
THE PENALTY OF EXCLUSION— A PRICE OR SANCTION?

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INTRODUCTION

When subject to penalty at all, police violations of Fourth¹ and Fifth Amendment² rights are punished primarily by way of the exclusionary rule.³ As currently cast, the principal objective of this judicially-created evidentiary device is to deter official deprivations of individual rights⁴—

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1. The Fourth Amendment obligates law enforcement officers to abstain from engaging in unreasonable searches and seizures. *See* U.S. CONST. amend. IV.

2. The Fifth Amendment self-incrimination clause prohibits the police from compelling any person in a criminal case to incriminate herself. *See* U.S. CONST. amend. V. The Amendment's due process clause provides further protection against evidence gathering techniques that "shock the conscience." *Rochin v. California*, 342 U.S. 165, 169–74 (1952). The Fifth Amendment analysis in this Article will focus principally on exclusions of evidence for violations of the self-incrimination clause.

3. *See Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (stating that the rule is designed to promote officers' respect for the Fourth Amendment's "constitutional guaranty 'in the only effectively available way—by removing the incentive to disregard it'" (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)); *Miranda v. Arizona*, 384 U.S. 436 (1966) (applying the exclusion penalty to statements obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination).

4. *See United States v. Calandra*, 414 U.S. 338, 348 (1974) (explaining that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its

compelling the police to perform their investigative duties within constitutionally prescribed limits by removing any incentive they might have for violating the constitutional norms.⁵

For decades, the exclusionary rule has drawn the attention of countless scholars. Some legal thinkers have heralded the wisdom of excluding probative evidence to penalize police wrongs while others have decried the folly of the penalty; some have condemned the myriad restrictions placed on the penalty over time while others have praised them.⁶ Still others have

deterrent effect"). See also *United States v. Leon*, 468 U.S. 897, 916 (1984); *Stone v. Powell*, 428 U.S. 465, 485 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976).

5. The rationale for the penalty has changed in important ways over time. For a discussion of the significance of the Court's movement from a multi-rationale approach to its current focus on the singular rationale of deterrence, see *infra* Part II.A.

6. A more controversial penalty can scarcely be imagined. For views supportive of continued or expanded application of the penalty, or critical of restrictions placed upon it, see Albert W. Alschuler, *Close Enough for Government Work: The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309; Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 429 (1974); Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercise in Futility*, 60 IND. L.J. 287 (1985); John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982); Bradley C. Canon, *Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for its Retention*, 235 S. TEX. L.J. 559, 561-63 (1982); Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 622-24 (1990); William C. Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WIS. L. REV. 1193, 1242-43; Yale Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIM. L. BULL. 5 (1979); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition?"*, 16 CREIGHTON L. REV. 565, 665-67 (1983); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 306, 340-61 (1982) [hereinafter LaFave, *Fourth Amendment*]; Wayne R. LaFave, *"The Seductive Call of Expediency": United States v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895 [hereinafter LaFave, *Call of Expediency*]; Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 49-50 (1994); William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule Reconsidered: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261 (1998); Pierre J. Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations, Damage Remedies and Congressional Power*, 73 J. CRIM. L. & CRIMINOLOGY 875 (1982); Thomas S. Schrock & Robert C. Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); William A. Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device*, 51 GEO. WASH. L. REV. 633 (1983); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 847-52 (1994); Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85 (1984).

For arguments expressing criticism of the exclusion penalty, a willingness to retreat from it, or support for restrictions placed on the exclusion penalty, see STEVEN SCHLESINGER, *EXCLUSIONARY INJUSTICE* (1977); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785-800 (1994); Randy E. Barnett, *Resolving the Dilemma for the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937 (1983); Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About its Effects in the Courtroom*, 78 MARQ. L. REV. 45 (1994); Daniel M. Harris, *The Return to Common Sense: A Response to "The Incredible Shrinking Fourth*

probed the efficiency of the exclusionary rule by closely examining its practical effects.⁷ This Article moves beyond the questions of legitimacy and efficiency that have engaged these other scholars, to urge the use of a new construct to appraise the exclusionary rule. This new construct is the economically based theory of penalties popularized by Professor Robert Cooter in his well-known article, *Prices and Sanctions*.⁸

Price and sanction theory posits that while all penalties for harmful human conduct seek the common goal of deterring harms, they do so in importantly different ways. Some penalties “price” behavior, while other penalties “sanction” it.⁹ A penalty that “prices” behavior is a penalty that permits an actor to choose to cause harm provided she “internalizes” the costs she imposes on others as a result of her decision to do so.¹⁰ Pricing schemes are morally neutral—they force an actor to pay for the full cost of her choice to do harm (though no more), while allowing her to elect to impose that harm without moral judgment.¹¹ Thus, priced behavior is

Amendment”, 22 AM. CRIM. L. REV. 25, (1984); Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1564–66 (1999); Carter LaPrade, *An Alternative to the Exclusionary Rule Presently Administered Under the Fourth Amendment*, 48 CONN. BAR. J. 100 (1974); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667 (1970); Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638–41 (1982) [hereinafter Posner, *Excessive Sanctions*]; Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49 [hereinafter Posner, *Rethinking*]; Steven Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is a Deterrent to Police?*, 62 JUDICATURE 404 (1979); James T. Ranney, *The Exclusionary Rule—the Illusion vs. the Reality*, 46 MONT. L. REV. 289, 289–90 (1985); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363; Malcom R. Wilkey, *A Call for Alternatives to the Exclusionary Rule*, 62 JUDICATURE 351 (1979); Malcolm R. Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. TEX. L.J. 531 (1982); Malcolm R. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978).

7. Chief Judge Richard Posner and others have devoted considerable attention to this task. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 681–86 (4th ed. 1992); *Rethinking*, *supra* note 6, at 50–71; *Excessive Sanctions*, *supra* note 6, at 638–41; Arval A. Morris, *The Exclusionary Rule, Deterrence and Posner’s Economic Analysis of Law*, 57 WASH. L. REV. 647 (1982). See also Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U. L. REV. 740, 743–44 (1974) (criticizing a 1973 study that purported to show that the penalty was an ineffective deterrent).

8. Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984). Professor Cooter developed price and sanction theory as an alternative to the dichotomous views of jurisprudential theorists, who see the law as a set of obligations backed by sanctions, and economics theorists, who see the law as a set of obligations enforced by prices. Rejecting the notion that the law operates under one system to the exclusion of the other, Professor Cooter proposed that it operates under both the price and sanction systems. See *id.*

9. See *id. passim*.

10. See *id.* at 1537. Professor Stephen Marks uses another label—“conditionally permissible activities”—to describe the same concept. Employing Professor Marks’ terminology, “priced” behavior is that which is “permissible conditional on the payment of compensation.” Stephen Marks, *Utility and Community: Musings on the Tort/Crime Distinction*, 76 B.U. L. REV. 215, 216 (1996).

11. See Cooter, *supra* note 8, at 1537–38.

morally acceptable behavior which inflicts a compensable harm. While pricing penalties ensure some measure of compensation for those harmed by others, they actually seek to deter only inefficient harms (harms that cost society more than they benefit individual actors) while avoiding the “over-deterrence” of efficient harmful human behavior (behavior that is less socially costly than the individual’s expected gain).¹² Therefore, when subjected to a price, a rational actor can be expected to choose injurious over non-injurious conduct whenever the benefits she stands to gain from causing injury to others outweigh her predicted costs.¹³ Put simply, a price will not deter a person from imposing injury if that price is smaller than the bounty she will reap from doing harm, nor is it intended to do so.

The opposite is true in a system of sanctioning penalties. A penalty that sanctions is a penalty attaching to conduct that society considers morally wrongful and quite determinedly seeks to prevent.¹⁴ Far from moral neutrality, sanctions threaten those who would engage in harmful conduct that is considered wrongful with moral condemnation and more. They deter such unwanted conduct by threatening a would-be injurer with a penalty and dose of societal condemnation thought sufficiently hefty to cause the actor, acting rationally, to choose compliant over non-compliant, or careful over careless behavior.¹⁵ Thus, unlike prices which seek to deter only inefficient harms (while avoiding the over-deterrence of other

12. In order to deter only inefficient harms, penalties that price must be able to measure accurately the actual costs imposed by an individual actor on others, holding the actor responsible for no more and no less than the full extent of the harm she causes.

13. “The [liability] decision is a warning that if one behaves in a certain way and an accident results, one will have to pay a judgment By thus altering the shadow price (of risky behavior) that confronts people, the warning may affect their behavior and therefore accident costs.” POSNER, *supra* note 7, at 24. The rational choice theory is a central feature of law and economics. It posits that as rational self-interested actors, people will generally employ cost-benefit analysis when deciding how to behave, including when deciding whether to comply with the law. See, e.g., Thomas S. Ulen, *Firmly Grounded: Economics in the Future of Law*, 1997 WIS. L. REV. 433, 442 (using the criminal sanction as an example and claiming that when expected benefits of illegal activity outweigh expected costs, “the rationally self-interested criminal commits the crime”; when the opposite is true, she refrains).

14. See Cooter, *supra* note 8, at 1537 (“[T]he purpose of a sanction is to deter people from wrongdoing”). I am indebted to my dear friend Professor Dean Alfange for the reminder that this view of penalties has old antecedents. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 118 (Mark DeWolfe Howe ed., Harvard University Press 1963) (1881) [hereinafter *THE COMMON LAW*] (“It cannot be inferred, from the mere circumstance that certain conduct is made actionable, that therefore the law regards it as wrong, or seeks to prevent it.”).

15. Using sanctions for violations of the criminal law as an example, Professor Cooter notes that a person subject to “costly prosecution” and possible conviction is also subject to “loss of reputation.” See Cooter, *supra* note 8, at 1549.

efficient, morally palatable harms), sanctions seek to deter harmful conduct that is considered wrongful, whether efficient or not.¹⁶

When these conceptions of prices and sanctions are applied to the penalty for police violations of Fourth and Fifth Amendment rights—the penalty of exclusion—fresh insights about the controversial penalty are possible. As an intuitive and normative matter, one would reasonably expect the penalty for lawless police action to be a sanction rather than a price, on the theory that the penalty’s objective is to communicate to the police that constitutionally defective investigative behavior is wrongful and prohibited, and to deter the occurrence of such behavior. In practice, however, several Supreme Court decisions applying (or not applying) the penalty might be read to suggest the contrary conclusion—that the penalty is actually a price, which would leave the police free to violate or abide by the constitutional requirements as they choose.

Criminal procedure scholars have yet to explore the ways in which the modalities of price and sanction can inform our understanding and assessment of the penalty of exclusion. Undertaking that task, this Article demonstrates how some of the limitations the Supreme Court has placed upon the exclusion penalty are at odds with price and sanction theory and have weakened the potential power of the penalty, while other aspects—particularly, the important and controversial “good faith exception” to the penalty—are consistent with price and sanction theory and have contributed to the penalty’s internal coherence and moral suasion.

Part I begins the exploration by surveying the principal distinctions between law-as-price and law-as-sanction.¹⁷ Proceeding by way of example, Part I illustrates two penalty systems in operation: one that prices actors who decide to impose harm on others, and another that sanctions those who decide to do so.¹⁸ Following this, Part I pauses briefly to

16. Sanctions thus operate unhindered by the need to make fine calculations about the actual costs imposed by individual actors.

17. See *infra* Part I.C. Professor Cynthia Williams has challenged the propriety of what she calls the “law-as-price” view in the corporate context. See Cynthia Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1385 (1998) (arguing that the law-as-price view “distill[s] all that is important about law and political obligation into economic terms” and “evaporat[es] the moral component of law”). Other terms have been employed to describe the same or similar concept, with varying levels of support. Such other expressions of the concept include the theories of “efficient breach” and “law as cost.” See Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1156–59 (approving of the conception of the law as a pricing or taxing mechanism for all but *mala in se* acts); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1576–77 (1995) (concluding that most regulatory law qualifies as “law as cost”).

18. See *infra* Part I.C.

consider how the price/sanction distinction can provide a new lens to those interested in the proper dimensions of the exclusionary rule.

Part II then applies price and sanction theory to the exclusionary rule¹⁹ by analyzing the language the Supreme Court has used when referring to the constitutional provisions to which the penalty attaches.²⁰ Part II considers whether the Court's nourishment of the deterrence rationale over other available rationales for the penalty of exclusion,²¹ as well as the many restrictions the Court has placed on the penalty's reach,²² evidence a pricing or a sanctioning approach. Although there are many situations in which police violations go unpunished by orders of exclusion, Part II concludes that the exclusionary rule is best described as a "sanction" for several reasons: 1) because the penalty is designed to communicate society's view that police violations of constitutional rights are wrongful;²³ 2) because it is triggered only by the errant actor's possession of a culpable mental state;²⁴ and 3) because the penalty does not attempt to calculate with precision the value of the actual harm imposed by an officer's transgressions.²⁵

Building on this conclusion, Part III uses price and sanction theory to illuminate the weaknesses and strengths of the Supreme Court's exclusionary rule jurisprudence. Beginning with weaknesses, price and sanction theory shows that certain facets of the Court's application of the penalty have undermined its effectiveness as a sanctioning device and nudged the exclusion penalty perilously close to, if not yet across, the line separating sanctions from prices. For example, rulings severely limiting the scope of the exclusionary penalty threaten to mislead the police about their continuing obligation to abide by constitutional mandates when collecting criminal evidence.²⁶ Similarly, the Court's failure to distinguish

19. The Supreme Court's application of the exclusion penalty has undergone dramatic changes throughout the twentieth century, moving from a position of no exclusion, to exclusion in the federal court system only, to exclusion in both federal and state courts, and finally to exclusion in both court systems but only in certain circumstances. *See infra* note 73.

20. *See infra* Part II.A.1.

21. Although not originally the only rationale for the penalty, increasingly the Supreme Court has emphasized deterrence as the exclusive basis for the exclusion of probative evidence. *See infra* Part II.A.2.

22. Prosecutors seeking to avoid the exclusion of helpful evidence may now rely on several categorical exceptions to the penalty. *See infra* text accompanying notes 130–62.

23. As a wrong, behavior that transgresses constitutional norms is to be prohibited, rather than priced. *See infra* text accompanying notes 40–44, 49.

24. This is a classic characteristic of a sanction. *See infra* text accompanying notes 43–44.

25. *See infra* text accompanying notes 47–49, 72.

26. In the *Miranda* context, for instance, decisions upholding the admission of *Miranda*-defective statement evidence have led some police forces to conclude that compliance with *Miranda* is

between willful and negligent evidence-gathering behavior has undermined the ability of the exclusion sanction to deter police wrongs.²⁷ Because the Court has chosen to employ a cost-benefit approach when deciding whether to exclude evidence, weighing inter alia the “cost” suffered by the wrongdoer when unlawfully acquired evidence is excluded, the message that the state has engaged in wrongdoing is significantly diluted.²⁸ Price and sanction theory warns that when a sanction is set at a level too low to deliver the normative message that the conduct to which it attaches is wrongful, the sanction may well begin to operate as a price.²⁹

At the same time, an enhanced understanding of price and sanction theory provides reason to applaud the Court’s development of the much-maligned “good faith exception” to the exclusionary rule and reveals the flaw of arguments critical of the exception.³⁰ Critics of the “good faith”

entirely discretionary. See *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1089 (9th Cir. 1999) (involving civil rights action against two California cities and individual police officers who intentionally obtained statements from suspects who had invoked their *Miranda* rights). The controversial practice of going “outside *Miranda*” illustrates the confusion that is generated by case law that so dilutes the penalty for errant police behavior that it leaves the impression that the conduct is no longer considered wrongful. See *infra* text accompanying notes 164–67. Additional confusion has resulted from the Court’s holdings that the scope of the exclusion penalty required for violations of constitutional requirements is different from the scope of the exclusion penalty that is required for violations of “prophylactic” court-created rules designed to safeguard those constitutional requirements. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 306 (1985); *Michigan v. Tucker*, 417 U.S. 433, 461 (1974).

27. While the exclusion penalty is triggered by the presence of a mental state of negligence or higher, see *infra* Part II.C., the penalty itself does not fluctuate with the seriousness of the mental state of the offending police actor. To the extent that exclusionary orders vary in severity at all, they do so only by numerical accident—courts suppress, however, many items the police happen to gather lawlessly. This means that evidence secured as a result of a negligent violation of constitutional rights is just as likely to be suppressed as evidence secured as a result of a willful violation. Moreover, this also means that evidence secured through willfully wrongful police conduct is just as likely to avoid exclusion under one of the Court’s categorical exceptions as evidence secured negligently. See *infra* Part III.B.

28. The valuation of an errant actor’s gain in a cost-benefit penalty assessment may be appropriate when a police officer has engaged in non-criminal (but sanctionable) conduct, but it is inappropriate when the officer has engaged in criminal conduct. This Article urges that the current practice of evaluating willful constitutional deprivations (largely criminal acts) and non-willful constitutional deprivations (largely non-criminal acts) in precisely the same way merits rethinking. See *infra* Part III.B.

29. See Cooter, *supra* note 8, at 1524–25. On the other hand, in the much larger group of cases involving unintentional but constitutionally defective police behavior, price and sanction theory supports the contemporary practice of considering the “cost” of exclusion, provided the courts are careful to admonish the police about their continuing obligation to respect constitutional boundaries. The calculation of this cost may quite properly lead the court to apply the exclusion penalty in some settings, but not others, or to the benefit of some persons (e.g., a victim whose expectation of privacy was infringed by the police) but not others (e.g., a person who lacks standing).

