way the system of justice works in Canada". This question was asked randomly in two forms, one of which explicitly asked if the respondent was unsure about the effects of the Charter. When not explicitly invited to admit uncertainty on the issue, 56.1 per cent thought of the Charter as having a positive effect on the criminal justice system, a result almost identical to the proportion of the population responding favourably to the Charter in question 1.2. Even this estimate of majority support for the Charter is inflated, however. When respondents were given the same question but allowed to admit uncertainty (1.3B), the

⁴² The survey was conducted between November 1st and December 20, 1987, at the CATI Laboratory of Institute for Social Research, York University. Machine readable data are archived at ISR and inquiries regarding the survey should be addressed to the authors at ISR.

⁴³ There are numerous ways to calculate response rates in survey research; see D.A. Dillman, *Mail and Telephone Surveys: The Total Design Method* (1978); J.H. Frey, *Survey Research by Telephone* (1985); F. Wiseman and P. McDonald, *Noncontact and Refusal Rates in Consumer Telephone Surveys* (1979), 16 *Journal of Marketing Research* 478. We used a conservative method to calculate the response rate.

⁴⁴ For example, the response rate to the Civil Liberties Survey (J. Tibert *et al.*, *Attitudes Towards Civil Liberties in Canada: Technical Report* (Toronto: Institute for Social Research, 1987)), was 64 per cent.

⁴⁵ *Supra*, footnote 31.

⁴⁶ This estimate approximates an estimate based on an equivalent question in an earlier survey conducted at ISR on Canadian attitudes towards civil liberties.

proportion giving a favourable response to the effect of the Charter dropped to 32.3 per cent. Uncertainty also lowers negative judgments of the Charter. The proportion expressing a negative opinion in response to question 1.3A was 12.5 per cent, but declined even more to 9.4 per cent when the alternate form of the question containing the uncertainty option was explicitly offered to the respondents. Although many Canadians hold positive attitudes towards the Charter, the data suggest that these

TABLE 1
KNOWLEDGE AND GENERAL ATTITUDES TOWARDS THE CHARTER

Identifier	Question	Response	Number	Percent
1.1	Have you heard of the Canadian Charter of Rights	Yes	637	75.7
		No	199	23.6
		Don't Know	6	.7
		Total	842	100.0
1.2	Generally speaking, do you think the Charter is a good thing or a bad thing for Canada?	Good Thing	496	77.7
		Bad Thing	37	5.8
		Don't Know	102	16.0
		Refused	3	.5
		Total	638	100.0
1.3A	What EFFECT do you think the Charter will have on the way the system of justice works in Canada?	POSITIVE Effect	161	56.1
		NEGATIVE Effect	36	12.5
		NO Effect	38	13.2
		Don't Know	52	18.2
		Refused	—	—
		Total	287	100.0
1.3B	What EFFECT do you think the Charter will have on the way the system of justice works in Canada? (In this form of the question, the interviewer expressly stated "or are you not sure what effect the Charter will have. . .").	POSITIVE Effect	113	32.3
		NEGATIVE Effect	33	9.4
		NO Effect	18	5.1
		Not Sure	183	52.3
		Refused	3	.9
		Total	350	100.0

attitudes are not firmly held. A conservative, but perhaps most valid estimate from question 1.3B, indicates that positive attitudes towards the Charter in general are held by only 32.3 per cent of those respondents who had heard of the Charter.

In Table 2, question 2.1 respondents were asked for their opinion about the Charter right guaranteeing an accused's right to counsel and the correlative duty placed on the police to advise an accused of such right when she or he is under arrest. There was overwhelming public support (96.7 per cent) for this Charter right. There was less, but still overwhelming approval (83.8 per cent) for the Charter requirement that

police must cease questioning and not interfere with the right of a detained person to contact her or his lawyer (question 2.2).⁴⁷

The survey also examined public approval of the Charter right to be secure against unreasonable search or seizure. When asked about the power to search for evidence of a crime (question 2.3), 82.9 per cent agreed with the Charter requirement that the police must obtain a search

TABLE 2
GENERAL ATTITUDES TOWARDS RIGHT TO COUNSEL AND
AGAINST UNREASONABLE SEARCH

Identifier	Question	Response	Number	Percent
2.1	The Charter of Rights states that anyone who is arrested has the right to speak to a lawyer. When the police arrest someone, they MUST tell that person she or he has the right to speak to a lawyer. Do you think this is the way the law should be?	YES	815	96.7
		NO	19	2.3
		Don't Know	8	1.0
		Total	842	100.0
2.2	When the police arrest someone, the Charter says that they MUST stop questioning that person and not interfere when she or he attempts to contact a lawyer. Do you think this is the way the law should be?	YES	706	83.8
		NO	104	12.4
		Don't Know	32	3.8
		Total	842	100.0
2.3	The Charter of Rights says the police MUST have a search warrant before they enter someone's house to search for evidence of a crime. Do you think this is the way law should be?	YES	698	82.9
		NO	121	14.4
		Don't Know	21	2.5
		Refused	2	.2
		Total	842	100.0
2.4A	When police are investigating a crime, they SHOULD have to obtain a search warrant to enter a business office to seize evidence. Do you. . .	Strongly Agree	98	24.0
		Agree	244	59.6
		Disagree, or	47	11.5
		Strongly Disagree	9	2.2
		Not Sure	11	2.7
		Total	409	100.0
2.4B	When police are investigating a crime, they SHOULD have to obtain a search warrant to enter a business office to seize evidence they think is about to be destroyed. Do you. . .	Strongly Agree	84	19.4
		Agree	211	48.7
		Disagree, or	98	22.6
		Strongly Disagree	25	5.8
		Not Sure	15	3.5
		Total	433	100.0

⁴⁷ *R. v. Manninen*, *supra*, footnote 23, at pp. 1242 (S.C.R.), 308 (D.L.R.), 104 (C.R.).

warrant before entering a person's home, and 83.6 per cent thought that police should have a search warrant before they can inspect business premises (question 2.4A).⁴⁸ Generally speaking, public opinion on these issues is consistent with the judicial requirement that, absent special circumstances, the police must have a search warrant in order to comply with the Charter guarantee against unreasonable search and seizure.⁴⁹ In question 2.4B, however, public support for the requirement of a warrant decreased substantially to 68.1 per cent when the police believed evidence was about to be destroyed. This is not inconsistent with the law on the subject, which recognizes that emergent circumstances may arise where it is not practicable to obtain a warrant.⁵⁰

On the basis of the responses to these questions, there appears to be widespread support for these rights guaranteed by the Charter. At the same time, data not reported here reveal broad support for the exercise of state power in the interest of controlling crime and promoting public safety.⁵¹ These two competing concerns meet on the issue of admissibility of evidence obtained in violation of the Charter.

⁴⁸ See *R. v. Rao*, *supra*, footnote 19, where Martin J.A. examined s. 10(1)(a) of the Narcotic Control Act, R.S.C. 1970, c.N-1, repealed S.C. 1985, c.19, s. 200(1), which authorized a peace officer, on reasonable and probable grounds, to search a place other than a dwelling house without a warrant. He stated: "In my view, the warrantless search of a person's office requires justification in order to meet the constitutional standard of reasonableness secured by s. 8 of the Charter, and statutory provisions authorizing such warrantless searches are subject to challenge under the Charter", *ibid.*, at pp. 106 (O.R.), 123 (C.C.C.).

⁴⁹ In *Hunter, Director of Investigation & Research, Combines Investigation Branch v. Southam Inc.*, [1984] 2 S.C.R. 145, (1984), 11 D.L.R. (4th) 641, 14 C.C.C. (3d) 97, 41 C.R. 97, Dickson J. stated: "I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure"; *ibid.*, at pp. 161 (S.C.R.), 653 (D.L.R.), 109 (C.C.C.), 115 (C.R.).

See also, *R. v. Collins*, *supra*, footnote 7. Lamer J. stated: "As a result, once the appellant has demonstrated that the search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable"; *ibid.*, at pp. 278 (S.C.R.), 521 (D.L.R.), 206 (C.R.).

⁵⁰ *Hunter, Director of Investigation & Research, Combines Investigation Branch v. Southam Inc.*, *ibid.*, at pp. 160-161 (S.C.R.), 653 (D.L.R.), 109 (C.C.C.), 114-115 (C.R.). Note that judges often resort to the saving provisions of s. 1 of the Charter rather than s. 8 in such circumstances. Where courts have held that a warrant was required in such circumstances, the need to secure evidence about to be destroyed is a factor that has been invoked under s. 24(2) to argue for the admissibility of the evidence obtained.