30. There are many critics of the good faith exception. For a selection of some of them, see authorities cited *infra* notes 238–39.

exception have argued that violations of constitutional rights should be penalized by exclusion even where the police have acted entirely reasonably. Under such a view, the state would be held strictly liable for constitutional harms irrespective of police fault. While this approach would surely broaden governmental liability for constitutionally defective acts, it would do so only at the inadvisable cost of undermining the exclusionary rule's normative sanctioning power.³¹ In the end, such an overly aggressive application of the exclusion penalty would weaken the public's support for the penalty in cases where that support is needed most—where the exclusion penalty operates as a sanction to penalize culpable police error.

I. THE THEORY OF PRICES AND SANCTIONS

We will do well to begin with the uncontroversial assertion that people sometimes hurt each other. To that, we can add the equally plausible notion that individuals sometimes steer clear of injurious conduct not simply because they are driven by motives of good citizenship, but because they fear the penalties that might be imposed upon them for engaging in injurious acts. Stated in economic terms, actors engage in injury-causing behaviors, or not, depending on how much they stand to gain or lose from doing so.³² If the penalties or “costs” are too high, a rational actor will refrain from engaging in injury-causing or prohibited conduct.

A. DEFINING PRICES AND SANCTIONS

Some law and economics theorists prefer to view “costs” or penalties collectively as a system of official “prices” for harmful human behavior.³³ Under this view, each penalty represents the price the community has assigned a particular harm. Others are resistant to this understanding and prefer to think of penalties as “sanctions” or threats that are designed to back up societal commands.³⁴ Penalties under this view are seen as coercive instruments designed to compel compliance with legal obligations.

31. Conversely, critics of the Court's failure to develop a symbiotic “bad faith” rule are precisely right. See, e.g., Burkoff, *supra* note 6.

32. “The virtuous prefer good, villains prefer bad, and rational actors in economics prefer themselves.” Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the “Bad Man” of Holmes*, 78 B.U. L. REV. 903, 903–04 (1998).

33. See, e.g., Easterbrook & Fischel, *supra* note 17, at 1177 n.57. But see Cooter, *supra* note 8, at 1523 (criticizing those holding this purely economic perspective as being “blind to the distinctively normative aspect of law”).

34. See generally Williams, *supra* note 17.

The chasm between these two schools of thought is wide. Under the former view, legal requirements are considered flexible and susceptible to breach (although breaches can be costly). Under the latter, legal standards are seen as official lines drawn in the sand and across which citizens are forbidden to tread.

In his seminal article *Prices and Sanctions*, Professor Robert Cooter set out to bridge this chasm, proposing alternatively that the law does both—price and sanction—and that lawmakers choose (or should choose) one strategy over the other depending on the effect on human behavior the community is attempting to achieve.³⁵ If a community believes that it is wrongful for its members to engage in certain behavior, it is likely to sanction that behavior when it occurs. If it wishes to leave its members free to choose whether to engage in potentially harmful behavior, provided that they willingly bear the cost of any harm that may occur, the behavior will be subject to a pricing penalty.³⁶ These dual penalty strategies can and do coexist, Professor Cooter argues, because not all harms or potentially harmful acts are viewed with the same moral repugnance.³⁷ Thus, lawmakers should employ a pricing strategy when there is general agreement that particular injurious behavior is permissible, provided the injury-producing actor “internalizes” the costs that her behavior inflicts on others. By contrast, lawmakers should employ a sanctioning strategy when there is general agreement that injurious behavior is wrongful and should be forbidden.³⁸ Concisely put, “sanctions attach to *forbidden* acts” while “prices attach to *permitted* acts.”³⁹

B. DISTINGUISHING PENALTIES THAT PRICE FROM THOSE THAT SANCTION

Under the foregoing principles, a first step toward determining whether a particular penalty is a price or a sanction might begin with the following inquiries: 1) Does the law permit an actor to engage in the harmful behavior so long as the actor pays a penalty which is equal to the social cost imposed by her action? or 2) Does the law strive to deter the

35. Cooter, *supra* note 8.

36. *See id.* at 1537–38.

37. *See id.* at 1537.

38. In other words, the law “prices” conduct (permits it to occur, and reoccur) when it is concerned only with efficiency, and “sanctions” conduct (forbids its occurrence) when it is concerned with values extending beyond efficiency. *See id.* at 1545.

39. *Id.* at 1537 (acknowledging that obligations can “appear opaque upon first examination”) (emphasis added).

behavior by communicating through its chosen penalty that the conduct is wrongful and prohibited? If the former, the penalty is likely a price, if the latter, it is likely a sanction.

For many legal rules, however, this is but a starting inquiry because it is not always easy to know whether the community perceives particular injurious behavior to be permissible for a price, or impermissible as wrongful.⁴⁰ In such instances, there are other means by which a price can be distinguished from a sanction. First, if a penalty becomes progressively more severe as the actor repeats the harmful behavior, it is likely to be a sanction.⁴¹ This progression in severity essentially mirrors the community's distaste for the injurious conduct. Using Professor Cooter's terms, it communicates that the conduct is "wrongful" when engaged in once, and that it is even worse when engaged in more than once.⁴² Thus, if repeated harmful behavior is punished more severely than singular behavior, the penalty in question will generally be a sanction.

The same is true for a penalty that applies only when an actor causes harm while possessing a culpable mental state.⁴³ In other words, if an actor's liability depends on whether she possessed a culpable mental state at the time she engaged in the harmful behavior, the penalty she faces is likely to be a sanction, not a price.⁴⁴

40. For example, do environmental laws that regulate a company's emission of pollutants into the air identify a forbidden wrong or a permissible, compensable, injurious act?

41. See Cooter, *supra* note 8, at 1524, 1537.

42. See *id.* at 1537.

43. An actor who moves across the line between "permitted" (priced) and "forbidden" (sanctioned) conduct will face an immediate "discontinuity" or severe jump in liability at the point that her conduct dips below the legal standard of care. See *id.* at 1523–24. This line characteristically tracks society's judgment of particular mental states. When such a sharp discontinuity is observed in a system of penalties, it is safe to characterize the penalty for the behavior as a sanction. Tort law, which penalizes actors who harm others negligently, provides a useful example of such a sanction. The line separating sanctions from prices in tort law is the line between negligent conduct (forbidden and sanctioned) and conduct for which an actor is held strictly liable for damages (permitted but priced). See *id.* at 1538. Although often mistaken for "prices," damages in negligence actions are actually sanctions. See *id.* at 1543 (pointing out the common confusion in tort law of sanctions for prices). In the absence of a strict liability regime, an actor who causes harm negligently faces a sharp discontinuity in the applicable penalty as she moves from the realm of non-negligent conduct (where her potential liability is zero) into the realm of negligent conduct (where her potential liability increases by one hundred percent).

44. Moreover, in the normal case, sanctioning penalties themselves become increasingly more severe with the seriousness of the actor's culpability. Thus, the sanction for an actor who proceeds purposively is typically steeper than the sanction for an actor who behaves recklessly; the sanction for reckless conduct is harsher than the sanction for negligent conduct, and so on. From an economist's viewpoint, this variance is not retributive. It is based on the belief that actors with more culpable mental states are more "resistant" to deterrence, and thus, must be threatened with increasingly harsher penalties to achieve the desired deterrent effect. As put by Professor Cooter: "Since the purpose of a

Prices, on the other hand, are peculiarly unconcerned with recidivism, mental states and the like. They are neither triggered by the presence of a culpable mental state nor inflated upon the actor's repetition of the harmful conduct.⁴⁵ Indeed, such fluctuations would run counter to the fundamental goal of a pricing penalty which is to *permit* the actor to engage in conduct that imposes external costs on others provided the actor internalizes those costs.⁴⁶ Although the price imposed on one actor might well vary from the price imposed on another, this variation is not attributable to the actors' mental states or recidivism, it is attributable to the extent of damage (the cost) their behavior inflicts. Put simply, the price will equal the social costs of each of their acts.⁴⁷ When the law prices, it does so at the level of the social cost of the behavior because its principal concern is that no actor impose an inefficient "externality"⁴⁸ on another. When the law sanctions,

sanction is to deter people from wrongdoing, the sanction will be adjusted to achieve this goal. Detering actors whose fault is intentional, deliberate, or repeated requires a more severe sanction than deterring actors whose fault is unintentional, spontaneous, or committed for the first time." *Id.* at 1537. For an excellent discussion of this point see Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 970–76 (1998) (collecting and discussing authorities reflecting this utilitarian view).

45. Professor Cooter explains why not:

The efficient price depends upon the extent of the external harm, not the actor's state of mind. If, contrary to fact, prices varied with the actor's state of mind—making the price higher if the act were done intentionally—then people would be deterred from doing the very acts that are permitted. Since a typical purpose of prices is to internalize costs, and since the external cost of an act is unrelated to the actor's state of mind, a price should not increase just because the activity is intentional, willful, or repeated.

Cooter, *supra* note 8, at 1537.

46. A natural question at this point might be: Why would there be any penalty for harmful conduct that is "permitted"? The answer is that the word "permitted" in this context is essentially a term of art. It applies to harms that are in fact redressed by the law—i.e., harms for which actors are required by law to compensate their victims. In other words, the law is not indifferent to such injurious behavior. Rather, when such behavior occurs, a legal penalty that prices responds to the breach by requiring the actor to internalize the costs of that conduct, but without signaling *ex ante* that the harm-causing behavior is wrongful.

An illustration of a simple pricing penalty involving a classic contract dispute may help to clarify this point. The law of contracts imposes obligations on those who enter into lawfully binding agreements. In essence, each party is obligated to perform her part of the negotiated bargain. It sometimes occurs, however, that a party fails to satisfy her part of the bargain, and breach results. It would be a mistake to conclude that the law is indifferent to such a breach simply because it does not always (nor even usually) intervene to force the breaching party to perform. Rather, in the run-of-the-mill case, recognizing that legally binding, contractual obligations are sometimes breached, the law of contracts imposes a "price" for non-performance, typically expectation damages, which attempt to put the victim of breach in the position he would have been in had the breach not occurred. See E. ALLAN FARNSWORTH, *CONTRACTS* § 12.1 (1982). It is in this sense that the law "permits" a party to choose not to comply with her contractual obligations, for a price.

47. See Cooter, *supra* note 8, at 1537–38.

48. Potential injurers can reduce or eliminate externalities by taking precautionary measures designed to prevent harms from occurring. Rules and penalties exist to encourage them to do just that.

it can impose a penalty well in excess of the behavior's social costs because the goal of a sanction is not merely to guarantee an efficient transaction between parties, but to signal that a behavior, which is perceived to be wrongful, is prohibited.⁴⁹

From these basic identifying characteristics, Professor Cooter has proposed the following test for distinguishing sanctions from prices which may be helpful in our effort to classify the exclusion penalty: "Sanctions increase with the need for deterrence, as indicated by the actor's state of mind, whereas prices increase with the amount of external harm caused by the act, which is invariant with respect to the actor's state of mind."⁵⁰

C. ILLUSTRATIONS OF PRICE AND SANCTION CHARACTERIZATIONS AT WORK

To see this test in action in a pricing context, we can imagine three persons who breach identical contractual promises, but for different reasons. Breaching Party #1 intentionally breaches her contractual promise because she stands to maximize her profits by doing so. Breaching Party #2 mistakenly breaches her contractual promise because she cannot be bothered to record delivery dates. Breaching Party #3 breaches her contractual promise due to a reasonable scheduling error. Would the law of

For example, a rule limiting the amount of toxins a polluter may emit into the atmosphere, enforced by a penalty provision that sets a fine for polluters who surpass the limitation, can be expected to reduce the externalities that polluters would otherwise impose on society. In the criminal context, a provision that outlaws killing and publicizes the penalty that will be imposed on those who kill hopes to deter the extreme and irreversible externalities imposed by killers. Viewed in economic terms, the goal of both of these and other penalties is the reduction of unwanted external costs. Penalties achieve this goal by threatening to impose costs on those actors who would impose externalities on others.

49. Criminal and tort law scholars have explored a similar concept in articles which discuss the so-called "tort/crime distinction." Frequently observed in criminal punishment literature is the notion that where a rule seeks to deter behavior that constitutes a crime, "complete deterrence" is the goal. By contrast, where a rule seeks to deter behavior that constitutes a tort, "optimal deterrence" is commonly said to be the appropriate goal. See, e.g., Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 421 (1998). The complete-versus-optimal distinction is explained by the strength of the community's resolve in not allowing the behavior in question to occur. When society prescribes a criminal penalty, it seeks to send the message that its resolve is firm, and that the conduct may not occur. When it prescribes a non-criminal penalty, its message is decidedly more ambivalent: It seeks to deter the behavior, but only to a point—essentially, the point of inefficiency. As stated by Professor Keith Hylton, optimal deterrence "implies deterring offensive conduct only up to the point at which society begins to lose more from deterrence efforts than from the offenses it deters." *Id.* Hence, optimal deterrence is achieved by forcing the non-criminal actor to internalize the costs her behavior has imposed on others.

50. Cooter, *supra* note 8, at 1537–38 (emphasis omitted). Professor Stephen Marks has expressed a similar idea in writing that we might choose to "'price' conditionally permissible activities" where the utility of the activity to the individual actor is sufficiently high. Marks, *supra* note 10, at 225.

contracts respond differently to these three acts of breach? The answer it seems is no.⁵¹ Whether the breach was intentional (Breaching Party #1) or negligent (Breaching Party #2) or non-negligent (Breaching Party #3), each of the victims suffered injury and would be entitled to compensation,⁵² the extent of which would be assessed at the level of the social cost of the breaching act. Moreover, the damage award would not likely be impacted by evidence that the breaching party had broken contractual promises before (i.e., proof that this was repeat behavior), nor would it be designed to ban future breaches or to convey the message that the decision to breach was wrongful.⁵³ Therefore, as a general rule under Professor Cooter's paradigm, acts of contractual breach are penalized by prices, not sanctions.⁵⁴ The penalty for contractual breach tracks its social costs while permitting it to occur; repeated acts of breach do not engender more punitive penalties; and the mental state of the breaching party is normally irrelevant to the calculation of damages.⁵⁵

A typical sanction operates quite differently. To see how, compare the penalty that is likely to be imposed on three actors who cause the death of another, but with different mental states. Killer #1 plans to kill his business partner, and carries out that plan by purchasing a gun and ammunition, lying in wait, and shooting the partner dead. Killer #2 has no plan to kill his business partner, but nonetheless, causes his partner's death when he points a gun at the partner and pulls the trigger in jest, believing it to be

51. In our hypothetical, therefore, the expectation damages for all three victims would be identical.

52. The mental state of the breaching party is normally irrelevant to the calculation of damages in such a dispute. See Cooter, *supra* note 8, at 1545 ("Facts about the promise breaker's state of mind do not usually influence the court's assessment of expectation damages.").

53. See, e.g., *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 750 (7th Cir. 1988) (Posner, J.) ("Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided that he makes good the promisee's actual losses.").

54. See Cooter, *supra* note 8, at 1545. Not all scholars like this answer for it implies that decisions to breach may be based purely on the basis of efficiency. For a view critical of the theory of "efficient breach" of contract, see Williams, *supra* note 17, at 1285. For a defense of the theory, see POSNER, *supra* note 7, at 118–20.

55. Of course, there are exceptions. Punitive damages are sometimes awarded in contract disputes if the contract concerns parties involved in a fiduciary relationship, and by reason of that relationship the breaching party has violated an additional obligation to the victim. See FARNSWORTH, *supra* note 46, at § 12.8; Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 241–44 (1977); Laura Lee, Comment, *Punitive Damages on Ordinary Contracts*, 42 MONT. L. REV. 93, 100 (1981). In such a case, the punitive damages would rightly be considered a sanction under Professor Cooter's test, though perhaps a sanction imposed for violations of fiduciary rather than contractual responsibilities. See Cooter, *supra* note 8, at 1545–46.

empty. Killer #3 also has no plan to kill his business partner, but does so after he reasonably mistakes the partner for a menacing burglar. Unlike the pricing laws (contracts) discussed above, the criminal law would separate Killer #1 from Killer #2 on the basis of perceived culpability. Because both acted with offending mental states, both will be subject to penalty. The extent of that penalty, however, is likely to vary according to the seriousness of their culpability. Hence, Killer #1 (whose mental state might be described as purposive or even, in some systems, premeditated)⁵⁶ will be considered more culpable than Killer #2 (whose mental state might best be described either as reckless or, at a minimum, negligent) and will stand to receive a much harsher penalty. Thus, the penalty for the acts of Killers #1 and #2 will both depend on, and vary in accordance with, their respective mental states, despite the fact that the harm caused by both is identical—i.e., they have both caused the death of an unoffending human being. Relatedly, due to the absence of an offending mental state, Killer #3 is likely to escape penalty, despite the fact that his action exacted an identical cost (the loss of an innocent's life).⁵⁷ The centrality of these hypothesized actors' mental states to the question of an appropriate penalty pushes toward the conclusion that penalties for homicide are properly classified as sanctions rather than prices.⁵⁸

56. Although rejected by the Model Penal Code, many criminal codes retain "premeditation" formulas for distinguishing between and grading intentional homicides. See, e.g., KAN. STAT. ANN. § 21-3401(a) (1999) (defining first degree murder as "the killing of a human being committed . . . intentionally and with premeditation").