⁵¹ For example, 58 per cent of respondents approved of companies having the right to test mandatorily their employees for use of illegal drugs; 89.1 per cent approved of airlines having the right to have their pilots participate in a drug testing programme; 80.7 per cent approved of random searches by custom officers of persons coming through Canadian customs, which increased to 94.4 per cent if the officer suspected the person

IV. *Public Opinion on the Exclusion of Evidence*

The survey elicited public opinion on the admissibility of unconstitutionally obtained evidence on three different levels. The first level invited response to the issue stated in rather abstract terms. The second level placed the issue in the context of a particular crime and a general category of police conduct. The third level involved the use of vignettes, presenting the respondent with a factual context for the decision and placing the respondent in a decision-making role. As the data reveal, as we move from the more abstract levels through the particular questions and into the factually specific vignettes, the picture of public opinion that emerges becomes increasingly refined.

A. *General Attitudes Towards the Exclusionary Rule*

Question 3.1 (Table 3) asked generally whether judges should or should not allow evidence to be used in court when police obtain it in violation of the Charter. The question was varied by randomly introducing two explicit qualifications in two alternative forms of the question: (1) that it depends on the crime (3.1B); and (2) that it depends on how the police violated the Charter (3.1C).

TABLE 3
GENERAL ATTITUDES TOWARDS THE EXCLUSIONARY RULE

Identifier	Question	Response	Number	Percent
3.1A	Do you think judges SHOULD or SHOULD NOT allow evidence the police get by breaking the rules of the Charter to be used in court?	SHOULD	90	39.8
		SHOULD NOT	98	43.4
		Depends on circumstances	27	11.9
		Don't Know	11	4.9
		Total	226	100.0
3.1B	Do you think judges SHOULD or SHOULD NOT allow evidence the police get by breaking the rules of the Charter to be used in court, <i>or</i> <i>do you think it depends on the crime?</i>	SHOULD	27	14.5
		SHOULD NOT	38	20.4
		Depends on Crime	112	60.2
		Depends on circumstances	5	2.7
		Don't Know	4	2.2
3.1C	Do you think judges SHOULD or SHOULD NOT allow evidence the police get by breaking the rules of the Charter to be used in court, <i>or do you think it</i> <i>depends on how the police</i> <i>broke the rules?</i>	Total	186	100.0
		SHOULD	29	12.9
		SHOULD NOT	48	21.3
		Depends on how they broke rules	114	50.7
		Depends on circumstances	17	7.6
		Don't Know	16	7.1
		Refused	1	.4
		Total	225	100.0

of concealing illegal drugs; and between 65.9 and 73.8 per cent approved of the police having the right to stop cars randomly in search of drunk drivers; see A. Bryant, M. Gold, D. Northrup and M. Stevenson, *Public Attitudes Towards the Exclusion of Evidence: Section 24(2) of the Canadian Charter of Rights and Freedoms*, Centre for Research on Public Law and Public Policy, York University, 1988.

When the question did not expressly contain either of these qualifications, 39.8 per cent would have allowed the evidence to be used in court and 43.4 per cent would have excluded it. When the qualifications were explicitly presented in the question, however, the percentage of the population who would admit the evidence regardless of the crime (14.5 per cent) or of how the Charter was violated (12.9 per cent) was considerably lower. The same was true for those prepared to exclude the evidence regardless of the crime (20.4 per cent) or of the Charter violation (21.3 per cent). Indeed, a majority of respondents thought that admission or exclusion should depend on the crime (60.2 per cent) or on how the police violated the Charter (50.7 per cent). This suggests that the public considers the context within which questions of admissibility arise, and that public attitudes are sensitive to some of the factors identified by courts as relevant to questions of the admissibility of evidence. The data do not, however, tell us very much about how the public would balance these factors.

To understand these issues better, we asked a further question concerning the admissibility of a confession in a rape case obtained by police use of force (in the first variation) and by police trickery (in the second).⁵² We also varied the form of the question to test for the influence of the question on the response.

When the question was posed in the affirmative, that is, that a judge should *admit* the evidence, 47.3 per cent favoured the admission of a confession obtained by force, and 59.0 per cent favoured admission in the case of deceit. When police used physical force, the 49.8 per cent who would have excluded the confession was almost identical to the 47.3 per cent favouring its admissibility. In the case of a confession obtained by deceit, however, only 36.3 per cent would have excluded it.

When the question was posed in the negative form, that is, that a judge should *exclude* the evidence, 60.7 per cent would have excluded a confession obtained by physical force, while 43.9 per cent would have excluded a confession obtained by deceit. It is clear that the use of force by the police has a significant effect on the public's willingness to admit or exclude the confession. It is also clear that the form of the question influenced significantly the public's decision to admit or exclude the confession.

The data from these questions present the structure of public opinion in a sharper light than emerged from the first, more abstract question. They clearly indicate that public opinion on the admissibility of confessions distinguishes between the different means used by the police

⁵² Questions 4.1A to 4.1D inclusive. In the question, we used the word "rape" rather than the term "sexual assault" to specify the nature of the sexual assault. This was based on our assumption that the public is more familiar with the word "rape".

TABLE 4
GENERAL ATTITUDES TOWARDS THE APPLICATION OF THE
EXCLUSIONARY RULE IN THE CASE OF A CONFESSION OF A RAPIST

Identifier	Question	Response	Number	Percent
4.1A	When the police <i>use physical force</i> to get a confession from a person ACCUSED of rape, a judge SHOULD allow evidence from the confession to be used in court. Do you . . .	Strongly Agree	24	11.6
		Agree	74	35.7
		Disagree, or	67	32.4
		Strongly Disagree	36	17.4
		Not Sure	4	1.9
		Refused	2	1.0
		Total	207	100.0
4.1B	When the police <i>use physical force</i> to get a confession from a person ACCUSED of rape, a judge SHOULD <i>NOT</i> allow evidence from the confession to be used in court. Do you . . .	Strongly Agree	28	12.4
		Agree	109	48.3
		Disagree, or	59	26.1
		Strongly disagree	14	6.2
		Not Sure	15	6.6
		Refused	1	.4
		Total	226	100.0
4.1C	When the police <i>fool or trick a person</i> ACCUSED of rape into confessing by saying they have an eye witness when they really don't, a judge SHOULD allow evidence from the confession to be used in court. Do you . . .	Strongly Agree	29	15.3
		Agree	83	43.7
		Disagree, or	52	27.4
		Strongly Disagree	17	8.9
		Not Sure	8	4.2
		Refused	1	.5
		Total	190	100.0
4.1D	When the police <i>fool or trick a person</i> ACCUSED of rape into confessing by saying they have an eye witness when they really don't, a judge SHOULD <i>NOT</i> allow evidence from the confession to be used in court. Do you . . .	Strongly Agree	24	11.0
		Agree	72	32.9
		Disagree, or	75	34.2
		Strongly Disagree	34	15.5
		Not Sure	13	5.9
		Refused	1	.5
		Total	219	100.0

to obtain a confession.⁵³ They also indicate that there is a substantial level of support for both admitting and excluding evidence obtained by either force or deceit, notwithstanding the fact that public opinion was influenced by the form of the question. But if this level of eliciting opinion produces more nuanced results than the more abstract question, an even richer picture emerges from the analysis of the three vignettes.

⁵³ This distinction, as measured by public opinion, mirrors the common law distinction between the factors of force and deceit in relation to the admissibility of a

B. *Drinking and Driving and the Right to Counsel*

The first vignette involved two drinking and driving offences—impaired driving and impaired driving causing death—randomly distributed to respondents. In all versions of this vignette the police required the accused to take a breathalyzer test. In one version the police deliberately did not inform the accused of his right to counsel, and in another version the police advised the driver of his right to counsel but required him first to provide a breath sample. In the third variation the police informed the accused of his rights under section 10(b) of the Charter, but the lawyer was not home and the driver did not ask to telephone a different lawyer. The results of the breathalyzer test showed that the accused's blood alcohol rate was just over or was three times over the legal limit, depending on the version of the vignette that a respondent was given. After being read a version of the vignette, each respondent was asked whether the judge should or should not allow the evidence from the breathalyzer test to be used at trial. The respondent was also told that the evidence was necessary for conviction.

The pattern of public support for the admission or the exclusion of the breathalyzer evidence is summarized in Table 5. An overwhelming majority of the sample (81.5 per cent) thought that the judge should admit the evidence, while only a small minority (15.8 per cent) supported the exclusion of the evidence in the various circumstances described in this vignette.⁵⁴

Differences in the seriousness of the offence, as measured by the level of intoxication or the consequence, had little or no effect on public attitudes on the admissibility of the breathalyzer evidence. Whether the driver consumed just over the legal limit or three times over the legal limit of alcohol, there was a minimal (if any) difference in the level of support for admission or exclusion. It would appear that respondents thought drunk driving was a serious offence, regardless of whether the driver's consumption of alcohol substantially or only slightly exceeded

confession; see *R. v. Rothman*, *supra*, footnote 6. In *R. v. Collins*, *supra*, footnote 7, at pp. 286-287 (S.C.R.), 538 (D.L.R.), 213 (C.R.), Lamer J. states that this distinction continues post-Charter: "I still am of the view that the resort to tricks that are not in the least unlawful let alone in violation of the *Charter* to obtain a statement should not result in the exclusion of a free and voluntary statement unless the trick resorted to is a dirty trick, one that shocks the community." It is beyond the scope of this article to speculate on what constitutes a "dirty trick".