57. The criminal law is especially attentive to the grading of actors' mental states. Usually, the criminal law demands proof that the accused committed a voluntary criminal act (*actus reus*) while possessing a sufficiently guilty mind (*mens rea*). See *Morrisette v. United States*, 342 U.S. 246, 250–51 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion."). The centrality of a guilty mental state to criminal liability has been emphasized by many legal writers. See, e.g., John C. Coffee, *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 210 ("American criminal law scholarship has always placed the issue of *mens rea* at center stage.").

58. Abundant examples are provided by penalties for criminally harmful conduct. Utilitarians would offer as an example homicide statutes which uniformly reflect such a grading system. Using the Model Penal Code (MPC) as an example, the most serious homicide charge recognized by the MPC (murder) requires proof of some of the most culpable mental states recognized by the MPC (purposive or knowing conduct or conduct manifesting an extreme indifference to the value of human life) and is punished more severely than any other homicidal act. See MODEL PENAL CODE §§ 210.2, 210.6. The least serious homicide charge (negligent homicide) can be established with proof of the least culpable mental state recognized by the MPC (negligence) and employs a much lighter sanction (one- to five-year term of imprisonment). See MODEL PENAL CODE §§ 210.4, 6.06(3).

A utilitarian would defend these differing penalties in part by arguing that the law can, on average, hope to deter knowing violations only by resorting to the threat of heftier penalties because knowing actors are simply, on average, tougher to deter than reckless actors. See Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1395 (1992); Michaels, *supra* note 44, at 972; Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193,

This perhaps unremarkable conclusion is reinforced by the two remaining characteristics that distinguish prices from sanctions: the importance of recidivism to the applicable penalty, and the permissive or prohibitory goal of the legal restraint placed on homicidal acts. Unlike the contractual example above, before imposing sentence, a judge would consider whether Killers #1 and #2 had killed before. As a rule, intentional homicidal offenders who have killed before will risk much more severe punishment than non-recidivist killers. Because recidivism will affect the severity of the penalty imposed, the penalty is best characterized as a sanction.⁵⁹

The conclusion that Killers #1 and #2 are likely to be punished by sanction and not price also nicely dovetails with the final characteristic Professor Cooter provided for distinguishing the two penalties: a sanction is a “detriment imposed for doing what is forbidden,” while a price is a detriment “extracted for doing what is permitted.”⁶⁰ Penalties prescribed for acts of homicide strive to deter such acts because they are perceived as so morally wrongful that no amount of money will suffice to purchase the right to engage in them. Indeed, it would be hard to conceive of a legal system that would approach homicide penalties in any other way—i.e., adopt the contrary pricing proposition that homicide is permissible provided the killer internalizes the social costs his act imposes. As the law of homicide reflects, some harmful acts are unacceptable, no matter what price the errant actor is willing to pay. Where this is so, the penalty is a sanction, not a price.

D. THE IMPORTANCE OF THE PRICE/SANCTION LABEL

The reader might quite reasonably pause here to consider why we should care whether the exclusionary penalty or any other penalty is labeled as a price or a sanction. A close look at the basic definitional distinction between the two penalty schemes suggests an answer.

1221–23 (1985); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 505 (1992). The utilitarian’s explanation for the employment of differing penalties by this and other criminal statutes would rankle retributivists who contend that punishment is valid only if commensurate with individual desert. See, e.g., Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS 179 (Ferdinand Schoeman ed., 1987).

59. See Cooter, *supra* note 8, at 1537.

60. *Id.* at 1523.

1. *The normative goals of prices and sanctions*

Recall that we would classify a penalty as a “price” if the penalty attaches to conduct which is morally acceptable to society provided the actor internalizes the cost of any injury her behavior imposes on others. Therefore, society may wish to adopt a pricing rather than a sanctioning strategy whenever it considers certain conduct to be productive in some of its particulars, although it also imposes social costs. A popular example might be the “pollution rights” conferred on certain industries. Pollution rights allow businesses to pollute, to a degree, for a price.⁶¹ Such a pricing penalty is designed neither to eradicate polluting behavior nor to stigmatize industrial actors who choose to pollute. The penalty is designed simply to force the party responsible for the polluting behavior to internalize the social costs it imposes by engaging in that behavior.

By contrast, we would classify a penalty as a “sanction” if the penalty seeks to deter conduct that society has concluded is in some way “wrong” and is thus prohibited.⁶² A polluter might go too far, for example, by intentionally or negligently emitting more toxins into the environment than applicable regulations permit. The penalty provisions for these regulatory limits may be of an entirely different breed than the penalty provisions that require the polluter to pay for the costs of emissions within predetermined limits. When a polluter intentionally or negligently surpasses the limit that the community has established as tolerable, it may engage in an act that is considered wrongful, and thus sanctioned rather than priced.⁶³ Although the activity may remain productive in some sense, society has appraised the value of such pollution-emitting activities in advance and has concluded that their costs will always outweigh their benefits leaving no further cost-benefit balance to be struck by the individual actor. Therefore, as a prescriptive matter, lawmakers should opt for a sanctioning strategy over a pricing strategy whenever the community perceives conduct as not only harmful, but wrongful.⁶⁴

61. *See id.* at 1550–51.

62. For helpful discussions on the increasing use of the criminal sanction to enforce environmental laws, see Gerhard O.W. Mueller, *An Essay on Environmental Criminality*, in ENVIRONMENTAL CRIME AND CRIMINALITY: THEORETICAL AND PRACTICAL ISSUES 3 (Sally M. Edwards et al. eds., 1996); Susan Hedman, *Expressive Functions of Criminal Sanctions in Environmental Law*, 59 GEO. WASH. L. REV. 889 (1991); Joe Scott Morris, *Environmental Problems and the Use of Criminal Sanctions*, 7 LAND & WATER L. REV. 421 (1972).

63. *See* Cooter, *supra* note 8, at 1550–51.

64. The scale is not necessarily exclusively financial. We may consider some level of pollution too high, whatever the financial benefits to some, because it interferes too greatly with the property or bodily integrity of others.

2. *The incentive effects of pricing and sanctioning devices*

Actors who face sanctions have a much greater incentive to avoid injurious behavior than do actors who face pricing penalties.⁶⁵ This is due to the sharp “discontinuity” in liability that an actor faces when a sanctioning (as opposed to pricing) penalty is in place and the actor’s conduct nears the line separating “permitted” from “forbidden” behavior.⁶⁶ To avoid engaging in behavior that falls within the forbidden zone and incurring the steep cost of such liability, actors will take “precaution.”⁶⁷ Although precaution can take many forms, in a system of sanctions it is always designed to keep an actor’s conduct within the permissible zone, for its purpose is to reduce the actor’s potential liability (private costs). Because precaution is not free, an actor in a sanctioning system of penalties bears two potential private costs: the cost of her own precaution and the cost of a sanction should her precaution fail to meet legal requirements.⁶⁸ If her conduct satisfies (or exceeds) the requirements of the law, she bears only one of those costs: the cost of her precaution. If her conduct falls below legal requirements, she bears the cost of both.⁶⁹ Therefore, to minimize her private costs in a system of sanctioning penalties, a rational actor will *at a minimum* take sufficient precaution to satisfy the applicable

65. Professor Cooter explains:

In the usual case, where a reasonable obligation is backed by a reasonable sanction, most people will find conforming strongly advantageous . . . and a few people will find nonconformity advantageous Very few people will find themselves on the margin between compliance and noncompliance, where conforming to the legal standard costs the same as not conforming.

. . . .
. . . In contrast, pricing the behavior causes most people to balance benefits and costs at the margin. Since many people would then be on the margin, a small change in a price will cause many people to change their behavior a little. In aggregate, then, behavior is more elastic with respect to prices than sanctions.

Cooter, *supra* note 8, at 1531 (emphasis and footnotes omitted). The “elastic” behavior is, of course, the willing infliction of penalty-inducing harms on others.

66. Because sanctions seek to convince actors to shun prohibited conduct, they are characterized by a sharp increase in the costs that they threaten to impose on actors who choose to engage in injurious behavior. As explained by Professor Cooter: “A sanction typically creates an abrupt jump in an individual’s costs when he passes from the permitted zone into the forbidden zone where behavior is sanctioned. This abrupt jump in costs disappears if the sanction is replaced by a price.” *Id.* at 1523–24. The “discontinuity” or “abrupt jump” in liability observed under sanctioning devices motivates law-abiding behavior in a way that pricing devices do not. This is because the discontinuity disappears when a pricing penalty is in place. Unlike sanctions, under a pricing strategy all harm-inflicting conduct is subject to penalty, even conduct that is both unintentional and reasonable. In other words, when the law prices conduct, it does so mindless of variations in individual culpability and in alignment with the extent of the harm caused. *See id.* at 1526–28.

67. *See id.* at 1525–26.

68. *See id.*

69. *See id.*

legal standard (i.e., the standard which establishes the line between permissible and forbidden conduct).⁷⁰ Further, most rational actors will do even more—most will give the liability line, and the accompanying sharply discontinuous penalty, a wide berth. Because of the steepness of the sanctioning penalty, persons subject to sanction will often choose to use “extra precaution” to steer well clear of forbidden behavior and its attending penalty.⁷¹ If the sanction is set at an appropriate level, it would never be rational for an actor to choose to engage in forbidden conduct, for the cost of doing so should always outweigh the benefits.

An actor subject to a pricing penalty is likely to engage in a very different cost-benefit analysis. There is no “permissible” and “forbidden” zone in a system of prices. Rather, prices permit harmful conduct to occur provided the actor internalizes the “external costs” (costs imposed on others) associated with the conduct. The private costs of an actor subject to a price, therefore, will equal the social cost of her behavior. This means that to minimize her private costs, the actor need only minimize the costs she is imposing on others. It also means that under a pricing system, it will be rational for an actor to choose to cause another harm and incur a price—if that price is equal to or less than the benefit the actor receives from engaging in the behavior. Thus, as a prescriptive matter, lawmakers should opt for a sanctioning strategy over a pricing strategy whenever the community wishes to promote greater avoidance of harmful behavior for which a penalty is prescribed.⁷²

II. THE PENALTY OF EXCLUSION—APPLYING PRICE AND SANCTION THEORY

This Part evaluates the nature of the exclusion penalty for police violations of the Fourth and Fifth Amendment⁷³ under the price and

70. The cost of a sanction may be very large because sanctions need not approximate the cost of the prohibited harm. *See id.* at 1527 (“It is not essential that the sanction equal the harm caused by the act to induce the self-interested actor to take precaution It is only essential that the sanction be large enough so that his private costs are minimized by conforming to the legal standard . . .”).

71. *See id.* at 1525–26.

72. This prompts the question: How are lawmakers to know when the community prefers the use of a sanction (with its greater compliance-inducing properties) rather than a price (which grants individuals greater freedom to conduct their own cost-benefit analysis)? Community consensus, Professor Cooter posits, is the key here. *See Cooter, supra* note 8, at 1533.

73. In 1914, the Supreme Court announced that the Fourth Amendment forbade the use of evidence obtained by federal agents during an unreasonable search or seizure in a federal trial. *See Weeks v. United States*, 232 U.S. 383 (1914). Some years later, the substantive obligations imposed by the Fourth Amendment were found to govern the conduct of state officers as well, via the due process clause of the Fourteenth Amendment. *See Wolf v. Colorado*, 338 U.S. 25 (1949), *overruled on other*

sanction model described in Part I. The evaluation proceeds by asking three questions pertinent to the price/sanction classification: 1) whether the exclusion penalty attaches to official acts which are perceived as “wrongful” and thus forbidden; 2) whether the mental state of the official actor is relevant to the imposition of the penalty; and 3) whether the severity of the penalty shifts in step with the severity of the harm the official misbehavior imposes.

The answers to these questions will enable us to determine whether the exclusion penalty for lawless acts of official evidence-gathering is a price or a sanction. We would label the exclusion penalty for unconstitutional police behavior a “pricing” mechanism only if we conclude that the penalty is designed to permit the police to engage in such harmful behavior provided they internalize the cost of the harms they inflict, in which case no stigma would be associated with an officer’s decision to engage in such behavior. By contrast, we would characterize the penalty for lawless evidence-gathering conduct as a sanction if we conclude that by adopting the exclusion penalty we attempt to communicate to the police that such acts are wrongful and will not be tolerated.

A. ARE POLICE TRANSGRESSIONS OF CONSTITUTIONAL RIGHTS FORBIDDEN?

To resolve the first question—whether lawless evidence gathering is considered “wrongful” and thus “prohibited”—it is appropriate not only to examine the language that the Supreme Court has chosen to use when describing conduct subject to the exclusion penalty, but also to examine the Court’s changing attitude toward the penalty’s rationale as well as the categorical restrictions the Court has placed on the penalty over time. As

grounds by Mapp v. Ohio, 367 U.S. 643 (1961). Unlike their federal counterparts, state courts were not immediately required to adopt the federal remedy of exclusion for Fourth Amendment violations committed by official state actors. See *Wolf*, 338 U.S. at 28 (holding the Fourth and Fourteenth Amendments did not compel states to exclude “logically relevant evidence” even if it was obtained during an unreasonable search or seizure). An exception was made in cases that “shocked the conscience.” *Rochin v. California*, 342 U.S. 165, 172 (1952). This special dispensation of state homebrewed remedies for unreasonable state searches and seizures continued until the Supreme Court determined, in its landmark decision in *Mapp v. Ohio*, that exclusion had to be the remedy for both federal and state Fourth Amendment violations. *Mapp*, 367 U.S. at 643. Shortly after *Mapp*, the Court expanded the scope of the evidence subject to exclusion for police violations by ruling that the “fruit of official illegality” must be excluded as well. See *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (holding that evidence derivatively obtained by exploitation of an initial illegality is subject to exclusion). Cf. *Nardone v. United States*, 308 U.S. 338, 340–41 (1939) (holding that the exclusionary rule bans both the “direct” and “indirect” use of illegally obtained evidence).

revealed by the discussion in Part I, an understanding of the rationale and scope of the exclusionary rule will enable us to determine the weight to give the labels the Court has used when describing Fourth and Fifth Amendment violations, and to measure the exclusion penalty against the distinguishing characteristics of prices and sanctions. For example, the Court's articulation of the rule's rationale can provide clues about whether constitutionally defective police acts are in fact perceived to be "wrongful" and thus prohibited. Cases that clarify the scope of the penalty can shed light on that question as well and also provide answers to the question concerning the relevance of a police officer's mental state.

1. *Language of prohibition*

To know whether the Supreme Court perceives acts that violate the Fourth and Fifth Amendments to be forbidden or permitted, we must start by analyzing the text of the Amendments themselves. The terms of both Amendments are cast in absolute or mandatory, rather than permissive or discretionary, language. The Fourth Amendment provides in forceful and pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." ⁷⁴ The Fifth Amendment is equally emphatic: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." ⁷⁵ A plain reading of these provisions would counsel the conclusion that violations of either are constitutionally prohibited.

The Supreme Court's characterizations of the substantive terms of the Fourth and Fifth Amendments are in accord with this conclusion. Beginning with the Fourth Amendment, even when wavering on the question regarding the appropriate penalty to be imposed on violators of the search and seizure provisions, the Court has repeatedly held that the Amendments themselves set forth "commands," ⁷⁶ obligations, ⁷⁷ or

74. U.S. CONST. amend. IV.

75. U.S. CONST. amend. V.

76. See, e.g., *United States v. Leon*, 468 U.S. 897, 906 (1984) (describing Fourth Amendment provisions as "commands" while noting that the Amendment's text does not expressly dictate exclusion as the penalty for a violation of those commands).

77. See *Weeks v. United States*, in which Justice Day wrote emphatically:

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority . . . This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is *obligatory* upon all entrusted under our Federal system with the enforcement of the laws.

232 U.S. 383, 391-92 (1914) (emphasis added).

“prohibitions.”⁷⁸ The Court has characterized violations of those commands as “illegal,”⁷⁹ “wrongful,”⁸⁰ subject to “sanction,”⁸¹ “repugnant” to the Amendment’s guarantees,⁸² representative of an improper and “ignoble shortcut to conviction,”⁸³ and “inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.”⁸⁴ Never has the Court suggested that such a “wrong” becomes somehow “unwrong” if the police guess correctly and find evidence of criminal activity while acting in violation of the Fourth Amendment.⁸⁵ Although there has been considerable dissension regarding how best to penalize such a constitutional wrong, as well as regarding whether the penalty should be withheld in certain circumstances due to concerns over its efficacy,⁸⁶ there has been no

The Court held that the same obligation applied to state law enforcement officers nearly 50 years later. See *Mapp*, 367 U.S. at 655 (“We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”).

78. *Weeks*, 232 U.S. at 394.

79. *Olmstead v. United States*, 277 U.S. 438, 461 (1928) (referring to an earlier holding as finding the government had engaged in a seizure of an “illegal character” in violation of the Fourth Amendment).