⁵⁴ For all versions of this vignette, approximately 40 per cent (339/842) of respondents thought that a Charter right was violated. Amongst this sub-group of the sample population, 62.5 per cent (212/339) thought that the judge should have admitted the evidence; 32.4 per cent (110/339) thought that the judge should have excluded the evidence; and 5 per cent (17/339) did not know. An analysis limited to the responses of those who thought the Charter was violated is the subject of a separate article.

TABLE 5
SUPPORT FOR ADMISSION/EXCLUSION OF BREATHALYZER EVIDENCE
BASED UPON THE SERIOUSNESS OF THE CRIME

SERIOUSNESS OF THE CRIME: EXTENT OF IMPAIRMENT (Percent Distribution)			
	The driver had just over the legal limit of alcohol	The driver had three times the legal limit of alcohol	All Scenarios
The judge should admit the evidence	82.2	80.7	81.5
The judge should exclude the evidence	15.6	16.0	15.8
Don't know	2.1	3.3	2.7
Number of cases	422	420	842
SERIOUSNESS OF THE CRIME: CONSEQUENCE (Percent Distribution)			
	Car swerved onto sidewalk and killed a pedestrian	Car weaved back and forth across centre line	All Scenarios
The judge should admit the evidence	83.2	79.5	81.5
The judge should exclude the evidence	14.3	17.5	15.8
Don't know	2.5	3.0	2.7
Number of cases	447	395	842

the legal limit. Furthermore, the seriousness of the offence, as measured by the consequences, had very little effect on attitudes towards admissibility: support for admission rose only slightly from 79.5 per cent to 83.2 per cent when the driving caused death.

Public opinion was noticeably influenced by the nature of the breach of the right to counsel. As shown in Table 6, when the police told the driver of his right to counsel, allowed him an opportunity to exercise this right, and did not attempt to frustrate his attempt to obtain legal advice, 89.0 per cent favoured admitting the breathalyzer evidence. However, where the police advised an accused of his right to counsel but did not allow him to exercise that right, the number of respondents favouring admissibility dropped to 83.0 per cent. And where the police deliberately failed to advise the driver of his right to counsel, support for admissibility further eroded to 72.5 per cent.

The variation of the seriousness of the breach factor similarly affected public support for the exclusion of evidence. When the breach of the

TABLE 6
SUPPORT FOR ADMISSION/EXCLUSION OF BREATHALYZER EVIDENCE
BASED UPON THE SERIOUSNESS OF THE BREACH OF THE CHARTER

	Police DELIBERATELY do not inform driver of his right to counsel	Police inform driver of his right but require him first to provide a breath sample	Police inform driver of his right to counsel but lawyer is not home	All Scenarios
	(Percent Distribution)			
The judge should admit the evidence	72.5	83.0	89.0	81.5
The judge should exclude the evidence	24.0	14.8	8.5	15.8
Don't know	3.5	2.2	2.5	2.7
Number of cases	287	271	284	842

Charter was the most flagrant, support for exclusion was highest (24.0 per cent); however, support decreased to 14.8 per cent and then further to 8.5 per cent as the nature or degree of violation of the accused's right to counsel decreased in severity. In short, the movement of public opinion favouring the admission or the exclusion of evidence mirrored the seriousness of the breach.

Because the vignettes were designed so that each individual factor was randomly selected, calculations of the effect of the seriousness of the offence and of the violation of rights were unbiased by the response to other contingencies in the case summaries. The independent and random assignment of the factors in the design of the survey also allowed us to examine an "interaction effect" of different combinations of the two drinking and driving offences and the alleged contraventions of the accused's right to counsel. As a result, we were able to estimate a greater or lower likelihood of public support for the admission or the exclusion of evidence in cases involving different combinations of these two factors.

The relevant data on the joint effect of these combinations of factors is given in Table 7. In cases involving impaired driving causing death and the least flagrant violation of the right to counsel, only 8.8 per cent would have excluded the evidence. In contrast, support for exclusion was highest (28.7 per cent) in cases involving impaired driving without a consequence and the deliberate refusal to inform the detained driver of his right to counsel. Predictably, support for admission was highest in cases where there was the least serious violation of the Charter right: 89.8 per cent for impaired driving *simpliciter* and 88.3 per cent where death resulted. Support for admission was lowest when the police deliberately violated the accused's right to counsel in the case of impaired

TABLE 7
 VARIATION IN SUPPORT FOR ADMISSIBILITY OF EVIDENCE
 IN DRUNK DRIVING VIGNETTE AS A RESULT OF
 THE INTERACTION BETWEEN THE SERIOUSNESS OF THE CRIME AND
 OF THE BREACH OF THE CHARTER

(Percent Distribution)

Violation	Charge	Admit	Exclude	Don't Know	No. of Cases
Deliberate denial of right to counsel	Impaired Driving Causing Death	77.8	19.4	2.8	144
	Impaired Driving	67.1	28.7	4.2	143
Informed of right but not allowed to contact counsel	Impaired Driving Causing Death	83.4	14.7	1.9	156
	Impaired Driving	82.6	14.8	2.6	115
Informed of right but attempt to call counsel unsuccessful	Impaired Driving Causing Death	88.3	8.8	2.7	147
	Impaired Driving	89.8	8.0	2.2	137
All Scenarios		81.5	15.8	2.7	842

driving without a consequence (67.1 per cent), although 77.8 per cent would have admitted the evidence when the driving caused death.

Two points deserve emphasis in Table 7. The first is the considerable flexibility of public attitudes on questions of the admission or the exclusion of evidence. Depending on the particular combination of circumstances, the balance of public opinion shifted noticeably, suggesting that the public balanced the seriousness of the offence against the extent of the Charter violation in deciding how to apply the exclusionary rule. The second point to be underlined is the general unwillingness of a substantial majority of respondents to see breathalyzer evidence excluded regardless of the circumstances presented in the vignettes. As Table 7 illustrates, less than 30 per cent of Canadians would have excluded such evidence under any of the presented circumstances, and up to 90 per cent were prepared to admit the evidence under other circumstances.

C. Drugs and the Right to be Secure Against Unreasonable Search or Seizure

The second vignette examined the exclusionary rule in the context of section 8 of the Charter, which guarantees the right to be secure

against unreasonable search or seizure. In the different versions of the vignette, the police seized various quantities of "soft" (marihuana) and "hard" (cocaine) drugs while searching a private residence. Depending on the amount seized, the accused was charged with possession or trafficking in a drug. The vignette contained three random variations of police conduct leading to the seizure of the drugs. In one variation, the police *unknowingly* executed a deficient warrant; in another they *knowingly* executed a deficient warrant; and in the third scenario they entered the premises and seized drugs without a warrant.

In the drug vignette, rather than asking respondents to suggest how the judge should have acted, we randomly informed them that the judge admitted or excluded the evidence. We then asked respondents if they agreed with the judge's decision on the application of section 24(2).

Tables 8 and 9 set out the responses to this vignette. The data illustrate that support for the exclusion of evidence in drug cases is sensitive to both the seriousness of the offence and the seriousness of the breach of the Charter. Because the respondents were randomly informed that the judge admitted or excluded the evidence, the data also indicate the extent to which public opinion can be influenced by the form of the question. When influenced by a judicial decision admitting the evidence, the public's application of the exclusionary rule was sensitive to the type of drug and the seriousness of the offence. Public support for admitting the evidence was higher for possession of cocaine (76.4 per cent) than for marihuana (68.2 per cent) and was higher still for trafficking in either drug (cocaine: 80.2 per cent and marihuana: 77.4 per cent). A similar pattern is evident regarding support for the exclusion of evidence, with 16.0 per cent supporting exclusion in the case of trafficking in cocaine, while 30.9 per cent would have excluded the evidence in the case of possession of marihuana. Whether measured by the type of drug ("hard" versus "soft") or by the nature of the offence (possession versus trafficking), the data indicate that public opinion is affected by the seriousness of the offence.

Table 8 also shows the effect that the type of drug and the nature of the offence have on public attitudes when influenced by a judicial decision excluding evidence. Support for the exclusion of evidence was 41.7 per cent for possession of marihuana and 47.5 per cent for possession of cocaine, but public support for exclusion noticeably decreased for trafficking in either drug: 31.9 per cent for trafficking in marihuana and 25.0 per cent for trafficking in cocaine. The same general pattern holds for those who would have admitted the evidence. Opposition to the exclusion of evidence was greatest for trafficking in either drug (marihuana: 63.7 per cent and cocaine: 68.7 per cent), but was marginally greater for possession of marihuana (53.2 per cent) than it was for possession of cocaine (48.4 per cent). Thus we see that the seriousness of the offence, as measured by the level of involvement in drugs but not always as mea-

TABLE 8
SUPPORT FOR ADMISSION/EXCLUSION OF SEIZED DRUGS BASED
UPON THE SERIOUSNESS OF THE CRIME

	SERIOUSNESS OF THE CRIME (Percent Distribution)				
	Two Marihuana Cigarettes/ Possession	Ten Pounds of marihuana/ Trafficking	\$80 Worth of cocaine/ Possession	\$20,000 Worth of cocaine/ Trafficking	All Scenarios
JUDGE RULES TO ALLOW EVIDENCE					
Agree with judge that evidence should be admitted	68.2	77.4	76.4	80.2	75.6
Disagree with judge that evidence should be admitted	30.9	17.9	20.2	16.0	21.2
Don't know	0.9	4.7	3.4	3.8	3.2
Number of cases	107	106	119	106	438
JUDGE RULES TO EXCLUDE EVIDENCE					
Agree with judge that evidence should be excluded	41.7	31.9	47.5	25.0	36.6
Disagree with judge that evidence should be excluded	53.2	63.7	48.4	68.7	58.4
Don't know	5.1	3.3	3.3	6.3	4.5
Refused	—	1.1	.8	—	.5
Number of Cases	79	91	122	112	404

sured by the type of drug, also affected public opinion when the judge ruled to exclude the evidence.

As Table 9 illustrates, public support for the admission or the exclusion of evidence was highly sensitive to the extent of the violation of the constitutional right. When the respondents were told that the judge admitted the evidence at trial, between 62.1 and 85.2 per cent of respondents supported judicial admission of the evidence, depending on the nature of the Charter breach. When the respondents were informed that the judge excluded the evidence, between 44.0 and 70.9 per cent opposed the judge's decision. Support for a judicial decision admitting evidence decreased as the seriousness of the violation of the Charter increased, and opposition to a judicial decision excluding evidence decreased as the severity of the Charter breach increased.

TABLE 9
SUPPORT FOR ADMISSION/EXCLUSION OF SEIZED DRUGS
BASED UPON THE SERIOUSNESS OF THE BREACH OF THE CHARTER

	Police not aware of error in warrant	Police aware of error in warrant	Police do not have warrant	All Scenarios
(Percent Distribution)				
<i>JUDGE RULES TO ALLOW EVIDENCE</i>				
Agree with judge that evidence should be admitted	85.2	80.7	62.1	75.6
Disagree with judge that evidence should be admitted	12.6	15.3	34.6	21.2
Don't know	2.2	4.0	3.3	3.2
Number of cases	135	150	153	438
<i>JUDGE RULES TO EXCLUDE EVIDENCE</i>				
Agree with judge that evidence should be excluded	22.0	37.5	50.4	36.6
Disagree with judge that evidence should be excluded	70.9	59.8	44.0	58.4
Don't know	6.3	2.0	5.6	4.5
Refused	0.8	0.7	—	0.5
Number of cases	127	152	125	404

When the seizure of the drugs was made without a warrant and when influenced by a judicial decision excluding the seizure, a bare majority of Canadians (50.4 per cent) supported excluding the evidence at trial. Even when influenced by a judicial decision admitting the evidence, more than one-third (34.6 per cent) of Canadians disagreed with admitting the evidence where there was no warrant for the search.

In circumstances where the police knew that the search warrant was defective, and where the respondents were also told that the judge excluded the evidence, support for exclusion dropped from 50.4 per cent to 37.5 per cent. Where influenced by a judicial decision admitting the evidence, opposition to the judicial decision decreased from 34.6 per cent to 15.3 per cent. In the instance of a technical but non-deliberate violation, where the police were unaware that the warrant was defective, support for judicial exclusion decreased further to 22.0 per cent, and opposition to judicial admission similarly decreased to 12.6 per cent.

The joint effects of the seriousness of the offence and the seriousness of the Charter violation on support for the admission or the exclu-

sion of evidence in drug cases are shown in Tables 10 and 11. Subject to two exceptions,⁵⁵ there was greater support for admissibility for the trafficking offences than for simple possession. Public support for exclusion increased also as the severity of the violation increased. Whether the judge ruled to admit or exclude the evidence, willingness to admit evidence was highest (93.3 per cent and 82.1 per cent) when the offence was the most serious (trafficking in cocaine) and the breach of the Charter was least serious (technical error without knowledge). On the other hand, willingness to exclude evidence was highest (46.9 per cent and 50.0 per cent) when the violation of rights was most flagrant (police did not have a search warrant) and the offence was the least serious (possession of marihuana).

It is important to underline the extent to which public support for the admission or the exclusion of evidence appears to have been influenced by the judicial decision.⁵⁶ Overall, when respondents were informed that the trial judge admitted the evidence of the drugs, 75.6 per cent agreed with the judge's decision and 21.2 per cent disagreed. When informed that the judge excluded the evidence, however, 36.6 per cent agreed with the exclusion of the evidence, and 58.4 per cent disagreed. The influence is even more pronounced in some of the variations of the vignette. Compare, for example, the difference between the 65.9 per cent supporting the judge's exclusion of evidence when there was no search warrant and the charge was possession of cocaine, with the 42.1 per cent supporting exclusion when the judge ruled the evidence admissible in the same circumstance. A more dramatic illustration occurred when the police seized two marihuana cigarettes while they were aware that there was a typographical error in the warrant. When influenced by a judicial decision admitting the evidence, 71.4 per cent favoured admission while 26.2 per cent favoured exclusion. When influenced by a decision excluding the evidence, the population was evenly split, with 48.6 per cent favouring and opposing exclusion.

Our general conclusions parallel those reached in the first vignette. Although the *overall* level of support for exclusion was low (between 21.2 per cent and 36.6 per cent) and the level of support for admission was high (between 58.4 per cent and 75.6 per cent) the willingness to admit or exclude was highly sensitive to the seriousness of the offence

⁵⁵ The two exceptions were: (1) Table 11—a greater percentage of respondents favoured admission in the case of simple possession of marihuana (70.8 per cent) than trafficking in marihuana (61.3 per cent) when police were unaware of having a deficient warrant; and (2) Table 10—a greater number of respondents supported admission in the case of simple possession of cocaine (87.8 per cent) than trafficking in cocaine (81.1 per cent) when police were aware of having a deficient warrant. These exceptions likely result from the small number of respondents who received each version of this vignette.

⁵⁶ The influence of the form of the question and the prior decision of the judge raises the issue whether judicial decisions may affect public attitudes towards the system of justice.

TABLE 10
 VARIATION IN SUPPORT FOR ADMISSIBILITY OF
 EVIDENCE IN DRUG VIGNETTE AS A RESULT OF THE
 INTERACTION BETWEEN THE SERIOUSNESS OF
 THE CRIME AND OF THE CHARTER BREACH WHEN
 THE JUDGE ADMITS THE EVIDENCE

Violation	Amount	Admit	Exclude	Don't Know	No. of Cases
(Percent Distribution)					
Police not aware of error in warrant	Two marihuana cigarettes	78.8	21.2	—	33
	Ten pounds of marihuana	84.3	9.4	6.3	32
	\$80 worth of cocaine	85.0	12.5	2.5	40
	\$20,000 worth of cocaine	93.3	6.7	—	30
Police aware of error in warrant	Two marihuana cigarettes	71.4	26.2	2.4	42
	Ten pounds of marihuana	83.3	16.7	—	30
	\$80 worth of cocaine	87.8	7.3	4.9	41
	\$20,000 worth of cocaine	81.1	10.8	8.1	37
Police do not have search warrant	Two marihuana cigarettes	53.1	46.9	—	32
	Ten pounds of marihuana	68.2	25.0	6.8	44
	\$80 worth of cocaine	55.3	42.1	2.6	38
	\$20,000 worth of cocaine	69.2	28.2	2.6	39
Total/Average		75.6	21.2	3.2	438

and the Charter breach.⁵⁷ In this respect, the public rationally balanced those factors said to be relevant by the courts. Therefore, regarding the right to be secure against unreasonable search or seizure in the context of drug offences, the *structures* of public and judicial opinion appear to be very similar.

⁵⁷ For all versions of this vignette, approximately 51 per cent (430/842) thought that a Charter right was violated. Amongst this sub-group of the sample population,

TABLE 11
 VARIATION IN SUPPORT FOR ADMISSIBILITY OF EVIDENCE
 IN DRUG VIGNETTE AS A RESULT OF THE
 INTERACTION BETWEEN THE SERIOUSNESS OF THE CRIME AND
 OF THE CHARTER BREACH WHEN THE JUDGE *EXCLUDES* THE EVIDENCE

Violation	Amount	Admit	Exclude	Don't Know	Refuse	No. of Cases
(Percent Distribution)						
Police not aware of error in warrant	Two marihuana cigarettes	70.8	25.0	4.2	—	24
	Ten pounds of marihuana	61.3	32.3	3.2	3.2	31
	\$80 worth of cocaine	66.6	27.3	6.1	—	33
	\$20,000 worth of cocaine	82.1	7.7	10.3	—	39
Police aware of error in warrant	Two marihuana cigarettes	48.6	48.6	2.8	—	35
	Ten pounds of marihuana	79.3	20.7	—	—	29
	\$80 worth of cocaine	48.9	44.5	4.4	2.2	45
	\$20,000 worth of cocaine	67.4	32.6	—	—	43
Police do not have search warrant	Two marihuana cigarettes	40.0	50.0	10.0	—	20
	Ten pounds of marihuana	51.6	41.9	6.5	—	31
	\$80 worth of cocaine	34.1	65.9	—	—	44
	\$20,000 worth of cocaine	53.3	36.7	10.0	—	30
Total/Average		58.4	36.6	4.5	0.5	404

when influenced by a judicial decision to exclude, 60.7 per cent (133/219) of respondents favoured exclusion, and 34.7 per cent (76/219) favoured admission. When influenced by a judicial decision to admit the evidence, 57.3 per cent (121/211) favoured admission and 39.8 per cent (84/211) favoured exclusion. Overall, 3.7 per cent (16/430) did not know. An analysis limited to the responses of those who thought that the Charter was violated is the subject of a separate article.