80. See *Leon*, 468 U.S. at 906 (noting the “*wrong* condemned by the Amendment is ‘fully accomplished’ by [an] unlawful search or seizure”) (emphasis added); *United States v. Calandra*, 414 U.S. 338, 354 (1974) (noting that use of fruits of an unlawful search or seizure “work[s] no new Fourth Amendment *wrong*,” suggesting by implication that a wrong occurs when the unlawful search or seizure occurs) (emphasis added).

81. *Mapp*, 367 U.S. at 669.

82. *Id.*

83. *Id.* at 660.

84. *Wolf v. Colorado*, 338 U.S. 25, 28 (1949).

85. Indeed, quite to the contrary. For example, the fact that evidence of criminal activity is found by the police who have conducted a search without probable cause will not cleanse the constitutional wrong committed by the searching officers. See, e.g., *Johnson v. United States*, 333 U.S. 10 (1948) (suppressing drug and drug paraphernalia evidence due to wrongful decision to enter premises without a warrant). Nevertheless, the Court has at times emphasized the difference between the rights secured by the Fourth Amendment and the remedy for violations of those rights. This point was the source of great dissension in the *Wolf* decision, in which the Court held that while a State could not “affirmatively . . . sanction [a] police incursion into privacy” without running afoul of the “guaranty of the Fourteenth Amendment . . . the ways of enforcing such a basic right raise[d] questions of a different order.” *Wolf*, 338 U.S. at 28. Although the Court eventually retreated from this position and extended the exclusion remedy to the right in *Mapp*, its more recent development of the categorical exceptions to the exclusion penalty suggests that it continues to second-guess its choice of penalties more than its perception of the Amendment as “rights-conferring.”

86. Compare *United States v. Calandra*, 414 U.S. 338, 352 (1974) (holding that the imposition of exclusion penalty in grand jury context would achieve only marginal deterrence), with *id.* at 355 (dissenting view); *Stone v. Powell*, 428 U.S. 465, 489–94 (1976) (holding that application of exclusion penalty in habeas proceedings would achieve only minimal benefits when weighed against substantial societal costs), with *id.* at 502 (dissenting view); *United States v. Havens*, 446 U.S. 620, 626–29 (1980) (holding that prosecutor could properly use items seized in violation of the Fourth Amendment to impeach), with *id.* at 629 (dissenting view); *United States v. Leon*, 468 U.S. 897, 926–26 (1984)

disagreement that conduct deemed violative of the constitutional provision is always wrongful and prohibited.⁸⁷

Similar observations can be made with respect to the Court's treatment of violations of the Fifth Amendment's privilege against compelled self-incrimination, developed largely in *Miranda* and its progeny.⁸⁸ Close attention to the Court's language in those cases reveals that, as in the Fourth Amendment context, the exclusion penalty applicable to *Miranda* violations attaches to conduct consistent with the sanction paradigm—i.e., custodial interrogative conduct that is considered wrongful and thus prohibited. At least as initially conceived, the exclusion of confessional evidence was to be virtually automatic upon a finding that the police had failed to comply with *Miranda*'s extraordinarily proactive mandates, which were designed to counteract the inherently compulsive nature of custodial interrogation.⁸⁹ To avoid exclusion, the government carried the "heavy burden" of showing that the police delivered the warnings and terminated all questioning until the suspect validly waived her rights.⁹⁰ Coercive police interrogation techniques were so troublesome that "no evidence" obtained from an unwarned suspect or from a suspect who had not knowingly, intelligently and voluntarily waived his right to silence or counsel could be used.⁹¹ The grave admonitions delivered by the Warren Court in *Miranda* sent a clear message that the exclusion penalty in

(holding evidence seized unlawfully under defective search warrant admissible under good faith exception), *with id* at 928 (dissenting view); *Rakas v. Illinois*, 439 U.S. 128, 137–39 (1978) (holding only person whose rights were violated had standing to assert Fourth Amendment claim), *with id.* at 156 (dissenting view); *Murray v. United States*, 487 U.S. 533, 541–44 (1988) (approving admission of evidence seized pursuant to valid warrant where that was obtained independent of an earlier, unlawful search for same evidence), *with id.* at 544 (dissenting view). Compare also *Wolf*, 338 U.S. at 25 (holding evidence seized by state officers in violation of the dictates of the Fourth and Fourteenth Amendments, while prohibited, need not be suppressed) with *Mapp*, 367 U.S. at 655 (holding "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court").

87. Even former Chief Justice Burger, no friend to the exclusion penalty, acknowledged that the penalty possessed constitutional stature. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 415 (1971) (Burger, J., dissenting).

88. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (excluding statement made during incommunicado interrogation of suspect as violative of the Fifth Amendment); *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding that once an accused has invoked *Miranda* right to counsel, further questioning at initiation of police violates the accused's Fifth Amendment privilege, and any statements obtained must be excluded from evidence). The Supreme Court recently reaffirmed the constitutional nature of the *Miranda* warnings. See *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (holding *Miranda* announced a constitutional rule).

89. See *Miranda*, 384 U.S. at 478–79.

90. *Id.* at 475.

91. *Id.* at 479. See also *id.* at 476–77 (drawing no distinction between incriminating statements offered as substantive evidence and incriminating statements used to impeach).

the Fifth Amendment context was aimed at deterring interrogative conduct perceived to wrongfully violate the privilege against compelled self-incrimination. Thus, at least at the time of the *Miranda* decision, the exclusion penalty for coercive interrogation behavior operated as a sanction.

As in the Fourth Amendment context, explicit and implicit statements of wrongfulness can also be found in many of the Court's self-incrimination decisions. The Court has consistently praised the Fifth Amendment privilege as "fundamental to our system of constitutional rule,"⁹² a "noble principle,"⁹³ a "hallmark of our democracy,"⁹⁴ "one of the great landmarks in man's struggle to make himself civilized,"⁹⁵ the antithesis of the "inquisitorial Star Chamber,"⁹⁶ and a "mainstay of our adversary system of criminal justice."⁹⁷ Meanwhile the Court has described violations of the Amendment as constitutional "mischief"⁹⁸ or an "evil."⁹⁹ So central to our notions of justice is this ancient right,¹⁰⁰ that just as a defendant may not be compelled to testify at her own trial, neither may she be pressured to make self-incriminating statements in other contexts, such as a civil proceeding,¹⁰¹ a grand jury proceeding,¹⁰² a juvenile proceeding,¹⁰³ or a police interrogation room.¹⁰⁴ With regard to the

92. *Id.* at 468.

93. *United States v. Grunewald*, 233 F.2d 556, 579 (1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957); *Miranda*, 384 U.S. at 460.

94. *Miranda*, 384 U.S. at 360 (quoting *Grunewald*, 233 F.2d at 581–82 (Frank, J., dissenting)).

95. *Ullmann v. United States*, 350 U.S. 422, 500 (1956).

96. *Id.* at 428 (noting that the privilege against compelled self-incrimination "was aimed at a . . . far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality"); *Michigan v. Tucker*, 417 U.S. 433, 439–40 (1974); *Miranda*, 384 U.S. at 459. *See also* LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 32–35 (1968); E.M. Morgan, *The Privilege of Self-Incrimination*, 34 MINN. L. REV. 1, 9–11 (1949).

97. *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966). *See also Miranda*, 384 U.S. at 460.

98. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

99. *Tucker*, 417 U.S. at 439; *Ullmann*, 350 U.S. at 428.

100. The roots of the constitutional guarantee run deep, extending to "ancient," even "biblical" times. *See Miranda*, 384 U.S. at 458–59 & n.27 (citing thirteenth century commentator Maimonides, *Mishneh Torah* (Code of Jewish Law), *Book of Judges, Laws of the Sanhedrin*, c. 18, ¶ 6, III YALE JUDAICA SERIES 52–53 ("To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree.") and Lamm, *The Fifth Amendment and Its Equivalent in the Halakhah*, 5 JUDAISM 53 (Winter 1956)).

101. *See McCarthy v. Arndstein*, 266 U.S. 34 (1924).

102. *See Hitchcock*, 142 U.S. at 562.

103. *See In re Gault*, 387 U.S. 1, 49–50 (1967) (holding juvenile proceedings must be regarded as criminal for purposes of the privilege against self-incrimination).

104. *See Miranda*, 384 U.S. at 467 ("[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.").

admissibility of statements obtained through police interrogation, the Court has made clear that the conduct of the police examiner is to be “carefully scrutinized”¹⁰⁵ due to the “inherent compulsive[ness]” of such questioning.¹⁰⁶ Police interrogation tactics have been periodically and pejoratively described as the “third degree,”¹⁰⁷ “irregular and improper,”¹⁰⁸ “psychologically coercive,”¹⁰⁹ “destructive of human dignity,”¹¹⁰ and “menacing”¹¹¹ practices capable of “exact[ing] a heavy toll on individual liberty,”¹¹² “trad[ing] on the weaknesses of individuals,”¹¹³ depriv[ing] the person being questioned of “every psychological advantage,”¹¹⁴ and “subjugat[ing] the individual to the will of his examiner.”¹¹⁵ As such, abusive uses of interrogative techniques are to be considered “at odds with one of our Nation’s most cherished principles that the individual not be compelled to incriminate himself.”¹¹⁶

At the level of judicial linguistics at least, these passages establish that the Court has viewed the guarantees of the Fourth and Fifth Amendment to be fundamental and prohibitory. This in turn supports the conclusion that the exclusion penalty is best characterized as a sanction under Professor Cooter’s theory.

2. *Beyond linguistics—the rationale of deterrence*

Careful readers of the Court’s exclusion decisions might nevertheless be dubious of the suggestion that the Court’s approach to punishing violations of the Fourth and Fifth Amendments reflects the imposition of a sanctioning rather than a pricing penalty. The reason for this apprehension is that when we look beyond the language of prohibition commonly employed by the Court, the actual prohibitory message that flows from the

105. *Spano v. New York*, 360 U.S. 315, 345 (1959). *See also* *Malinsky v. New York*, 324 U.S. 401, 418 (1945).

106. *Miranda*, 384 U.S. at 458.

107. *Id.* at 445. *See also* Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932); Charles S. Potts, *The Preliminary Examination and ‘The Third Degree’*, 2 BAYLOR L. REV. 131 (1950).

108. *Miranda*, 384 U.S. at 447.

109. *Id.* at 448. *See also* *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) (holding that coercion can be mental as well as physical).

110. *Miranda*, 384 U.S. at 457.

111. *Id.* at 457.

112. *Id.* at 455.

113. *Id.*

114. *Id.* at 449.

115. *Id.* at 457.

116. *Id.* at 457–58. The Court reiterated its enduring view that the *Miranda* warnings are constitutionally grounded in *Dickerson v. United States*, 120 S. Ct. 2326 (2000).

Court's contemporary exclusionary rule decisions is far less clear. To see why, it is necessary to consider the Court's evolving vision of the rationale that underpins the exclusion penalty and motivates its application.

For the past two decades, the Supreme Court has justified the exclusion of probative but tainted evidence almost exclusively on the ground of deterrence.¹¹⁷ The exclusion penalty is believed to deter constitutionally defective evidence-gathering activities because it deprives the police of the very thing that motivates their lawless behavior—the use of any criminal evidence found.¹¹⁸ As put in *Mapp v. Ohio*, the penalty for Fourth Amendment violations strives “to compel [law enforcement officers'] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”¹¹⁹

At the time of the *Mapp* decision, this was not the only rationale that was offered to explain the choice of exclusion as the penalty for police violations of the Fourth Amendment. To the contrary, early accounts of the

117. For authority asserting that the “prime purpose” of the exclusionary rule is to deter police violations of individual rights, see *United States v. Leon*, 468 U.S. 897, 916 (1984); *Stone v. Powell*, 428 U.S. 465, 485 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 347 (1974); *Harris v. New York*, 401 U.S. 222, 225 (1971). See also *Michigan v. Tucker*, 417 U.S. 433, 451 n.25 (1974) (noting that in the Fifth Amendment context, the imperative of judicial integrity does not supply an independent basis for exclusion); JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* § 21.02 (1997) (observing that, today, deterrence is the prime if not sole purpose of the rule); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS*, § 2.01, at 18 (4th ed. 2000) (stating “[t]oday . . . the only purpose for the rule . . . is as a method of deterring the police from engaging in unconstitutional searches and seizures”); Charles F. Campbell, Jr., *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 *BAYLOR L. REV.* 499, 525–26 (1990) (“[O]nly deterrence remains as the principal factor in deciding whether to apply the rule in a particular context.”); Oaks, *supra* note 6, at 669–70 (1970).

118. Under the poetically labeled “fruit-of-the-poisonous-tree” doctrine, this would include all tainted evidence whether obtained directly or indirectly from police illegality. See *Wong Sun v. United States*, 371 U.S. 471 (1963). The poisonous tree doctrine thus expands the universe of proof subject to the exclusion penalty. The doctrine’s poetic label is creditable to Justice Frankfurter, see *Nardone v. United States*, 308 U.S. 338, 341 (1939), though its roots are thought to extend back to *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). See WHITEBREAD & SLOBOGIN, *supra* note 117, § 2.04, at 37. However, the Court has developed three doctrines which are frequently used to avoid exclusions of the fruit of unlawful police conduct: the attenuation doctrine, see *infra* note 143 and accompanying text; the independent source doctrine, see *infra* note 144 and accompanying text; and the inevitable discovery doctrine, see *infra* note 145 and accompanying text. Pursuant to these categorical qualifications placed upon the poisonous tree doctrine, physical evidence that has been attained at the expense of constitutional rights has been admitted in numerous cases notwithstanding its fruit-like character. See, e.g., *Murray v. United States*, 487 U.S. 533, 537 (1988) (approving admission of evidence under independent source doctrine); *Nix v. Williams*, 467 U.S. 431, 444 (1984) (approving admission of evidence under inevitable discovery doctrine); *Nardone*, 308 U.S. at 341 (approving admission of evidence under attenuation analysis).

119. *Mapp*, 367 U.S. at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

rule's rationales suggested a far more textured basis for the penalty,¹²⁰ including primarily the imperative of judicial integrity. Under this additional rationale, it was believed that admission of evidence collected in violation of the Fourth Amendment would compound the constitutional harm already inflicted by the police by involving the courts in those misdeeds *ex post*. As stated in one decision, *ex post* approval of such lawless action would essentially "affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution"¹²¹ To avoid bestowing this judicial "stamp of approval" and thereby becoming complicit in the wrongdoing, the courts eschewed evidence which, though probative, was wrongfully obtained.¹²² Thus, based on a rationale entirely unrelated to the goals of deterrence, the Court conveyed the impression that unconstitutional acts by the police were so wrongful that the acts were capable of sullyng federal and state judges uninvolved in the underlying defective conduct.

In more recent years, however, the Court has moved insistently away from the judicial integrity rationale, stressing deterrence as the sole appropriate basis for deciding when to impose the exclusion penalty. For the purpose of our price and sanction inquiry, this movement is significant because, as we saw in Part I, one of the principal distinguishing features of a sanction is the penalty's unique power to express the community's sense that the underlying behavior is not only harmful, but wrongful. When judicial integrity was the driving force behind an exclusion decision, the Court very effectively communicated this message of wrongfulness to the police and prosecutors by signaling that, in the absence of an exclusion

120. Legal scholars have emphasized several non-instrumentalist reasons for adopting exclusion as the remedy for constitutionally defective evidence-gathering practices, and criticized the Court's increasingly myopic focus on deterrence as the rationale for the exclusionary rule. *See, e.g.*, Schrock & Welsch, *supra* note 6, at 257-60; Wasserstrom & Mertens, *supra* note 6, at 87-88, 151-52; James Boyd White, *Forgotten Points in the Exclusionary Rule Debate*, 81 MICH. L. REV. 1273, 1283-84 (1983); Fred Gilbert Bennett, Note, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 UCLA L. REV. 1129, 1147-54 (1973).

121. *Weeks v. United States*, 232 U.S. 383, 394 (1914). The Court's phraseology here is important. As argued above, this passage reflects that the restrictions on governmental action in the Fourth Amendment constitute "prohibitions" rather than a set of guidelines which the police may choose to abide by or violate. *See supra* Part II.A.1.

122. *See Terry v. Ohio*, 392 U.S. 1, 13 (1968) (declaring that courts would not "be made parties to lawless invasions of constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions"); *Elkins*, 364 U.S. at 223 (1960) (stating that use of such evidence would make judges "accomplices in the willful disobedience of a Constitution they are sworn to uphold"); *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (arguing that the use of illegally acquired evidence would judicially sanction lawless governmental action and thereby undermine the rule of law).

order, evidence collected in violation of Fourth Amendment limits was so imbued with the potential to smear that even judicial robes normally infused with an aura of impartiality and fairness would be tarnished by it.

The triumph of the deterrence rationale over the judicial integrity rationale significantly softened the moralizing message observable in those earlier exclusion decisions. Although a penalty based on a deterrence rationale is still capable of conveying a message of wrongfulness similar to that conveyed by the judicial integrity rationale, a penalty justified on the basis of deterrence alone will not invariably do so. As we have seen, not all penalties that are designed to deter harmful conduct conceive that such conduct is wrongful. For example, pricing penalties strive to deter harms (at least inefficient harms) and yet decline to label harm-causing acts as wrong.¹²³ Put another way, harms are not wrongs when viewed through the prism of price.