D. Confessions: Voluntariness and the Right to Counsel

The third vignette involved a crime of violence against the person. We varied the vignette to present three different offences—murder, rape⁵⁸ and assault, and two different victims—a child and an adult woman. In all versions of the vignette, the police advised the accused of his right to remain silent and of his right to contact his lawyer. The accused informed the police that he wanted to exercise his right to speak to counsel and the police allowed him to use a telephone to call his lawyer.

In every version of the vignette, the accused confessed to the crime. In the first version, the police obtained the confession by continuing to question the accused after he called his lawyer. In the second version, the accused was placed in a cell with an undercover officer and the police obtained the confession by means of this subterfuge. In the final version, the police threatened the accused by saying “things might get rough if [you do] not confess now”. The respondents were told that, without the confession, the accused would not be convicted. After being read a version of the vignette, each respondent was asked whether the judge should admit or exclude the confession. The pattern of public support for the admission and exclusion of the confession is summarized in Tables 12 and 13.

A substantial majority of Canadians (72.7 per cent) thought that the judge should rule the confession admissible, although a significant minority (23.6 per cent) thought that the judge should exclude it.⁵⁹ One relevant factor appears to have been the nature of the offence, with rape being considered differently than either murder or assault. For the crime of rape, 77.2 per cent of the population would have admitted the confession at trial, while those favouring admission decreased to 70.1 per cent for murder and 71.1 per cent for assault.

Public opinion was sensitive to the method used by the police to obtain the confession. As Table 13 reveals, when the police continued to question the accused or they placed the accused in a cell with an undercover police officer, 80.9 per cent and 78.6 per cent respectively would have admitted the evidence. In contrast, the percentage of the population that would have admitted the confession dropped to 58.5 per cent when the police threatened the accused.

⁵⁸ In the survey we used the term “rape” rather than “sexual assault” on the assumption that the public was more familiar with this term.

⁵⁹ For all versions of this vignette, approximately 35 per cent (293/842) of respondents thought that a Charter right was violated. Amongst this sub-group of the sample population 40.3 per cent (118/293) thought that the judge should have admitted the evidence, 54.2 per cent (159/293) thought that the judge should have excluded the evidence, and 5.5 per cent (16/293) did not know. An analysis limited to the responses of those who thought the Charter was violated is the subject of a separate article.

TABLE 12
SUPPORT FOR THE ADMISSION/EXCLUSION OF CONFESSION
BASED UPON THE SERIOUSNESS OF THE CRIME

	SERIOUSNESS OF THE CRIME			
	Assault	Rape	Murder	All Scenarios
	(Percent Distribution)			
Judge should admit evidence	71.1	77.2	70.1	72.7
Judge should exclude evidence	26.3	18.2	25.9	23.6
Don't know	2.6	4.2	3.3	3.3
Refused	—	0.4	0.7	0.4
Number of cases	308	264	270	842

TABLE 13
SUPPORT FOR THE ADMISSION/EXCLUSION OF EVIDENCE BASED
UPON THE SERIOUSNESS OF THE BREACH OF THE CHARTER

	Continue to Question	In cell with Undercover Officer	Threat with Violence	All Scenarios
	(Percent Distribution)			
Judge should allow evidence	80.9	78.6	58.5	72.7
Judge should exclude evidence	15.8	17.9	37.2	23.6
Don't know	3.0	3.1	3.9	3.3
Refused	0.3	0.4	0.4	0.4
Number of cases	303	257	282	842

The method of investigation employed by the police also affected the respondents' willingness to exclude the confession. When the police obtained the confession by means of a threat, more than twice as many Canadians (37.2 per cent) favoured exclusion than when the police obtained the evidence by the two alternative means: a trick (17.9 per cent) or continued questioning (15.8 per cent).

The interrelationship between the factors of seriousness of the crime and of police conduct on public attitudes towards the application of the exclusionary rule is set out in Table 14. Of interest here is the remarkable consistency of the attitudes towards the application of the exclusionary rule for the crimes of assault and murder, and the different way in which the public reacted to the crime of rape. Regardless of the nature of the police conduct, the proportion of the population prepared to admit the confession for rape is higher than the proportion prepared to do so for either murder or assault. The difference increases as one moves from the least to the most flagrant breach of the Charter.

Also of interest is the similarity in response to the police obtaining confessions by continuing to question the accused or by placing an undercover officer in his cell. Between 76.5 and 82.3 per cent of respondents favoured admitting the confession for each of the three crimes in each of these two situations.

However, regarding all three crimes, attitudes towards admissibility were dramatically affected whenever the police threatened the accused. As the data illustrate, the percentage of Canadians willing to admit the confession decreased noticeably for murder (53.3 per cent), rape (67.8 per cent) and assault (55.2 per cent) when an unspecified threat caused the accused to confess. Conversely, the public's willingness to exclude the evidence increased dramatically for each crime: murder (44.4 per cent); rape (24.1 per cent); assault (41.9 per cent) when the police used threats to obtain the confession.

TABLE 14
VARIATION IN SUPPORT FOR THE ADMISSIBILITY OF EVIDENCE
IN CRIME OF VIOLENCE VIGNETTE AS A RESULT OF
THE INTERACTION BETWEEN THE SERIOUSNESS OF
THE CRIME AND THE BREACH OF THE CHARTER

Violation	Crime	Admit Confession	Exclude Confession	Don't Know	Refused	Number of cases
Continue to Question	Murder	80.0	15.8	3.2	1.1	95
	Rape	82.3	15.6	2.1	—	96
	Assault	80.4	16.1	3.6	—	112
Undercover Policeman	Murder	76.5	17.6	4.7	1.2	85
	Rape	81.5	14.8	3.7	—	81
	Assault	78.0	20.9	1.1	—	91
Threat	Murder	53.3	44.4	2.2	—	90
	Rape	67.8	24.1	6.9	1.1	87
	Assault	55.2	41.9	2.9	—	105
Total/Average		72.7	23.6	3.3	.4	842

Three observations are suggested by this data. First, the threat of force by the police significantly increased Canadians' willingness to exclude the confession. Second, Canadians were significantly less willing to exclude the confession in cases of rape than they were for murder or assault. Third, Canadians did not appear to distinguish between the crimes of murder and assault for purposes of applying the exclusionary rule.

These data confirm the conclusions derived from the other vignettes. Regarding the structure of public opinion, the willingness to admit or

exclude evidence varied with the seriousness of the offence and the seriousness of the breach of rights. Furthermore, although the willingness of Canadians to exclude evidence is generally low, close to a majority is prepared to exclude evidence where they perceive a flagrant breach.

V. *Public and Judicial Opinion Compared*

Thus far we have examined public attitudes towards the admissibility of evidence in an effort to identify the structure of public opinion on this issue. In this part, we will examine the extent to which public opinion is consistent with judicial decision in the circumstances presented in the three vignettes. In light of the stated rationale for section 24(2)—to preserve public respect for the justice system—it would appear important to determine the extent to which the public agrees or disagrees with how judges are applying the exclusionary rule. We begin, therefore, with the comparison of public and judicial opinion on the admissibility of evidence. We conclude by considering the extent to which members of the general public believe that the administration of justice would be brought into disrepute by judicial decisions on the exclusionary rule that differ from their own.

A. *Drinking and Driving and the Right to Counsel*

The Supreme Court of Canada has held that a “flagrant” breach of an accused’s right to counsel in a charge of impaired driving renders the breathalyzer evidence inadmissible.⁶⁰ Where the police deliberately fail to advise the accused of the right to counsel, or where they require the breathalyzer test before allowing the driver to contact counsel, the Supreme Court would find that the conduct of the police was a serious breach of the Charter mandating exclusion.⁶¹ The data set out in Table 7 indicate, however, that only between 28.7 per cent at its highest and 14.7 per cent at its lowest would agree with the court’s application of the Charter in these circumstances, whereas between 67.1 and 83.4 per cent of Cana-

⁶⁰ *R. v. Therens*, *supra*, footnote 7.

⁶¹ Where the police deliberately do not inform the driver of his right to counsel, this violates s. 10(b) of the Charter and the admission of the breathalyzer evidence would bring the administration of justice into disrepute; see *R. v. Therens*, *ibid.*

Advising the accused of his right to counsel, but requiring him to provide a sample of his breath before he is able to exercise that right is also contrary to s. 10(b) and would render the breathalyzer evidence inadmissible. “. . . s. 10(b) also imposes a duty not to call upon the detainee to provide that evidence without first informing him of his s. 10(b) rights and providing him with a reasonable opportunity and time to retain and instruct counsel”; *R. v. Therens*, *ibid.*, at pp. 624 (S.C.R.), 665 (D.L.R.), 110 (C.R.). At common law and under the Canadian Bill of Rights, the second type of police conduct would not render the evidence inadmissible; see *Hogan v. R.*, [1975] 2 S.C.R. 574, (1974), 48 D.L.R. (3d) 427, 26 C.R.N.S. 207. W. Tarnopolsky said that “[t]he *Hogan* case is clearly one reason why the Charter now includes s. 24, subsection (1) . . .”; *Charterwatch*, Canadian Lawyer, February 1983, p. 18.

dians would disagree with the court. Moreover, if the less serious violation of the accused's right to counsel also triggers the application of the exclusionary rule, as some authorities have held,⁶² at least 88.3 per cent of the population would disagree with its application in these circumstances and no more than 8.8 per cent of Canadians would agree.

A comparison of the data and legal doctrine therefore suggests that there is a very significant gap between public and judicial opinion on the application of the exclusionary rule in the context of the right to counsel and drinking and driving offences. Inasmuch as the public appears to have balanced the seriousness of the offence and the seriousness of the breach in applying the exclusionary rule, the structure of public and judicial opinion appear similar; the public and the judiciary select the same criteria and apply the criteria in a similar way. At the same time, the public is much less willing to exclude evidence in circumstances where the courts would clearly require exclusion.

B. *Drugs and the Right to be Secure Against Unreasonable Search or Seizure*

In *R. v. Collins*,⁶³ Lamer J. set out the basic criteria for a reasonable search:

A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out was reasonable.

Table 9 presents the data against which the relevant case law will be compared.⁶⁴

In one version of the drug vignette the police acted upon a warrant which, unknown to them, contained a typographical error. The courts have stated that an error of this nature would not result in the exclusion

⁶² If there were ample time to comply with the time requirements for taking a breath sample, then absent any other extenuating circumstances, the demand by the police that the driver provide a breath sample after one unsuccessful attempt to call counsel would be a violation of s. 10(b). See, *R. v. Elefante* (1986), 47 M.V.R. 170, 47 Alta. L.R. (2d) 139 (Alta. C.A.). This, however, appears subject to the accused acting *bona fide* and in a reasonably diligent manner; see *R. v. Naugler* (1986), 27 C.C.C. (3d) 257, 42 M.V.R. 191 (N.S.C.A.). The Supreme Court has remarked: "Generally speaking, if a detainee is not being reasonably diligent in the exercise of his rights, the correlative duties set out in this court's decision in *R. v. Manninen*, [1987] 1 S.C.R. 1233, imposed on the police in a situation where a detainee has requested the assistance of counsel are suspended and are not a bar to their continuing their investigation and calling upon him to give a sample of his breath"; *R. v. Tremblay*, [1987] 2 S.C.R. 435, at p. 439, (1987), 60 C.R. (3d) 59, at p. 62.

⁶³ *Supra*, footnote 7, at pp. 278 (S.C.R.), 521 (D.L.R.), 206 (C.R.).

⁶⁴ Because the sample size for each of the grouped combinations of factors is very small in Tables 10 and 11, and therefore may not be representative of the general population, we used the data collected in Table 9 for our comparison.

of the evidence.⁶⁵ Between 70.9 and 85.2 per cent of the respondents would agree, and between 12.6 and 22.0 per cent would disagree with the application of the exclusionary rule in these circumstances.⁶⁶

In another version of this vignette the police seized the drugs without a warrant. Whether the courts would exclude evidence seized without a warrant would depend upon the presence of additional circumstances. The Ontario Court of Appeal has stated the law in the following way:⁶⁷

... where no circumstances exist which make the obtaining of a warrant impracticable and when the obtaining of a warrant would not impede effective law enforcement, a warrantless search of an office of fixed location ... cannot be justified and does not meet the constitutional standard of reasonableness prescribed by s.8 of the Charter.

The Supreme Court of Canada has held that a warrantless search is *prima facie* unreasonable and the burden shifts to the Crown to demonstrate reasonableness.⁶⁸ In the absence of justifying circumstances, it seems probable that the courts would exclude the evidence in the presented circumstances.⁶⁹ Between 34.6 and 50.4 per cent of the respondents would decide the evidentiary issue in the same way as the courts. However, there would be substantial opposition (between 62.1 and 44.0 per cent) to the application of the exclusionary rule in these circumstances.

⁶⁵ There are two judicial approaches to the application of the Charter in the instance of a defective warrant. One school of thought holds that in order to meet the "reasonableness" standard in s. 8, the police must have a valid warrant and the onus shifts to the authorities to rebut the presumption of unreasonableness; see Dickson J. in *Hunter v. Southam*, *supra*, footnote 49, at pp. 160-161 (S.C.R.), 653-654 (D.L.R.), 109-110 (C.C.C.), 114-115 (C.R.). A trivial breach of the Charter, however, would not bring the administration of justice into disrepute: *R. v. Collins*, *supra*, footnote 7, at pp. 286 (S.C.R.), 527 (D.L.R.), 212 (C.R.). The other school of thought holds that some technical errors in a warrant do not render a search unreasonable. As Martin J.A. stated: "I find it difficult to think, however, that mere minor or technical defects in the warrant automatically make an ensuing search or seizure unreasonable under s. 8 of the Charter, where the officer executing the warrant reasonably believes that he or she is acting under a valid warrant and where the defect is not such as to prejudice the interests that s. 8 was designed to protect"; *R. v. Harris and Lighthouse Video Centres Limited*, *supra*, footnote 17, at pp. 23 (C.C.C.), 43 (O.A.C.).

⁶⁶ In the drug vignette the respondents were randomly informed that the judge admitted or excluded the evidence before they were asked for their opinion on the judge's decision. This survey design resulted in a range of public opinion towards the evidentiary issue.

⁶⁷ *R. v. Rao*, *supra*, footnote 19, at pp. 107 (O.R.), 123 (C.C.C.).

⁶⁸ *Hunter v. Southam*, *supra*, footnote 49, at pp. 160-161 (S.C.R.), 653-654 (D.L.R.), 109-110 (C.C.C.), 115 (C.R.).

⁶⁹ In *R. v. Dyment*, *supra*, footnote 21, at pp. 441 (S.C.R.), 508 (D.L.R.), Lamer J. states: "The fact that the seizure in this case was unlawful, in my view, ends the enquiry as to whether the search was an unreasonable one."

In the third version of this vignette the respondents were informed that the police knew that there was a defect (a typing error) in the warrant before they entered the residence. It seems likely that the approach by the judiciary in these circumstances would parallel their approach to the case of the warrantless search: absent any acceptable grounds to justify their conduct for proceeding without a proper warrant, the courts would exclude the evidence.⁷⁰ In contrast, public opinion appears to distinguish between entering premises without a warrant to search for drugs and doing so with a facially defective warrant of which the authorities are aware. Although a significant percentage of the population (between 15.3 and 37.5 per cent) would agree with the application of the exclusionary rule where the police knowingly enter premises with a deficient warrant, a much greater percentage of the population (between 59.8 and 80.7 per cent) would disagree.

Although the gap between judicial and public opinion is significant in the drug vignettes, the gap is substantially less than in the drinking and driving vignette. Where police were unaware that there was a technical defect in the warrant, judicial and public opinion were congruent. Such congruence was absent in all the versions of the drinking and driving vignette. In the instance of a search without a warrant the data also indicate a substantial percentage of respondents (between 34.6 and 50.4 per cent) favouring exclusion of evidence. Again, this is in marked contrast to the drinking and driving vignette where the greatest percentage of respondents favouring exclusion was 24.0 per cent.⁷¹ However, there was a significant gap between public and judicial opinion in the version of the vignette where the police were aware that there was a typographical error in the warrant.

C. Confessions: Voluntariness and the Right to Counsel

In *R. v. Manninen*,⁷² the Supreme Court of Canada held that section 10(b) of the Charter requires the police to inform the accused of his right to counsel, to provide the detainee with the reasonable opportunity to exercise that right, and to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel. Because the vignette did not expressly state that the accused spoke to his lawyer,⁷³ and because there may be a

⁷⁰ See Dickson C.J.C. in *R. v. Genest*, *supra*, footnote 19. It is beyond the scope of this article to examine whether a search under a warrant containing a typographical error is a warrantless search.

⁷¹ We used Table 6 as a reference data because the sample size is most comparable to Table 9.

⁷² *Supra*, footnote 23, at pp. 1241-1242 (S.C.R.), 307-308 (D.L.R.), 103-104 (C.R.).