In addition to the gentler message delivered by an exclusion decision premised on the deterrence rationale, it also seems clear that an exclusion rule based on deterrence will inevitably yield far fewer actual exclusion orders than those that would have been ordered under a judicial integrity rationale. Under the judicial integrity rationale, judges would not soil their hands by admitting tainted evidence, and evidence could be tainted in a wide variety of ways, including through reasonable but constitutionally defective police action. The difference between evidence seized in deliberate violation of a person's rights, and evidence seized during an unintentional violation of the Constitution's commands, is irrelevant under the judicial integrity rationale. Whenever evidence is secured unconstitutionally it would sully the judicial process if admitted. Therefore, an exclusionary rule fueled by the judicial integrity rationale would tend to operate far more mechanically than the present rule based upon the current deterrence rationale. Put slightly differently, the integrity rationale would have precluded the Court from engaging in a balancing process, which, as we shall see, weighs the cost of excluding tainted evidence against the benefits of its admission,¹²⁴ and has frequently resulted in the admission of illegally obtained evidence. By contrast, the deterrence rationale is subject to more fits and starts. Where the facts of a case reveal little reason to

123. This was demonstrated earlier in the example comparing the contract-breaching conduct of three parties. *See supra* Part II.C.

124. As put by one prominent legal scholar: "The concept of judicial integrity potentially functions as a moral imperative—'thou shalt not be an accessory to an illegal act'—and, as such, does not seem to allow for cost-benefit analysis of the exclusionary rule." DRESSLER, *supra* note 117, § 21.02 at 324.

believe that exclusion will deter future police wrongdoing, exclusion is not likely to be ordered.¹²⁵ This necessarily means that the deterrence rationale will yield fewer applications of the exclusion penalty than the judicial integrity rationale would have generated.¹²⁶

Indeed, numerous cases decided by the Supreme Court over the past two decades confirm that the deterrence rationale has had this effect. A brief review of the many instances in which the Court has found that exclusion is not required despite the presence of Fourth and Fifth Amendment errors is warranted to fully understand the magnitude of this development.

3. *Categorical restrictions on the reach of the exclusion penalty*

As any student of constitutional criminal procedure can attest, exclusions of evidence secured in violation of the Fourth and Fifth Amendments do not mechanically flow from a determination that an individual's rights have been violated. Rather, the exclusionary rule has been reserved for cases in which "its remedial objectives are . . . most efficaciously served."¹²⁷ Because the penalty's stated remedial objective is now to deter police violations by removing any incentive the police might have to engage in such wrongful conduct (rather than to shield the judicial process from evidence obtained unconstitutionally), decisions whether to exclude evidence involve an economic calculation of costs against benefits. The inquiry goes something like this: Are the "costs"¹²⁸ of excluding the

125. See, e.g., *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Leon*, 468 U.S. 897 (1984).

126. Although the lesser yield of the deterrence rationale may cause us to question whether the exclusionary rule is truly being applied as a sanction, one characteristic of the judicial integrity approach is much more in keeping with pricing than is the deterrence approach. The automatic approach of judicial integrity would not take into account the officer's state of mind. As explained in Part I, this is one of the three central features of a price.

127. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

128. The classic "costs" of excluding evidence include the fact that probative evidence is not considered by the trier of fact, the guilty go free, community safety is not enhanced, and innocents receive no protection from it. See DRESSLER, *supra* note 117, § 21.04[2] at 333-38. Of course, not all agree that the exclusionary rule imposes costs. See, e.g., Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611 (1983). However, the Supreme Court has held that the costs of the penalty are "well known," see *Stone v. Powell*, 428 U.S. 465, 489-90 (1976), and has repeatedly employed cost-benefit analysis to determine when it should or should not apply. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (including as a "cost" of exclusion of unlawfully seized evidence from a deportation proceeding the fact that a person who was committing a crime at the time of the proceeding could go free). In short, the Court's practice implicitly accepts the view that the exclusionary rule imposes costs, that the costs can be identified, and that the weight of the costs can be properly assessed.

evidence outweighed by the deterrent “benefits”¹²⁹ gained? Despite its selection of exclusion as the “only effective” penalty for defective evidence-gathering practices, the Court has often answered this question in the negative.

a. *Categorical exceptions to Fourth Amendment exclusions*

Beginning with cases involving challenges to the use of evidence obtained as a result of an unreasonable search or seizure, tainted evidence may be used in a wide variety of contexts outside the criminal trial where the court concludes that the public stands to gain less from exclusion than it stands to lose. Courts have held that unconstitutionally collected evidence need not be excluded in grand jury proceedings,¹³⁰ civil tax proceedings,¹³¹ civil deportation proceedings,¹³² child protection proceedings,¹³³ military discharge proceedings,¹³⁴ parole and probation revocation proceedings,¹³⁵ supervised release proceedings,¹³⁶ habeas corpus proceedings,¹³⁷ and sentencing proceedings.¹³⁸ Although exclusion in these myriad settings

129. Defenders of the penalty argue among other things that the rule encourages greater law-abiding behavior by the police, fewer violations of constitutional rights, and an enhanced respect for the law. See generally DRESSLER, *supra* note 117, § 21.04[2] at 333–38.

130. See *Calandra*, 414 U.S. at 338. The Court shunned the exclusion penalty, reasoning that the marginal deterrent value obtained from allowing a grand jury witness to invoke the exclusionary rule as the ground for refusing to answer questions related to illegally seized documents was outweighed by the disruption of the grand jury’s investigative function. Exclusion of the evidence at trial provided sufficient deterrence. See *id.* at 351.

131. See *United States v. Janis*, 428 U.S. 433, 458 (1976) (reasoning deterrence of official wrongdoing is too “attenuated when the punishment imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign”). Post-*Janis* decisions have concluded that exclusion is not required even where the unlawful search and the civil tax proceeding are conducted by the same sovereign. See, e.g., *Tirado v. Commissioner*, 689 F.2d 307, 311 (2d Cir. 1982) (holding that federal tax proceedings are outside the “zone of primary interest” of federal narcotics agents who conduct an unlawful search, and thus, application of the exclusionary rule would have only a marginal deterrent effect).

132. See *Lopez-Mendoza*, 468 U.S. at 1050–51.

133. See, e.g., *In re Diane P.*, 110 A.D.2d 354, 494 N.Y.S.2d 881 (1985).

134. See, e.g., *Garrett v. Lehman*, 751 F.2d 997 (9th Cir. 1985).

135. See, e.g., *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357 (1998); *United States v. Finney*, 897 F.2d 1047 (10th Cir. 1990); *United States v. Rea*, 678 F.2d 382 (2d Cir. 1982); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970).

136. See, e.g., *United States v. Montez*, 952 F.2d 854 (5th Cir. 1992).

137. See *Stone v. Powell*, 428 U.S. 465, 494–95 (1976) (holding that the exclusionary penalty is not available to penalize Fourth Amendment violations in habeas proceedings because “the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force”).

138. See, e.g., *United States v. Tejada*, 956 F.2d 1256, 1263 (2d Cir. 1992) (holding that “the benefits of providing sentencing judges with reliable information about the defendant outweigh the likelihood that allowing consideration of illegally seized evidence will encourage unlawful police conduct” unless there is proof that the police obtained the evidence expressly to enhance the

would plainly impose a penalty that might deter future similar misconduct, the marginal deterrent effect on the police that is achieved by excluding evidence outside of the trial setting has been thought outweighed by the social costs incurred when probative evidence is unavailable to litigants, courts, and triers of fact. Instead, the threat of exclusion of the evidence from a criminal trial,¹³⁹ the cases hold, is sufficient to motivate law-abiding evidence-gathering behavior. The upshot of this reasoning is that the costs and gains of exclusion are to be weighed on a case-by-case basis, and the exclusion penalty will threaten few consequences for abuses of search and seizure authority outside of the criminal trial itself.

Even within the criminal trial, illegally obtained proof retains considerable prosecutorial utility. It is well settled, for example, that tainted evidence may be admitted at an accused's criminal trial if it is offered to impeach rather than as substantive evidence in the prosecutor's case-in-chief.¹⁴⁰ Neither will tainted evidence be excluded if it was come by in "good faith,"¹⁴¹ if the person opposing the use of the evidence lacks standing to make the claim,¹⁴² if the challenged evidence is too

defendant's sentence); *United States v. McCrory*, 930 F.2d 63 (D.C. Cir. 1991); *United States v. Schipani*, 315 F. Supp. 253 (E.D.N.Y. 1970), *aff'd* 435 F.2d 26 (2d Cir. 1970).

139. This also applies to any other procedural setting that falls within the searching officer's "zone of primary interest." *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-53 (1984).

140. Even where proof of "good faith" conduct on the part of the police is missing, under the so-called "impeachment exception," unlawfully secured physical and statement evidence becomes available to the prosecutor should the defendant choose to testify at trial. *See United States v. Havens*, 446 U.S. 620 (1980) (permitting the prosecutor to use items seized in violation of the Fourth Amendment to contradict the defendant's trial testimony); *Harris v. New York*, 401 U.S. 222 (1971) (authorizing the use of statements obtained in violation of the Fifth Amendment to impeach the testimony of a defendant who chose to testify at trial). Again, the Court has concluded that sufficient deterrence is achieved by banning use of the evidence in the prosecutor's case-in-chief, and any marginal deterrent effect that might be gained from a more wholesale application of the exclusion penalty is outweighed by the social costs suffered whenever probative evidence is excluded. However, prosecutors may not use illegally obtained evidence to contradict the testimony of non-defendant witnesses. *See James v. Illinois*, 493 U.S. 307 (1990).

141. *See United States v. Leon*, 468 U.S. 897, 908 (1984). *See also Massachusetts v. Shepard*, 468 U.S. 981, 920 (1984). Under the "good faith exception," if a prosecutor is able to establish that the searching or seizing officer was "reasonably" unaware that she was violating the Fourth Amendment, the evidence may be used at trial. As with the other exceptions to the exclusionary penalty, the good faith exception finds its moorings in the Court's economically-based cost-benefit analysis. Weighing the social costs of exclusion (guilty go free, etc.) in such a case against the benefits of exclusion (deterrence), illegally-gathered evidence is often admitted on the theory that the potential deterrent effect of an exclusion order is negligible—the police cannot be deterred from engaging in prohibited conduct that they reasonably fail to realize is prohibited.

142. Only one whose legitimate expectation of privacy has been violated is entitled to seek exclusion of such evidence. Thus, the state may use unreasonably secured evidence against a party who lacks such a privacy expectation without concern for the fact that another person's rights were indisputably violated in the process of obtaining the proof. For example, passengers in a car may lack

“attenuated” from the illegality from which it derived,¹⁴³ if it was obtained by way of an untainted “independent source,”¹⁴⁴ or if it would “inevitably” have been discovered despite the misconduct of the police.¹⁴⁵

standing to challenge an unreasonable search of the car if they lack a sufficient possessory or privacy interest in the car. See *Rakas v. Illinois*, 439 U.S. 128 (1978) (holding that only a person whose legitimate expectation of privacy has been violated by the police action may challenge its constitutionality). Further, a simple possessory interest in an item seized will not confer standing on a person who has no legitimate expectation of privacy in the place subjected to a lawless search. See *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (holding defendant’s possessory interest in drugs found in his girlfriend’s purse did not provide him a legitimate expectation of privacy in the purse upon which he could base a constitutional challenge). Several factors are relevant to legitimate expectation-of-privacy determinations, including whether the person bringing the challenge retained a right to exclude others from the place subjected to search. See *Rakas*, 439 U.S. at 154–55 (holding that, in a car subjected to a search, passengers who had no right to exclude others from the car lacked standing); *Alderman v. United States*, 394 U.S. 165, 175–80 (1969) (holding homeowner retained standing to contest statements obtained lawlessly in his home despite his physical absence at the time of the police action) (cited approvingly in *Rakas*, 439 U.S. at 143). Another factor is whether the person exercised dominion over or continuing access to the place searched as well as a possessory interest in the item seized. See *Minnesota v. Olsen*, 495 U.S. 91 (1990) (holding overnight guest in another’s home which is subject to search may have legitimate expectation of privacy sufficient to assert Fourth Amendment claim); *United States v. Jeffers*, 342 U.S. 48, 50–51 (1951) (holding non-owner could contest search of an apartment in light of his unrestricted access to and use of the premises despite his absence at the time the search occurred).

143. Like the good faith and impeachment exceptions, the attenuation doctrine is premised on the belief that, after a point, exclusion of probative evidence becomes too costly relative to its deterrence returns. See *Leon*, 468 U.S. at 911 (holding that “the dissipation of taint concept . . . attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies the cost”) (quoting *Brown v. Illinois*, 422 U.S. 590, 609 (1975) (Powell, J., concurring)). Thus, evidence obtained derivatively from unlawful police conduct is admissible under the attenuation doctrine if the links between the illegality and the proffered evidence have “become so attenuated as to dissipate the taint” of the police misconduct. *Nardone v. United States*, 308 U.S. 338, 341 (1939). The fact that the police would not have acquired the derivative evidence “but for” an initial illegality is not dispositive of the exclusion question. See *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963) (holding that not all proof “is ‘fruit of the poisonous tree’ simply because it would not have come to light but for the illegal actions of the police”). Rather, the attenuation doctrine instructs courts to inquire whether the police obtained the evidence being offered “by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” *Id.* at 488 (emphasis omitted). Several factors are found to promote or hinder dissipation, including (on the promote side) the passage of time, the increasing number of links in the chain between the initial illegality and the acquisition of the challenged evidence, the intervention of acts of free will, and (on the hinder side) the flagrancy of the initial illegality. See *id.* at 484–87. See also DRESSLER, *supra* note 117, § 21.08, at 358–59 (discussing attenuation factors).

144. Rather than providing an exception to the rule that poisonous-fruit evidence is excludable, the independent source doctrine reaffirms that rule, but clarifies that not all evidence obtained subsequent to an unlawful act by the police will be considered the fruit of that act. See *Murray v. United States*, 487 U.S. 533, 541–43 (1988) (approving admission of evidence seized pursuant to a lawfully issued search warrant, because it was “independent” of an earlier warrantless, and thus unlawful, search for the same evidence); *Segura v. United States*, 468 U.S. 796, 815–16 (1984) (approving admission of evidence found in an apartment pursuant to valid warrant, though the police had unlawfully entered the apartment before obtaining the warrant, because the warrant was based on

The combined breadth of these categorical exceptions to exclusion¹⁴⁶ underscores the remarkably mitigating effect the deterrence rationale has had on contemporary exclusionary rule jurisprudence and highlights the abandonment of the judicial integrity rationale as a supplemental basis for exclusion.¹⁴⁷ It also raises the concern that savvy police officers or prosecutors versed in the many exceptions to the exclusionary rule might decide that the consequences of violating the Fourth Amendment, if any, are worth the benefits to be gained from engaging in such misconduct.

An example of government officials engaged in precisely this type of overt cost-benefit analysis can be found in the facts of the well-known “briefcase caper” case, *United States v. Payner*.¹⁴⁸ In *Payner*, an informant acting at the behest of a Special Agent of the IRS entered a bank officer’s apartment without a warrant and rifled through his briefcase, where he found an incriminating financial paper belonging not to the bank officer, but to the target of the IRS’s investigation.¹⁴⁹ It was later established at trial that a Justice Department attorney had specifically advised the agents that they could conduct the blatantly unlawful search of the bank officer’s room and belongings without fear of suppression because the bank officer

information wholly unconnected with the lawless entry). See also William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 933–34 (1991) (criticizing *Murray* for its encouragement of confirmatory warrantless searches). The converse situation may also trigger the doctrine. Where evidence is seized lawfully by the police, but that seizure is followed by conduct that violates the Fourth Amendment, the initial seizure will be considered independent of the unlawful police conduct, and exclusion deemed unnecessary. See DRESSLER, *supra* note 117, § 21.08 at 354.

145. A close cousin of the independent source doctrine, the inevitable discovery doctrine shields from exclusion all evidence discovered unlawfully, but which would “inevitably” have been discovered lawfully had the illegality not occurred. See *Nix v. Williams*, 467 U.S. 431, 444 (1984). The threshold for establishing such an inevitability is steep. See WHITEBREAD & SLOBOGIN, *supra* note 117, § 2.04, at 45 (noting that “courts have required a fairly high degree of proof” in this regard). For some, however, it is not steep enough. See *id.* at 46 (arguing that the *Williams* standard which requires proof of inevitability by a preponderance of the evidence, places insufficient burden on the state to prove that “the discovery of the evidence through legal means was truly inevitable”). See also *Williams*, 467 U.S. at 459–60 (Brennan, J., dissenting) (agreeing that evidence that would “inevitably” have been found lawfully should be admissible, but only where the prosecutor establishes such inevitability by clear and convincing proof).

146. Professor Steiker has referred to these categorical exceptions as “inclusionary rules.” See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2469 (1996). Professor Slobogin has described them collectively as comprising “today’s swiss cheese exclusionary rule.” See Slobogin, *supra* note 6, at 375.

147. See WHITEBREAD & SLOBOGIN, *supra* note 117, § 2.03, at 24–25 (observing that in good faith exception cases, courts have “either ignored the precept that the judicial system should not be a party to police illegality, or argued that judicial integrity is not implicated because the violation has already occurred by the time the evidence is used in court”).