⁷³ The vignette states "after he calls his lawyer".

difference of opinion as to the legal effect of the police conduct in some of the presented circumstances, we will compare public and judicial opinion on the different factual and legal basis. (The relevant data is set out in Table 14).

In one version of the vignette the police continued to question the accused after he called his lawyer. If we assume the detainee's sole attempt to obtain legal advice was unsuccessful, the courts would likely exclude the confession because the accused did not have a reasonable opportunity to exercise his right to counsel.⁷⁴ In contrast, only a small proportion of the public (approximately 16 per cent) would have excluded the confession in the presented circumstances. On the other hand, a large segment of the population (over 80 per cent) would have admitted the evidence.

What if we assume that the accused spoke to his lawyer before the police continued to question him? There is some authority for the proposition that once an accused has successfully invoked his rights under section 10(b), the police are required first to notify counsel of their intent to interrogate the accused before questioning him.⁷⁵ The level of public agreement with this interpretation of the scope of the Charter would be the same as that which is set out in the preceding paragraph. Conversely, if the failure by the police to notify counsel does not mandate exclusion,⁷⁶ there would be substantial agreement between public and judicial opinion on the admissibility of the confession: between 80.0 and 82.3 per cent of respondents would admit the evidence in these circumstances.

In the undercover officer version of the vignette, it is clear that a cellblock confession to a policeman is admissible at common law.⁷⁷ However, there is some judicial authority that unless the accused expressly waives his right to remain silent, this method of investigation contra-

⁷⁴ "Immediately after the respondent's clear assertion of his right to remain silent and his desire to consult his lawyer, the police officer commenced his questioning as if the respondent had expressed no such desire. Again, there may be circumstances in which it is particularly urgent that the police proceed with their questioning of the detainee before providing him with a reasonable opportunity to retain and instruct counsel, but there was no such urgency in this case"; *R. v. Manninen*, *supra*, footnote 23, at pp. 1243-1244 (S.C.R.), 309 (D.L.R.), 105 (C.R.). See also *Ross v. R.* (1989), 91 N.R. 81 (S.C.C.); *R. v. Playford* (1988), 61 C.R. (3d) 101, 63 O.R. (2d) 289 (Ont. C.A.); *R. v. Gilbert* (1988), 61 C.R. (3d) 149, 40 C.C.C. (3d) 423 (Ont. C.A.).

⁷⁵ *R. v. Greig* (1987), 56 C.R. (3d) 229 (Ont. H.C.). But see, *R. v. Playford*, *ibid.*; *R. v. Black* (1987), 56 C.R. (3d) 242, 77 N.S.R. (2d) 23 (N.S. App. Div.); *R. v. Emile* (1988), 65 C.R. (3d) 135, [1988] N.W.T.R. 196 (N.W.T.C.A.).

⁷⁶ See the two judicial approaches, *ibid.*

⁷⁷ See *R. v. Rothman*, *supra*, footnote 6, for pre-Charter, and *R. v. Collins*, *supra*, footnote 7, for post-Charter decisions.

venes section 7 of the Charter.⁷⁸ There is substantial opposition to (over 76 per cent) and a low level of agreement (between 15 and 18 per cent) with the application of the exclusionary rule in these circumstances for all three crimes.

A threat renders a confession inadmissible at common law and perhaps under the Charter as well.⁷⁹ For the crime of rape the data indicate that there is a substantial gap between public and judicial opinion on this evidentiary issue. A significant majority (67.8 per cent) of respondents would have admitted the accused's confession, and 24.1 per cent would have excluded it. For the crimes of murder and common assault, the gap between judicial and public opinion narrows noticeably as 44.4 and 41.9 per cent of the population respectively would have excluded the evidence for these crimes. However, a majority of the population would have admitted the confession (53.3 and 55.2 per cent).

As with the other two vignettes the public appears to have considered the seriousness of both the offence and the breach, and to have balanced these factors in their decision-making process. In that sense, the structures of public and judicial attitudes are congruent. However, the data indicate that the public does not always balance the factors in the same way as do the courts. For example, public support for the exclusion of evidence was greatest when the police conduct was most flagrant in the second and third vignettes, that is, when the police entered a residence without a warrant to seize drugs or threatened an accused to obtain a confession. However, a deliberate denial of an accused's right to counsel in the first vignette, which the Supreme Court of Canada has classified as a flagrant violation of the Charter, did not appear to have had this effect.

D. *Bringing the Administration of Justice into Disrepute*

As we have seen, Canadians' decisions on admissibility are influenced by both the seriousness of the crime and the extent of the violation of the Charter. Thus we can assume that these factors are relevant to public attitudes towards what brings the administration of justice into disrepute. We were interested, however, to determine what respondents thought of the justice system when a judge's decision to admit or exclude evidence conflicted with their views on admissibility. The responses to our questions are set out in Table 15.

⁷⁸ *R. v. Greig*, *supra*, footnote 75; *R. v. Smith* (unreported, November 5, 1987), (Ont. H.C.).

⁷⁹ The Supreme Court of Canada has not authoritatively set out the boundaries of the confession rule in relation to rights under the Charter or whether courts must first determine admissibility under the common law before examining the Charter issue; see *R. v. Clarkson*, *supra*, footnote 17.

TABLE 15
PROPORTION OF RESPONDENTS WHO THINK LESS OF THE JUSTICE SYSTEM
WHEN THEY DISAGREE WITH THE JUDICIAL DECISION
ON ADMISSIBILITY OF THE EVIDENCE

Vignette Scenario	Yes	No	Not Sure	Refused	No. of Cases
<i>Drinking and Driving</i>					
Respondent who answers judge should admit the evidence is asked if she/he would think less of justice system if the judge decided to exclude the evidence.	79.2	16.9	3.9	—	687
Respondent who answers judge should exclude the evidence is asked if she/he would think less of justice system if judge decided to admit the evidence.	67.6	28.6	3.8	—	133
<i>Drug Case</i>					
Respondent who supports judicial decision to admit the evidence is asked if she/he would think less of the justice system if the judge excluded the evidence.	81.6	16.3	2.1	—	331
Respondent who opposes judicial decision to admit the evidence is asked if she/he thinks less of the justice system because the judge did not exclude the evidence.	72.0	23.7	4.3	—	93
Respondent who supports judicial decision to exclude the evidence is asked if she/he would think less of the justice system if the judge admitted the evidence.	70.9	25.7	2.7	0.7	148
Respondent who opposes judicial decision to exclude the evidence is asked if she/he would think less of the justice system because the judge did not admit the evidence.	72.5	22.9	4.2	0.4	236
<i>Rape, Murder, Assault</i>					
Respondent who answers judge should admit the evidence is asked if she/he would think less of the justice system if the judge decided to exclude the evidence.	78.1	17.5	4.4	—	612
Respondent who answers judge should exclude the evidence is asked if she/he would think less of the justice system if the judge decided to admit the evidence.	65.4	29.1	5.5	—	199

In the drinking and driving case, we asked respondents who thought the evidence *should be excluded* if they would think less of our system of justice *if the judge allowed* the evidence to be used in court. Over two-thirds of the respondents (67.6 per cent) reported that they would think less of the system of justice. When we asked those respondents who thought the evidence *should be allowed* in court whether they would think less of the justice system *if the judge ruled to exclude* the evidence, an even greater proportion of the population (79.2 per cent) answered that they would think less of the system. Similar results were obtained in the other two vignettes; between 65.4 per cent and 81.6 per cent would think less of the system of justice if the judge made a decision with which they do not agree. A greater proportion of those respondents who would have admitted the evidence would think less of the justice system than would the respondents who would have excluded the evidence.

To summarize, members of the public do believe that the administration of justice would be brought into disrepute by judicial decisions on the exclusionary rule that contradict the decisions they themselves would have made. Moreover, those who favour the admission of evidence are more inclined to think less of the administration of justice. For this reason, and considering the magnitude of the gaps between judicial and public opinion outlined earlier, serious questions may be raised about the interpretation and application of section 24(2). These questions are addressed in the conclusion.

Conclusion

The purpose of this conclusion is to summarize the major findings of this survey on public attitudes towards the exclusion of evidence and to suggest some of their implications. We began, however, by addressing the possible use of empirical data in Charter litigation.

It will be recalled that one of the reasons the Supreme Court rejected survey evidence was its lack of reliability: no survey could adequately capture all the circumstances relevant to the decision whether or not to admit evidence obtained in violation of the Charter.

On certain levels, this study illustrates how one can put a fairly rich variety of factors before the public, and by using the techniques and methods developed in the survey, determine the structure of public opinion in a fairly sophisticated and refined way. At the same time, the results of this study should raise serious questions about the forensic use of most survey evidence on the admissibility of evidence in courts.

It is well established that the form and placing of a question will influence the response. For example, in the second vignette, responses to the question of admissibility of the drugs were sensitive to suggestions that a judge had decided to admit or exclude evidence. Although

our survey was relatively free of such bias in the questions, and where it was introduced it was for the purpose of determining the impact that subtle changes in question-design would have on the responses, one should be cautious about assuming that a response was not significantly influenced by the form of the question.