148. 434 F. Supp. 113, 131 & n.69 (N.D. Ohio 1977), *aff’d per curiam*, 590 F.2d 206 (6th Cir. 1979), *rev’d*, 447 U.S. 727 (1980).

149. *Payner*, 434 F. Supp. at 119–20, 122.

was not the target and the eventual defendant in the case would lack standing to raise the Fourth Amendment claim.¹⁵⁰ Unwilling to stomach such a naked disregard of constitutional guarantees, but hamstrung by the Fourth Amendment's standing doctrine, the District Court invoked both the Fifth Amendment's due process clause¹⁵¹ and its inherent "supervisory power" to exclude the papers discovered in the briefcase.¹⁵² The Court of Appeals affirmed solely on the ground that the exclusion was a proper exercise of the trial court's supervisory power,¹⁵³ but the Supreme Court reversed, finding that although the trial court might enjoy inherent supervisory power to exclude evidence obtained in willful violation of a defendant's rights, it lacked supervisory power to exclude evidence taken in willful violation of the rights of a third party not presently before it (i.e., the bank officer).¹⁵⁴

Some might conclude from the creation of such categorical exemptions and holdings as that in *Payner*, that the penalty for violating the Fourth Amendment is no longer a sanction. If, as in *Payner*, police are truly free to choose whether to abide by or violate the constitutional requirements,¹⁵⁵ the penalty for the decision to inflict the constitutional harm begins to look less and less like a sanction for wrongful conduct.

b. *Categorical exceptions to Fifth Amendment exclusions*

In the context of illegally obtained statements, a similar pattern emerges, and cases decided after *Miranda* may similarly undermine the firmness of the conclusion that exclusions for *Miranda* violations operate as a sanction. In a long line of cases decided since *Miranda*, the Court has narrowed the scope of the exclusion penalty, holding that the penalty of

150. See *id.* at 132–33 (finding of fact by the District Court that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion"). The government later denied before the Supreme Court that its agents had encouraged the informant's illegal behavior, but the Court held that it "need not question the District Court's contrary findings." *Payner*, 447 U.S. at 731 n.3.

151. See *Payner*, 434 F. Supp. at 133–34. Even if Fourth Amendment rights are not violated, where federal or state officials execute a search in a manner so outrageous that it "shocks the conscience" of the court, the evidence may be excluded under the Due Process clauses of the Fifth and Fourteenth Amendments. *Rochin v. California*, 342 U.S. 165, 169–74 (1952). See also *Lego v. Twomey*, 404 U.S. 477, 485–86 (1972).

152. See *Payner*, 434 F. Supp. at 135.

153. See *Payner*, 590 F.2d at 206.

154. See *Payner*, 447 U.S. at 734. The Court noted in dicta that it would have reached the same conclusion with respect to the defendant's due process challenge. See *id.* at 737 n.9.

155. See *id.* at 748 (Marshall, J., dissenting) (remarking that the majority's holding permitted the government to wield the standing rules as a "sword . . . to permit it deliberately to invade one person's Fourth Amendment rights in order to obtain evidence against another").

exclusion is not required by the Fifth Amendment when *Miranda*-defective statements are offered to impeach rather than for substantive purposes.¹⁵⁶ In addition, the Court has approved the use of the “fruits” of a *Miranda*-defective statement,¹⁵⁷ as well as the substantive use of statements that are obtained from an unwarned suspect where an officer has a reasonable concern for public safety.¹⁵⁸ Finally, and perhaps most importantly, the Court has repeatedly stressed that the rule of *Miranda* is “prophylactic”;¹⁵⁹ that the Constitution itself does not compel the police’s delivery of the quartet of warnings there formulated;¹⁶⁰ that other safeguards might be “equally effective” in protecting a suspect’s Fifth Amendment rights;¹⁶¹ and that, although failures to comply with the *Miranda* rule will subject the government to some penalty, the precise scope and nature of the penalty is simply of judicial, not constitutional, origin.¹⁶² Intentional or not, only the most naive jurist could have expected the police to miss the implicit, if unvoiced, message lurking within the layers of these admonitions—so long as the police do not act *unconstitutionally* when they fail to comply with the mandates of *Miranda*, and *Miranda*-defective statements retain at least some prosecutorial utility, there is nothing “wrong” with purposively skirting the *Miranda* rules to obtain statement evidence that possesses impeachment value.

These refinements to the exclusion penalty in the interrogation context have led one scholar to conclude that violations of *Miranda* are no longer considered “inherently wrong.”¹⁶³ Professor Weisselberg argues that the implicit and non-moralizing message running through the post-*Miranda*

156. See *Harris v. New York*, 401 U.S. 222, 226 (1971) (approving the use of a statement obtained without warnings to impeach defendant’s credibility). In a later case, the Court acknowledged but dismissed as “speculative” the possibility that this limitation on the exclusion penalty would encourage the police to continue to interrogate in violation of *Miranda* in order to collect impeachment evidence. See *Oregon v. Hass*, 420 U.S. 714, 723 (1975). More recently the Court stated that even if the impeachment exception created such an incentive, the possibility would be outweighed by the social interest in the search for truth. See *Michigan v. Harvey*, 494 U.S. 344, 351–52 (1990).

157. See *Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (holding that *Miranda*-compliant statement need not be suppressed simply because it was obtained as result of a *Miranda*-defective statement); *Michigan v. Tucker*, 417 U.S. 433, 450 (1974) (holding prosecutor could properly offer the testimony of a witness whose identity was discovered as a result of *Miranda* violation).

158. See *New York v. Quarles*, 467 U.S. 649, 656–57 (1984).

159. See, e.g., *Tucker*, 417 U.S. at 446.

160. See, e.g., *Elstad*, 470 U.S. at 306. “[E]qually . . . effective” prophylaxis must be provided, however, if the four warnings are abandoned. *Dickerson v. United States*, 120 S. Ct. 2326, 2335 (2000).

161. See *Miranda*, 384 U.S. at 479.

162. See *Elstad*, 470 U.S. at 306; *Tucker*, 417 U.S. at 450.

163. Charles Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 111 (1998). Professor Weisselberg reaches this conclusion only by way of observation, not by way of endorsement.

decisions is that the police may *choose* whether to abide by or to violate the *Miranda* rules.¹⁶⁴ If they choose to abide by the rules, no penalty will be incurred and the prosecutor will enjoy the unfettered use of all statement evidence gathered.¹⁶⁵ If they choose to violate the rules of *Miranda*, however, the government will incur only a limited penalty of exclusion which no longer denounces their investigative conduct as wrongful.¹⁶⁶ Under this reading of the Court's opinions, the courts are essentially indifferent about the avenue that is selected by the police (compliance or violation). The decision whether to comply with or violate *Miranda* is left solely to the discretion of the police.¹⁶⁷ While decisions to violate the rules

164. *See id.* at 111–112.

165. *See id.* at 112.

166. *See id.* at 111.

167. Professor Weisselberg presents an impressive array of evidence that some police forces have internalized the message that compliance with *Miranda* is discretionary and have modified their interrogation practices accordingly. *See id.* at 132–140. In a controversial interrogation practice employed by some California police departments, for example, police officers are instructed via police manuals and training sessions that the law permits them to go “outside *Miranda*,” i.e., that it is lawful to continue to question a suspect who has invoked her right to remain silent or her right to counsel for the purpose of collecting impeachment evidence or evidence that might convince the defendant not to testify at trial. *See id.* Particularly telling is the transcript of a videotaped training session during which a local prosecutor counseled police officers that it was lawful to go “outside *Miranda*” and explained the reasons they might decide to do so:

What if you've got a guy [in custody] that you've only got one shot at? This is it, it's now or never because you're gonna lose him—he's gonna bail out or a lawyer's on the way down there, or you're gonna have to take him over and give him over to some other officials—you're never gonna have another chance at this guy, this is it. And you Mirandize him and he invokes. What you can do—legally do—in that instance is go outside *Miranda* and continue to talk to him because you've got other legitimate purposes in talking to him other than obtaining an admission of guilt that can be used in his trial . . .

. . . [Y]ou may want to go outside *Miranda* and get information to help you clear cases. . . .

Or maybe it will help you recover a dead body or a missing person. . . .

You may be able to recover stolen property. . . .

Maybe his statement “outside *Miranda*” will reveal methods—his methods of operation. . . .

Maybe his statement will identify other criminals that are capering in your community. . . .

Or, his statements might reveal the existence and location of physical evidence. You've got him, but you'd kinda like to have the gun that he used or the knife that he used . . . [Y]ou go “outside *Miranda*” and take a statement and then he tells you where the stuff is, we can go and get all of that evidence.

And it forces the defendant to commit to a statement that will prevent him from pulling out some defense and using it at trial—that he's cooked up with some defense lawyer—that wasn't true. So if you get a statement “outside *Miranda*” and he tells you that he did it and how he did it or if he gives you a denial of some sort, he's tied to that, he is married to that. . . . [P]erfectly legitimate said both the California and U.S. Supreme Courts [sic] to use non-Mirandized statement[s] if they're otherwise voluntary. I mean we can't use them for any purpose if you beat them out of him, but if they're voluntary statements, . . . [we can] use them to impeach or rebut. So you see you've got all those legitimate purposes that could be served by statements taken “outside *Miranda*.”

Id. at 135–36 (quoting Videotape: Questioning: “Outside *Miranda*” (Greg Gulen Productions 1990) (on file with Professor Weisselberg) (alterations in original).

are slightly more costly (evidence is excluded from the prosecutor's case-in-chief), the penalty carries no stigma. In this sense, exclusion orders have become strictly the cost of doing good police business.

If Professor Weisselberg's reading of the post-*Miranda* case law is correct, the neglect of a moral message in the Court's Fifth Amendment decisions would make it difficult to continue to view the exclusion penalty imposed for police violations of *Miranda* as a sanction (a penalty imposed for conduct that is prohibited) rather than a price (a penalty imposed for conduct that is permitted, but taxed).

4. *Evidence that Fourth and Fifth Amendment violations are considered wrongs*

Does the elevation of the deterrence rationale and the development of this laundry list of exceptions to the exclusionary rule inevitably lead to the conclusion that the exclusion penalty is a pricing rather than a sanctioning strategy? While constitutionally defective behavior has been allowed to occur without punishment under categorical exceptions that shield unconstitutionally secured evidence from the exclusion penalty, the fact that a sanction is not imposed does not magically transform the penalty into a price. Indeed, sanctions go unapplied all the time, for a wide variety of reasons. The well-known "British nanny" case involving Louise Woodward provides but one helpful example. There, the sentencing court, in the interests of justice, declined to order Woodward's incarceration after the jury returned a guilty verdict on a homicide charge and, instead, set her free.¹⁶⁸ This decision about the appropriate penalty to be applied did not transform the *authorized* penalty for Woodward's homicide charge from a sanction to a price. Indeed, if it had been a price, presumably Woodward would have had to internalize the cost that her careless conduct imposed on the family members of the deceased baby.¹⁶⁹ Similarly, the fact that in certain cases or circumstances the courts decline to impose the exclusion penalty to constitutional errors is not enough to conclude that the penalty is a price. It may, however, give rise to concerns about the overall efficacy of

168. See *Commonwealth v. Woodward*, 427 Mass. 659, 694 N.E.2d 1277 (1998). While it is true that the court did impose other conditions for Woodward's release which might also be characterized as sanctions, the court's decision not to impose a prison sentence for the defendant's homicide was an extraordinary act of judicial lenience.

169. The sheer difficulty of calculating such a cost may be, at least in part, what drives the law to approach the penalties for homicidal crimes as sanctions (prohibited wrongs to be completely deterred) rather than prices (permissive harmful acts for a fee). See Cooter, *supra* note 8, at 1537-38.

the Court's chosen penalty, a point discussed at greater length in Part III below.

Though the Court's irregular application of the exclusion penalty cannot inexorably support the conclusion that the penalty is a price, the Court's development of what I call "doctrinal counterweights"—restrictions that counteract the anti-deterrent effects of the categorical exceptions—supports the contrary conclusion that the penalty is a sanction. These doctrinal counterweights are particularly noticeable in the Fourth Amendment context, an area in which the Court has proceeded with perhaps greater care to communicate to the police that intentional efforts to circumvent the Amendment's substantive guarantees will be considered wrongful.

Paradoxically, an example of such a counterweight is found in *United States v. Leon*, the birthplace of the good faith exception to the exclusion penalty.¹⁷⁰ The dissenters in *Leon* (joined by many legal commentators since) warned that the creation of the good faith exception to the exclusionary rule would have several anti-deterrent effects: It would fail to deter judges from signing off on defective search warrant applications; it would fail to deter prosecutors from seeking a judicial signatory to such an application; and it would fail to deter the police from executing a warrant known to them to be defective.¹⁷¹ Although largely unpersuaded by these dire predictions, the *Leon* majority plainly recognized that, if left to function unguided, the good faith exception had the potential to encourage unwanted police attempts to circumvent the Amendment's mandates. To counteract this anti-deterrent result, the Court articulated several "counterweights" or exceptions to when the good faith exception would save a search conducted pursuant to a defective warrant. As held by the Court, the lynchpin of the good faith exception is the "reasonableness" of the officer's reliance on a warrant approved by a judicial officer.¹⁷² In four situations, that reliance would be unreasonable: 1) where the officer presented the judicial officer with information he "knew was false or would have known was false except for his reckless disregard of the truth"; 2) where the judicial officer "wholly abandoned his judicial role" when issuing the warrant; 3) where the warrant was based on information "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and 4) where the warrant was itself "so facially deficient" that an officer executing it could not reasonably believe

170. 468 U.S. 897 (1984).

171. *Leon*, 468 U.S. at 928.

172. *See id.* at 922–23.

it to be valid.¹⁷³ Each of these four situations contemplates either a judge or police officer acting in purposive or reckless violation of Fourth Amendment guarantees. The messages relayed by the counterweights are that compliance with the Amendment is not discretionary and that noncompliance is wrongful. Thus, the creation of these counterweights supports the conclusion that the exclusion penalty is a sanction, not a price.

Another example of an anti-deterrent counterweight is found in *Segura v. United States*¹⁷⁴ and *Murray v. United States*,¹⁷⁵ cases in which the Court clarified the scope of a second categorical exception from the exclusion penalty—the independent source doctrine.¹⁷⁶ Under this doctrine, evidence the police initially discover unlawfully, but later obtain lawfully, may be admitted into evidence provided that the police ultimately secured the evidence via activities that were wholly untainted by the initial illegality. Thus, under the counterweight attached to the exception, admissibility is limited to cases in which the prosecution can show that the officers' initial violative action did not affect in any way the ultimate search for or seizure of the challenged evidence.¹⁷⁷ This restriction on the scope of the exception delivers two powerful messages to officers who may contemplate violating the Fourth Amendment on the hope that they will later be able to rely on the independent source doctrine as an end run around the exclusion penalty. First, if they are wrong and they are not able to establish that the evidence was wholly unconnected to the initial transgression, the evidence will be lost to them because its procurement will be viewed as wrongful. Second, even if they are right and the evidence was in fact secured through wholly and independently lawful action, this fact will do nothing to cleanse the initial action of its "wrongfulness." Evidence is saved by the doctrine, if it is saved at all, only by virtue of the fact that its procurement can be separated entirely from police action considered wrongful. Once again, this supports the

173. *Id.* at 923 (citations omitted).

174. 468 U.S. 796, 814 (1984) (approving the introduction of evidence found in an apartment pursuant to a valid warrant, though the police had unlawfully entered the apartment before obtaining the warrant, because the warrant was based on information "wholly unconnected" to the earlier lawless entry).

175. 487 U.S. 533, 541–43 (1988) (approving admission of evidence seized pursuant to a lawfully issued search warrant because it was "independent" of an earlier unlawful search for the same evidence).

176. *See id.* Although formally announced in *Murray*, the independent source doctrine can lay claim to much older roots. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

177. *See Segura*, 468 U.S. at 796.

conclusion that the penalty for transgressions of the Fourth Amendment is a sanction, rather than a price.¹⁷⁸

Even the Court's *Payner* decision contains language that is designed to deliver a normative message of wrongfulness. Although unwilling to uphold the exclusion of evidence obtained by the government on the facts of the case, the *Payner* majority did stress that "[n]o court should condone the unconstitutional and possibly criminal behavior of those who planned and executed [the] 'briefcase caper'" and reminded the country's police force that its decisions were "replete with denunciations of willfully lawless activities undertaken in the name of law enforcement."¹⁷⁹ This language signals that the Court continues to perceive governmental conduct like that in *Payner* as wrongful, though factual peculiarities in individual cases may nonetheless lean against application of the exclusion penalty. While perhaps evidencing a short-sighted application of the penalty,¹⁸⁰ the Court's emphasis supports the conclusion that the penalty, when applied, is a sanction.¹⁸¹

Assumptions implicit in the scholarly criticism that has been heaped upon the Court for the refinements it has made to the exclusion device push toward the same conclusion—violations of the Amendments constitute prohibited constitutional wrongs. Legions of legal scholars have attacked the restrictions the Court has placed on the application of the exclusion

178. Some danger may persist that the police will intentionally violate the constitutional provision when they know they have sufficient independent evidence to obtain a warrant. See Stuntz, *supra* note 144, at 933–34 (criticizing *Murray* for its encouragement of confirmatory warrantless searches). However, the *Murray* majority found this possibility insufficiently meritorious to outweigh the creation of the independent source exception. See *Murray*, 487 U.S. at 533.

179. *Payner*, 447 U.S. at 733–34 (citing *Jackson v. Denno*, 378 U.S. 368, 386 (1964); *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)). See also *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (holding that evidence obtained unconstitutionally need not be suppressed in a civil deportation hearing, but emphasizing that the Court did "not condone any violations of the Fourth Amendment that may have occurred during the arrests of the [defendants]").

180. In Part III, I argue that the Court's creation of the categorical exceptions to exclusions in the absence of sufficient accompanying messages of wrongfulness has undermined the effectiveness of the exclusion penalty as a sanctioning device. In cases involving governmental criminality, the penalty of exclusion should be applied without exception.

181. In a lengthy footnote the Court expanded on its dislike of the government's conduct. See *Payner*, 447 U.S. at 734 n.5. The footnote reported that the conduct was considered so egregious that it provoked congressional oversight hearings into the case, and a termination of the IRS's investigation. See *id.* The Commissioner of the IRS subsequently adopted guidelines which required its agents and operatives to report known illegalities to state authorities. See *id.* (citing Internal Revenue Manual §§ 9373.3(3), 9373.4 (Manual Transmittal 9-21, Dec. 27, 1977)). The Court wrote that "these measures . . . indicate *disapproval* of the practices found to have been implemented in this case." *Payner*, 447 U.S. at 734 n.5 (emphasis added).

penalty in a variety of settings over the past several decades.¹⁸² The criticism is predicated on the implicit and widely accepted view that constitutionally defective evidence-gathering activity imposes a constitutional wrong.¹⁸³ These wrongs will go unpunished, the scholars argue, if items secured by virtue of the lawless evidence-gathering activity are not excluded. Although a serious area of contention, the disagreement between the Court and these legal commentators centers on the question of what to do about Fourth and Fifth Amendment wrongs when they occur,¹⁸⁴ rather than on the question of whether violations of the Amendments are considered prohibited or permissible.¹⁸⁵

Although it may be tempting to conclude from the Court's recent focus on deterrence and its development of categorical exceptions to the exclusion penalty that the Court no longer views police violations of

182. See authorities cited *supra* note 6.

183. See Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 908 (1986) ("Little dispute surrounds the purposes of the Fourth Amendment: the Framers intended to *prohibit* general searches unsupported by probable cause. But little agreement exists respecting the purposes of the exclusionary rule . . ." (emphasis added)).

184. As noted above, careful reading of the Court's decisions reveals wide agreement among the Justices across a broad selection of cases that the restrictions placed by the Fourth Amendment on the search and seizure authority of the Constitution are prohibitory, not permissive. Some members of the Court have expressed concerns from time to time that particular aspects of the Court's decisions might perversely create incentives for the police to employ constitutionally defective evidence-gathering tactics. See, e.g., *McNeil v. Wisconsin*, 501 U.S. 171, 187 (1991) (Stevens, J., dissenting) (worrying that police might "file charges selectively in order to preserve opportunities for custodial interrogation . . ."). Certainly, the Court has never held that compliance with the Fourth Amendment's ban against unreasonable searches and seizures or the mandates of *Miranda* is discretionary. To the contrary, admonitions abound that compliance is mandatory. See *supra* Part II.A.1. Though considerable disagreements have occurred among the Justices in Fourth Amendment cases, those disagreements have centered on the question of how properly to interpret the Amendment's commands. For example, there has been considerable disagreement over what constitutes an "unreasonable" search or seizure and how severe the penalty should be when constitutional error occurs. See *supra* note 86. Serious as these disagreements are, they do not support a conclusion that the exclusion penalty is a price.

185. Professor Steiker made a similar argument in an article focused on the difference between the Court's "conduct" rules and its "decision" rules. See Steiker, *supra* note 146, at 2469-70. Building on the earlier work of Professor Meir Dan-Cohen, see Meir Dan-Cohen, *Decision Rule and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984), Professor Steiker explained that in the context of constitutional criminal procedure, conduct rules are rules "addressed to law enforcement agents regarding the constitutional legitimacy of their investigative practices." Steiker, *supra* note 146, at 2470. Decision rules are rules which are addressed to courts to guide their decision-making about "the consequences of unconstitutional conduct" by the police. *Id.* Professor Steiker pointed out that shifts in the Court's decision rules (by creating a proliferation of "inclusionary rules") have greatly outpaced changes in its conduct rules. As put by Professor Steiker: "[T]he Burger and Rehnquist Courts have accepted to a significant extent the Warren Court's definitions of constitutional 'rights' while waging counter-revolutionary war against the Warren Court's constitutional 'remedies' of evidentiary exclusion . . ." *Id.*

constitutional rights to constitute prohibited wrongs, such a conclusion would be premature. The evolving exclusion rationale certainly makes it fair to question whether a penalty that is driven by deterrence concerns operates more like a price than a sanction, but it would be a mistake to view the mere ascendancy of the deterrence rationale as conclusive evidence that the exclusion penalty is a price. Indeed, the deterrence of harms is a classic objective of both pricing and sanctioning devices.¹⁸⁶ Thus, the deterrence rationale alone simply cannot provide the basis for concluding that the exclusion penalty is a price. Neither can deterrence *plus* the categorical exceptions add up to this conclusion in light of the normative messages that continue to be delivered by the counterweights described above.¹⁸⁷

The fact that a view of the exclusion penalty as a sanction also meshes with our fundamental normative expectations of how the exclusionary rule should operate provides further support that it is a sanction.¹⁸⁸ Indeed, an assertion that the exclusion penalty should be a sanction is hard to contest, while the contrary proposition that it is merely a price would strike most as unpalatable and untrue. Therefore, our normative instincts nicely coalesce with the Amendments' textually mandatory tone, as well as the Court's prohibitory language and counterweights. At least preliminarily, all this points to the same answer: The exclusion penalty is a sanction rather than a price. To test this conclusion, the penalty can be measured against another of the principal characteristics of a sanction—the possession of a culpable mental state.

186. See Cooter, *supra* note 8, at 1532.

187. However, as will be seen below, by elevating the deterrence over the judicial-integrity rationale while simultaneously declining to apply the sanction in a wide range of cases, the Court may well have diminished the power of the exclusion penalty as a sanctioning device and curbed its ability to deter constitutionally defective police conduct at the margins. See *infra* Part III.A. If this trend continues, and it is unaccompanied by counterbalancing reminders from the Court that the constitutional requirements are mandatory, the sanction of exclusion could eventually come to be seen as no more than the price incurred for zealous police work. See Keith A. Fabi, Comment, *The Exclusionary Rule: Not the "Expressed Juice of the Woolly-Headed Thistle"*, 35 BUFF. L. REV. 937, 951–52 (1986) (worrying that "[a]pplication of the rule in fewer and fewer circumstances" would "lessen[] police perception of exclusion as a serious sanction").

188. See Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 30 (1980) ("The notion that the fruits of illegal official action may not be used against an individual is so deeply imbedded in American constitutional law that it is often assumed as a given.").

B. THE RELEVANCE OF AN OFFICIAL'S MENTAL STATE TO EXCLUSION

As will be recalled from Part I, one of the principal ways to distinguish a price from a sanction is to examine the effect the mental state of the harm-producing actor has on the application and dimension of the attending penalty for the behavior. If the existence of a particular mental state is critical to the applicability of a penalty, the penalty is likely to be a sanction. By contrast, if the penalty applies irrespective of the actor's possession of a culpable mental state, the penalty is likely to be a price. In addition, many sanctioning penalties are not only triggered by the possession of a culpable mental state, but are proportionate to the egregiousness of the actor's culpability as well.¹⁸⁹

Based on the foregoing, if the exclusionary penalty is a sanction, we would expect it to be triggered only in cases in which official wrongdoers acted with a culpable mental state of negligence or higher. We might also consider whether the penalty for lawless police action becomes more severe in step with the community's perception of the wrongfulness of the police action. If, to the contrary, the penalty applies whenever it is determined that a constitutional harm has occurred regardless of the actor's possession of a culpable mental state, the penalty is better described as a price. In other words, if the government is held strictly liable and subject to the exclusion penalty whenever a citizen's Fourth or Fifth Amendment rights are violated, the penalty operates as a price.

These related criteria support the conclusion that the exclusion penalty is a sanction rather than a price for two reasons. First, the presence of a culpable mental state of negligence or higher is a prerequisite to the application of the exclusion penalty. This practice is well illustrated by the following passage in *Leon*:

'The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused.'¹⁹⁰

This passage demonstrates that official violations of the Fourth and Fifth Amendments become potential subjects of the exclusion penalty when

189. This is particularly true of sanctioning penalties for criminal harms. See *supra* notes 66-71 and accompanying text.

190. *Leon*, 468 U.S. at 919 (quoting *United States v. Peltier*, 422 U.S. 531, 539 (1975)). See also *Michigan v. Tucker*, 417 U.S. 433, 447 (1974).

an official actor crosses the line separating negligent from non-negligent conduct. This focus on the possession of a culpable mental state as the trigger for exclusion provides further evidence that the penalty is a sanction.

The Court's adoption of the "good faith exception" is similarly consistent with Professor Cooter's sanction modality and inconsistent with his price modality.¹⁹¹ Because under a system of sanctions the possession of a culpable mental state is central to the imposition of a penalty, no sanctioning penalty is ever imposed on the basis of strict liability. The opposite is true in penalty systems where harmful acts are "priced" regardless of culpability. Persons who reasonably (i.e., non-negligently) impose harms on others are subject to penalty for those harms under a pricing modality because, as we have seen, prices operate without concern for notions of individual culpability.¹⁹² When these identifying features are applied to the penalty for Fourth or Fifth Amendment violations, the sanctioning quality of the exclusion penalty is again illuminated. Pursuant to the Court's "good faith exception," when harms are imposed by the police non-negligently, the government is not held strictly liable for those injuries as we would expect it to be were exclusion a price.¹⁹³ The fact that we do not punish constitutional errors on a strict liability basis supplies additional evidence that the exclusion penalty, when used, is a sanction rather than a price.¹⁹⁴

191. The reader might reasonably wonder how that could be when under the good faith exception official constitutional errors go unpunished. How can a doctrine that does not penalize official harms support the conclusion that the Court has adopted a "sanctioning" approach to official harms? The answer lies in the basic definition of a sanction provided by Professor Cooter. Recall that one of the central defining characteristics of a sanction is that it is triggered by the possession of a wrongful mental state. If an actor possesses no culpable mental state, a sanctioning system of penalties would impose no punishment, even if the actor's conduct imposed a harm on another. Suppose, for example, that a motorist was driving in a perfectly safe and reasonable manner, and was abiding by all traffic regulations when a young man on a skateboard suddenly veered into the driver's path. The young man was hit and killed. Suppose further that no driver acting reasonably would have been able to avoid hitting and killing the young man under the circumstances. If the motorist did not act negligently, she would be unpunished under a sanctioning system.

192. See *supra* notes 45–48 and accompanying text.

193. See *supra* notes 45–48 and accompanying text.

194. Certainly we could punish harms imposed by the police on a strict liability basis. Indeed, before the Court's decision in *Leon*, the federal courts disagreed about whether reasonable police harms justified exclusion. See, e.g., *United States v. Williams*, 622 F.2d 830, 846–47 (5th Cir. 1980) (en banc) (pre-*Leon* decision adopting a form of good faith exception). Even today, some legal commentators advocate the abolition of the "good faith exception." See, e.g., Burkoff, *supra* note 6.

C. THE PENALTY OF EXCLUSION DOES NOT TRACK THE MAGNITUDE OF
THE POLICE HARM IMPOSED

A final reason to conclude that exclusion is a sanction is provided by the way the penalty operates when it is applied. As explained in Part I, pricing penalties attempt to mirror the value of harm imposed by an actor in an effort to deter only inefficient harms. By making an actor pay for the amount of the injury she causes to others, and no more, the actor is left free to choose whether to impose the harm using relatively straightforward cost-benefit analysis. This means that in some situations it will be rational for the actor to impose harm, because the benefits will outpace her costs; in other situations it will not be rational to do so, because the costs outweigh the benefits. To work properly, pricing penalties must be capable of calculating quite precisely the value of the harm imposed by particular behavior, and they must seek to do so any time the penalty is applied. Thus, a particular penalty can be identified as a price (rather than a sanction) by its tendency to track the actual harms imposed by disparate actors.

The penalty of exclusion simply does not work in this way. Indeed, while monetary penalties are capable of making such finely-tuned calibrations, the exclusion penalty is not. The penalty of exclusion involves no transfer of money, nor any other punishment geared to mirror the value of the actual harm imposed by police actors in discrete situations.

Even if we could put a dollar figure to the harm that is suffered by a person subjected to a warrantless search in one's home (versus, for example, the harm suffered from a warrantless search in public), the exclusionary rule makes no effort to do so. When the penalty is applied, all unlawfully acquired evidence is suppressible in precisely the same way no matter how egregious or minor the police error. To see this point we can hypothesize two officers who impose on two homeowners what we might reasonably conclude are differing degrees of harm. Officer #1 unreasonably searches the home of Homeowner #1 without a warrant, in the middle of the night, to the terror of the homeowner's young children, and finds a kilogram of cocaine. Officer #2 unreasonably searches the home of Homeowner #2 without a warrant, while the homeowner and his children are away on vacation, and finds a kilogram of cocaine. One might quite reasonably conclude that the harm suffered by Homeowner #1 and his family is greater than the harm suffered by Homeowner #2 and his family. Although the police action violated the privacy rights of all of the residents in both hypotheticals, the harm to Homeowner #1 was accompanied by an

additional psychological harm that Homeowner #2 and his family were spared. In a pricing system, we would expect the cost the police would have to “internalize” for this behavior to differ in accordance with the differing harms suffered by the residents in the two homes. Plainly, the courts make no effort to modify the penalty of exclusion in this way so as to match the degree of harm imposed on persons whose rights are violated. The fact that Officers #1 and #2 would face the precisely same penalty—the exclusion of one kilogram of cocaine—provides a final reason to conclude that the exclusion penalty is not a price, but a sanction.

III. THE SUCCESS OF THE EXCLUSIONARY PENALTY AS A SANCTIONING DEVICE

Part I of this Article set forth the basic characteristics of prices and sanctions and Part II concluded that the exclusionary penalty for Fourth and Fifth Amendment violations is best labeled a sanction. This Part evaluates the success of the Court’s chosen penalty for police transgressions of the Fourth and Fifth Amendment as a sanctioning device. As explained more fully below, I conclude that although the exclusion penalty in both the Fourth and Fifth Amendment contexts is best described as a sanction, at least two aspects of the Court’s application of the sanctioning penalty threaten to undermine its effectiveness as such. First, the many restrictions placed on the use of the sanction, both inside and outside the trial context, have reduced its potency. While perhaps an unintended consequence, these restrictions send a clear message that many constitutionally defective evidence-gathering acts will go unpunished. Some police departments have internalized this news as conferring a “green light” to lawless action. Second, the Court’s failure to distinguish between intentional and negligent constitutional violations by the police further undermines the power of the sanction by diluting the message that intentional violations of the constitutional provisions are considered especially “wrongful.” The Court’s willingness to weigh the costs of exclusion against its benefits in cases involving evidence of police criminality in precisely the same way that it would in cases involving nonpurposive violative police conduct is particularly misguided.

On the other hand, the conclusion that the exclusion penalty is a sanction supports the Court’s development of a “good faith exception” to the exclusionary rule. Just as preservation of the line between willfully violative and negligent conduct is important, so too is the preservation of the line between culpable (negligent) and nonculpable (non-negligent) conduct. When non-negligent errors occur through no fault of the police,

the conduct is appropriately shielded from sanction. Just as “over-criminalization” will undermine social confidence in the criminal sanction, so too will the overzealous application of the exclusion penalty undermine the public’s confidence in the propriety of that sanction.

A. INFREQUENT APPLICATION OF THE EXCLUSION PENALTY UNDERMINES ITS POTENCY AS A SANCTION

Part I commenced with the suggestion that people sometimes decline to impose harm on others out of fear of the cost they could incur for doing so. From an economic perspective, if the cost is sufficiently high that it outweighs the benefits the actor stands to reap from engaging in the harmful conduct, the actor, acting rationally, will choose to do no harm. In a system of sanctions, actors will bear the cost of precaution to avoid incurring the cost of a sanction (which applies at the point an actor violates an applicable legal standard) because of the sharp discontinuity associated with liability punished by sanction. However, as explained by Professor Cooter, while it is not essential that a sanction equal the harm caused to induce a self-interested actor to take precaution sufficient to satisfy an applicable legal standard, it is “essential that the sanction be large enough so that his private costs are minimized by conforming to the legal standard.”¹⁹⁵ Simply put, the private costs faced by the potentially noncompliant actor must be greater than the benefits she stands to reap from noncompliance.¹⁹⁶ If the courts weaken the sanction that applies to the conduct, this calculus is bound to shift as the actor factors the weakened punishment into the cost-benefit equation.