More importantly, our study illustrates the dangers of asking (and relying upon) questions that simply asked for the public's opinion, without placing the respondents in a factual context which forced them to confront the consequences and implications of the decision. For example, when asked about the importance of the right to counsel, an overwhelming majority of respondents approved it.⁸⁰ But when asked to evaluate the importance of that right in the context of a decision concerning a criminal trial, the responses showed a much lower valuing of the right.⁸¹ This study also illustrates how the expression of public opinion can change when respondents are invited to admit uncertainty, or where a qualifying factor is explicitly introduced.⁸² For methodological reasons alone, therefore, and leaving entirely aside any philosophical questions concerning the relevance of survey evidence to the interpretation of section 24(2), one should be very careful before advocating the forensic use of survey evidence. Nevertheless, surveys such as ours elicit responses which are sensitive to the different contexts within which decisions are taken, and present a far more accurate picture of public opinion on these issues than would surveys based on a more traditional methodology.

One of the purposes of the survey was to ascertain the structure of public opinion towards the exclusion of evidence. The public's willingness to admit or exclude evidence was related to the seriousness of the breach of the Charter and to the seriousness of the crime for which the accused was charged. In general terms, support for exclusion increased with the severity of the Charter breach, and decreased with the severity of the crime.⁸³ In this respect, the structure of public opinion is similar to that of judicial opinion on these issues: the public applies the same criteria as judges do, and in a similar manner.⁸⁴ Recalling that one of the reasons

⁸⁰ See questions 2.1 and 2.2 set out in Table 2.

⁸¹ See, for example, data regarding the right to counsel in the context of drinking and driving, set out in Tables 6 and 7.

⁸² Regarding uncertainty, see the question on support for the Charter in Table 1. On the influence of qualifying factors, see variations to question 3 in Table 3 concerning the exclusionary rule.

⁸³ The public's view of acceptable police conduct was also influenced by the need to prevent the destruction of evidence, as was illustrated in the response to question 2.4B in Table 2. We infer that decisions regarding admissibility would also be sensitive to this concern.

⁸⁴ This generalization must be made subject to the qualification introduced in *R. v. Collins*, *supra*, footnote 7; see, *supra*, footnote 15. Although the *Collins* qualification arguably would not affect the results in vignette 2, it would with respect to vignettes 1

advanced by some members of the Supreme Court of Canada for not allowing survey evidence of public opinion was that the public may not hold reasonable views on the subject,⁸⁵ it is sufficient to observe that, whether reasonable or not, the public appears to apply the same criteria as do the judges in as rational a fashion.

This said, the public appears less willing to exclude evidence than are judges, at least as evidenced by the legal principles articulated in the decisions of the courts considered here. As we saw in the previous section, the gap between public and judicial opinion was considerable in a number of contexts, notably the case of drinking and driving and the right to counsel. Moreover, the data analyzed in Table 15 suggest that those who oppose the exclusion of evidence are more strongly committed to their view that excluding evidence brings the administration of justice into disrepute, than are those who favour exclusion. What does this imply for the judicial interpretation of section 24(2) of the Charter?

As discussed earlier, one of the rationales for the exclusionary rule is to maintain public support for the judicial system. Accordingly, one might argue that the gap between public and judicial opinion should impose a constraint on the judicial application of section 24(2).⁸⁶ Given the stated rationale for the exclusionary rule, courts ought to be careful to ensure that the *exclusion* of evidence does not bring the administration of justice into disrepute in the eyes of the public. Any significant gap between judicial and public opinion will undermine public respect for the legal system, and the system will be thrown into a crisis of legitimacy. Or so the argument would go.

It is important, however, to pause before reaching conclusions expressed in such sharp terms. It is not at all clear that the gap between judicial and public opinion, as is suggested in the data, will remain fixed at the levels we calculated. Moreover, the relationship between public opinion and the moral legitimacy of the system is a complex issue. We will consider each of these points in turn.

and 3. There may very well be a structural difference between public opinion and that of the Supreme Court on this issue, but an exploration of the point is beyond the scope of this article.

⁸⁵ This is inferred from the reasons of Lamer J. in *R. v. Collins*, when he examines the test for applying s. 24(2): "The reasonable person is usually the average person in the community, but only when that community's current mood is reasonable"; *ibid.*, at pp. 282 (S.C.R.), 524 (D.L.R.), 209 (C.R.).

⁸⁶ We leave aside entirely the philosophical question of whether or not the views of the public ought to matter at all in the interpretation and application of section 24(2): this is beyond the scope of this article. Our point of departure is the stated rationale for the exclusionary rule and the reference by the Supreme Court of Canada to the views of the public as central to the application of section 24(2); see, *R. v. Collins*, *ibid.*, at pp. 281 (S.C.R.), 523-524 (D.L.R.), 208-209 (C.R.).

First, the conclusion that the public is less willing to exclude evidence than is the judiciary was based largely upon a reading of the principles and decisions handed down by the Supreme Court of Canada. This is not the only comparison that could be drawn. For example, it is not clear that the public is so much less willing to exclude evidence than were judges in the early years of the Charter, before the Supreme Court signalled clearly that a liberal approach was to be taken to the interpretation of the Charter generally and to questions of admissibility under section 24(2) in particular. Nor is it clear that lower court judges today are applying section 24(2) in the same way as is the Supreme Court of Canada and some courts of appeal. It may well be that there is less of a gap than was suggested by our analysis of appellate legal doctrine. If so, this would be relevant both to the questions of the role of the Supreme Court in relation to trial courts, and to issues surrounding whether the rationales underlying section 24(2) are being advanced or compromised by judicial decisions.

Second, whatever gap currently exists will not necessarily remain of the same magnitude over time, there being no reason to assume that public attitudes are frozen on these issues. Indeed, the reactions of the public to questions of admissibility cannot be divorced from their knowledge and attitudes about the Charter generally. In this respect, our data suggest that the Charter has not yet achieved a significant salience within Canadian political culture. It will be recalled that many Canadians have no fixed attitudes towards the Charter, and even fewer are committed to a positive view of the Charter.⁸⁷ It is not unreasonable to assume that the Charter will become better known to the Canadian public as the years go on, and it may be that this could increase public support for the exclusion of evidence under the Charter.⁸⁸

Assume, however, that a gap between public and judicial opinions remains, either because public attitudes do not change significantly, or because public support for the exclusionary rule drops even further.⁸⁹ Does this pose a threat to public respect for the legal system—that is, to the rationale for section 24(2)?

⁸⁷ See questions 1.3A and 1.3B in Table 1.

⁸⁸ There is, of course, no way to predict the extent to which support for the Charter will increase (or decrease) over time. Nor can we assume that support for the Charter will remain related to support for the exclusion of evidence obtained in violation of the Charter. It is possible to say, however, that public attitudes towards issues of admissibility, already sensitive to a number of contextual factors, will remain sensitive to a range of factors, one of which may be the enhanced salience of the Charter in Canadian culture.

⁸⁹ Of course, it is not clear to what extent the public hears about (or cares about) individual decisions to admit or exclude evidence. These decisions are made in the course of a trial, typically on a *voir dire*. To be sure, a big headline in a newspaper

It is no answer, of course, to invoke the idea that majority views ought not to bear upon these issues on grounds that the Charter is designed to protect minorities (or accused persons) from the majority.⁹⁰ The stated rationale for section 24(2) is the maintenance of public respect for the administration of justice, and the public's views therefore must surely count. But it is not clear (either sociologically or philosophically) that the public's approval for judicial decisions is ever a sufficient or necessary condition for the acceptability of the system as morally legitimate. It may be, for example, that all that is required is the support and acquiescence of the relevant legal and political elites for the system to be adequately legitimized. In any event, it is not clear that public respect for the system of justice turns on questions of the admissibility of evidence more so than it does on questions of access to justice, fairness to victims of crime, and so on.

What does seem relatively clear is that a significant gap between public and judicial opinion might throw into question the adequacy of the stated rationale as a justification for the rule. To the extent that judicial decisions are *not* congruent with public opinion, and the public is not being brought "onside" by the educative effect of judicial decisions, it may lead the courts to articulate a different rationale for the rule.⁹¹ For the time being, however, it seems premature to conclude that the apparent gap between judicial and public opinion poses a danger to public confidence in our justice system.

about a criminal going free may pique the public's interest, if not their rage, but most decisions on these matters never become known to the general public.

⁹⁰ *R. v. Collins*, *supra*, footnote 7, at pp. 282 (S.C.R.), 524 (D.L.R.), 209 (C.R.).

⁹¹ Although it is beyond the scope of this article to consider such matters, there do appear to be some contradictions between some of the principles set out by the courts and the accepted (and rejected) rationales for the exclusionary rule. One apparent contradiction concerns the relevance of "good faith" on the part of the police, and the apparent rejection of deterrence as a rationale for s. 24(2). For discussion of this point, see Gibson, *op. cit.*, footnote 14, pp. 259-260.