This same reasoning applies when a court reduces the *frequency* of a sanction’s application, rather than its severity. In either situation, a rational actor will recalculate the “cost” of noncompliance with the law. “If the sanction is reduced or applied less frequently, then the people on the margin will tip in the direction of not conforming.”¹⁹⁷ Worse, not only will the number of noncompliant actors increase in response to a sufficiently low level of enforcement of a sanction, but those who tip toward noncompliance will tip a lot.¹⁹⁸ Applied to the exclusion context, this

195. Cooter, *supra* note 8, at 1527.

196. See *supra* text accompanying notes 45–48.

197. Cooter, *supra* note 8, at 1531.

198. See Cooter, *supra* note 8, at 1531 (“Although few people tip, those who do will probably change their behavior a lot, rather than a little. The change in behavior will be substantial because the choice is between taking enough precaution to avoid the sanction entirely, or paying the sanction and taking little or no precaution.”).

means that if the Court fails to apply the sanctioning penalty of exclusion often enough, official compliance with the constitutional rules to which the penalty attaches must be expected to decline, and in dramatic ways.¹⁹⁹

Indeed, the compliance-reducing effects of the Court's exclusionary rule jurisprudence can already be observed. The controversial interrogation practice known as "going outside *Miranda*" described in Part II.A²⁰⁰ provides an example. Whatever one thinks of the practice, its development is not at all surprising from the perspective of price and sanction theory—indeed it is precisely how a price/sanction theorist would have expected the market to respond to the many categorical restrictions the Court has placed on the exclusion penalty in the confession context. As noted earlier, one inherent danger of abdicating the penalty in multiple categories of settings is that the police will interpret the Court's fundamental message as one of permission.²⁰¹ The lack of any concealment efforts on the part of police departments utilizing this interrogation technique provides perhaps the most compelling evidence that they have in fact interpreted the Court's rulings in this way. Such behavior shows that they perceive that the practice commits no constitutional wrong and that they are permitted to engage in it.²⁰²

A study of police attitudes toward the now-defunct holding in *Wolf v. Colorado*²⁰³ provides further evidence that police may interpret Court

199. Applying the theory of "acoustic separation" to the Court's exclusion decision, Professor Steiker expressed this same concern:

Where the police 'hear' the Court's decision rules and thus are able to predict the likely legal consequences of their unconstitutional behavior, *they may see little reason to continue to obey conduct rules* that are consistently unenforced in criminal prosecutions. If the consequences imposed by the Court's decision rules play a significant role in motivating compliance with conduct rules, then changes in decision rules will necessarily change compliance with conduct rules.

Steiker, *supra* note 146, at 2543 (emphasis added). Professor LaFave made the point this way:

[M]y credo is: If you want the police to go seven miles, then what must be done is to erect an unmistakable signpost at the seven-mile limit, and what must not be done is to tell the police that we will look the other way provided they go no farther than eight miles.

LaFave, *Fourth Amendment*, *supra* note 6, at 359–60.

200. Under this practice some police departments actively encourage police officers to ignore unambiguous invocations of the right to silence or counsel in order to secure confessional evidence. *See supra* text accompanying notes 164–67.

201. As once put by Professor LaFave, "The notion . . . is not that the police are inherently evil, but rather that . . . they are no less likely than the rest of us to equate admissibility with legality." LaFave, *Fourth Amendment*, *supra* note 6, at 353.

202. Indeed, this seems to be the lesson of the defenses of contemporary actions challenging the practice of going "outside *Miranda*." Far from concealment, the police departments that have adopted this interrogation practice have done so quite openly, actively training new recruits on how best to secure a confession after a valid invocation of *Miranda* rights or in the absence of an effective waiver. *See supra* note 167 and accompanying text.

203. 338 U.S. 25 (1949).

decisions which exempt tainted evidence from exclusion as conferring upon them a license to engage in constitutionally defective conduct.²⁰⁴ In *Wolf*, the Court held that violations of the Fourth Amendment by state law enforcement officers did not have to be punished by exclusion.²⁰⁵ In his study, Professor Loewenthal reported the results of interviews he conducted with ninety police commanders in the New York City Police Department regarding their interpretation of the decision in *Wolf*. Despite the fact that the opinion clearly held that the Fourth Amendment guarantees were “basic to a free society” and thus enforceable against the States through the Fourteenth Amendment’s Due Process clause,²⁰⁶ most of the law enforcement officers interviewed stated that they interpreted the decision “as not having imposed any legal obligation” on them to abide by the mandates of the Fourth Amendment “since under that decision the evidence would still be admissible no matter how it was obtained.”²⁰⁷ Loewenthal concluded from this widely held misperception that “to police, the imposition of the exclusionary rule is a prerequisite for the imposition of a legal obligation.”²⁰⁸

There is also evidence to support the related prediction of Professor Cooter that those who choose not to comply with a sanction due to the infrequency of its application will tend to deviate from the rules being violated in a significant way. Police departments that have veered “outside *Miranda*” have veered a lot, employing interrogation strategies that do precisely what the *Miranda* rules forbid. A similar observation can be made about the level of the misconduct involved in the *Payner* case.²⁰⁹ With full knowledge that a warrantless entry of the bank officer’s room and search of his belongings would violate his Fourth Amendment rights, a government attorney directed the investigating agents that they were free to do so.²¹⁰ Again, when viewed from the perspective of a self-interested

204. See Loewenthal, *supra* note 188, at 29.

205. The rule of *Wolf* was subsequently overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961). However, at the time of the *Wolf* case, the majority was persuaded that the exclusion penalty applicable in federal trials for Fourth Amendment violations was not required in state criminal proceedings. See *Wolf*, 338 U.S. at 28–29 (noting that “most of the English-speaking world” did not regard the penalty as vital to the protection of the guarantee against unreasonable searches and seizures, and of the 47 States that had considered the exclusion doctrine after it was adopted as the federal remedy, most (by a margin of 30 to 17) had rejected it).

206. *Id.* at 27.

207. Loewenthal, *supra* note 188, at 29 (“Prior to *Mapp v. Ohio*, the police were not aware that constitutional standards for search and seizure had been applied to them in *Wolf v. Colorado*; no sanctions had been imposed in *Wolf*, and the police continued to search with impunity.”).

208. *Id.*

209. See *supra* discussion accompanying notes 148–54.

210. See *Payner*, 434 F. Supp. at 121–22.

actor, these developments make perfect economic sense, for “[o]nce it pays to fall short of the legal standard, it pays to fall significantly short of it.”²¹¹

Moreover, if the nonapplication of the penalty is permitted to assume systemic proportions, characteristics unique to the exclusion penalty make it particularly susceptible to like decisions not to comply with constitutional requirements. First, the exclusion penalty is not imposed directly upon the individual police officer(s) responsible for the constitutional violation.²¹² To the extent the officer responsible for the error feels the impact of the penalty at all, it is only indirectly, and very often well after the violation occurs. Therefore, the effect of the penalty for the individual officer is closely related to how “invested” the officer is in the successful prosecution of the suspect, and the impact that a history of suppression has on the officer’s reputation within the prosecutor’s office and the officer’s own precinct. An officer will only fear that her professional reputation will be tarnished if she perceives that her behavior is considered “wrongful” inside the station house, prosecutor’s office or for that matter, courthouse.

Second, the penalty only applies in those cases in which the police actually find evidence of criminality. An unreasonable search that yields no evidence provides no fodder for the exclusion penalty. Therefore, in the absence of a viable alternative remedy, the officer who violates the Fourth Amendment rights of a person, as to whom no incriminating evidence is found, will face no exclusion penalty at all. This makes the application of the exclusion penalty all the more pressing in situations in which it does apply. The deterrent power of any penalty is widely acknowledged to be affected by the swiftness and certainty of its application.²¹³ A penalty, whose unique characteristics undermine both of these attributes, must be

211. Cooter, *supra* note 8, at 1531. Far from culpably careless behavior, the decision to search in *Payner* constituted both an intentional violation of the bank officer’s constitutional rights and a criminal act.

212. Critics of the view that the exclusionary rule serves as an effective deterrent of police violations of constitutional rights have emphasized the fact that the penalty does not directly penalize individual police offenders but instead relies on the assumption that a police officer will learn sometime (well) after the violation that the evidence she collected has been suppressed. *See* Barnett, *supra* note 6 at 955–56. Even supporters of the exclusion penalty have acknowledged that more direct sanctions imposed on police violators would result in greater deterrence. *See* Loewenthal, *supra* note 188, at 31–32. In Loewenthal’s study of the New York City police, many officers stated that while they were deterred “to some extent by the exclusionary rule,” they characterized the exclusionary rule “as a moderate deterrent” when compared to more direct sanctions. *Id.* at 31. The police advised that “sanctions which would threaten police with substantial financial losses or even criminal penalties would . . . deter them from taking even the slightest chance of searching or arresting in relatively marginal situations . . .” *Id.* at 31–32.

213. *See, e.g.*, JAMES Q. WILSON, THINKING ABOUT CRIME 117–21 (rev. ed. 1983).

applied with special vigilance if it is to retain its force as a sanctioning device.

B. THE VALUATION OF CRIMINAL GAINS IS INAPPROPRIATE IN CASES OF INTENTIONAL TRANSGRESSIONS

As seen in Part II, rather than a bright-line approach, the Court employs a cost-benefit analysis when it is called upon to decide whether evidence obtained unconstitutionally should or should not be excluded.²¹⁴ A fundamental feature of this cost-benefit approach is its willingness to consider the utility of the official violator's transgressing behavior—the wrongdoer's "loot"—as relevant to the question of whether the penalty should be imposed at all.²¹⁵ The driving force behind this practice is the Court's desire to achieve an "optimal" rate of enforcement of the exclusion penalty²¹⁶ by identifying when the benefits of lawless, evidence-collection behavior exceed the costs it imposes on society.

The validity of considering the value of criminal gains finds its most notable support in the work of Gary Becker.²¹⁷ Positing crime as an

214. The diminished ability of a prosecutor to secure the conviction of a person whom the evidence (though tainted) powerfully suggests is guilty is widely considered to be the principal "cost" of exclusion. The promotion of official adherence to constitutional norms is considered the principal benefit. The converse works similarly. The cost of *non*-exclusion is the fear that the police will trammel upon constitutional rights without concern for penalty; the benefit is the enhanced chance of securing conviction of the guilty and ascertaining the "truth." See *Brown v. Illinois*, 422 U.S. 590, 610–11 (1975) (Powell, J., concurring); *United States v. Calandra*, 414 U.S. 338, 348 (1974); *Michigan v. Tucker*, 417 U.S. 433, 451 (1974).

215. As seen in Part II, by using this cost-benefit approach, the Court has frequently concluded that if lawless official behavior is permitted to go unsanctioned by exclusion, society will reap the benefits of the use of that loot (evidence of the accused's criminality). Such is the case because the benefits gained sometimes outweigh the losses suffered from the occurrence of lawless police conduct. See *supra* text accompanying notes 127–62.

216. This may be confusing to those who understand sanctions (as opposed to prices) to be tools used to deter those who would engage in acts which are *forbidden*. If the law forbids these acts from occurring, what explains the courts' willingness to seek only optimal rather than complete enforcement of these rules? The answer is simply that enforcement itself is costly. See George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 526–27 (1970). Although we could devote exorbitant resources to ferreting and penalizing all official actors who tread consciously or unconsciously on the constitutional rights of others, to do so would be expensive. Thus "only in crimes of enormous importance will such expenditures be approached." *Id.* at 527.

217. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 173 (1968). Professor Stephen Marks explains the alternatives of inclusion and exclusion of criminal utility:

If we count utility we would set the damage amount to $D = L/p$ where "L" symbolizes the loss to society and "p" symbolizes the probability of detection. . . . If we do not credit utility then we would set the penalty at $D > B/p$ where ["B"] symbolizes the benefit to the criminal of the act. In the former case, the criminal activity occurs if benefit to the criminal exceeds the loss to the rest of society. In the latter case, we set the penalty so as to minimize criminal activity.

“economically important . . . ‘industry,’”²¹⁸ Professor Becker argued that it was possible to identify the optimal level of law enforcement through an economic equation which measures the total “social loss” suffered from criminal conduct. According to Becker’s equation, the social loss caused by criminality is equal to the harm done by the crime, plus the cost of law enforcement to prevent its occurrence, *minus* the “social value of the gain to offenders.”²¹⁹

Although his article remains widely influential,²²⁰ several law and economics scholars have challenged Becker’s suggestion that the gain to a criminal offender is entitled to account for positive social value in the social welfare equation.²²¹ As argued by two leading critics of this notion, Professors Jeff Lewin and William Trumbull: “[O]nce society has decided to criminalize the activity in question, such gains [sh]ould no longer be counted.”²²² Similarly, Professor Stephen Marks advocates: “In determining the socially optimal level of enforcement of criminal law, society typically should not consider the utility gained by the criminal from the criminal act.”²²³ These criticisms rest on the idea that when society chooses to employ a criminal as opposed to a civil sanction, its intent is to create a stronger deterrent to the conduct, send a stronger message of moral condemnation, and communicate a stronger resolve that the law be

Marks, *supra* note 10, at 220 n.21 (citation omitted).

218. See Becker, *supra* note 217, at 170.

219. *Id.* at 173, 192.

220. See Hylton, *supra* note 49, at 427 & n.25 (observing that Becker’s article “touched off a large literature on the economics of crime” and citing examples).

221. See, e.g., STEVEN E. RHOADS, *THE ECONOMIST’S VIEW OF THE WORLD: GOVERNMENT, MARKETS, AND PUBLIC POLICY* 143–78 (1985) (arguing that criminal gains should not be counted); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as Preference Shaping Policy*, 1990 DUKE L.J. 1, 11–13 (urging that the inclusion of “criminal benefits in the concept of social welfare seems to defy common sense”); Kenneth G. Dau-Schmidt, *Sentencing Antitrust Offenders: Reconciling Economic Legal Theory*, 9 WM. MITCHELL L. REV. 75, 90 (1984); Jeff L. Lewin and William N. Trumbull, *The Social Value of Crime?*, 10 INT’L REV. L. & ECON. 271, 278 (1990) (arguing that criminal gains should be excluded from the social welfare equation out of respect for “the constraints imposed by political and social institutions”); Stigler, *supra* note 216, at 527 (questioning the inclusion of the gain to the offender as a social value in light of the fact that “society has branded the utility derived from such activities as illicit”). Cf. Coffee, *supra* note 57, at 193–94 (commenting that “the criminal law often and necessarily displays a deliberate disdain for the utility of the criminalized conduct to the defendant”). Not all economists agree that it is inappropriate to consider criminal utility in the social welfare equation. See Alvin K. Klevorick, *On the Economic Theory of Crime*, in NOMOS XXVII: CRIMINAL JUSTICE 289, 292–94 (J. Roland Pennock & John W. Chapman eds., 1985) (listing optimal enforcement models in which criminal utility is counted).

222. Lewin & Trumbull, *supra* note 221, at 273 n.13.

223. Marks, *supra* note 10, at 215 (emphasis omitted).

enforced.²²⁴ While it is necessary and appropriate that the quantity of resources devoted to the enforcement of sanctionable offenses take into account limited enforcement resources, it is also appropriate that enforcement increases with society's view of the gravity of the conduct. The label "criminal," therefore, assumes special significance in the rate of enforcement inquiry.²²⁵ As put by Professor Coffee, where "society has refused on moral grounds to recognize the legitimacy of the benefit" achieved by a criminal wrongdoer, "by definition the benefits of the crime to the individual can never exceed the costs it imposes on society."²²⁶

Applying this reasoning to the exclusionary rule context, I posit the following: When police misconduct is also criminal conduct, the courts' consideration of the spoils of that misconduct is always inappropriate. That is, in cases involving proof of police criminality, the penalty of exclusion should be applied without exception in order to ensure that police and prosecutors perceive such action as both constitutionally and criminally wrongful. Where conduct that is unconstitutional enters the realm of the criminal, it is simply not possible to give positive weight to criminal utility in one context without doing serious harm to the message of moral wrongfulness in the other.²²⁷ Thus, when the Court says in one breath that it does not condone police criminal conduct, but in the next permits the spoils of that criminality to be used to the benefit of the wrongdoer, it undercuts not only the deterrent force of the exclusion penalty, but the moralizing power of applicable criminal provisions as well. This means that the Court should abandon its current practice of weighing the utility of *criminally* tainted evidence when deciding how rigorously to apply the exclusion penalty.

Of course, in the vast majority of exclusionary rule cases, the constitutionally defective acts of official actors cannot readily be classified as criminal conduct. Fourth and Fifth Amendment rights are violated much more often by police acting negligently or recklessly, an insufficient basis

224. See Coffee, *supra* note 57, at 225 (using price and sanction theory to explain the criminal sanction as a system of moral education whose "natural style is to prohibit rather than to price" and whose voice "prefers to deal in moral absolutes").

225. See Stigler, *supra* note 216, at 528 ("The state will pursue more tenaciously the offender who commits a larger crime (or repetitive crimes) and thus increase also the probability of apprehending him.").

226. Coffee, *supra* note 57, at 195.

227. Professor Coffee has made a similar argument in a non-exclusion context. See *id.* at 194 (arguing that "the criminal law should generally not be used when society is unprepared to disregard the social utility of the defendant's behavior").

for criminal prosecution.²²⁸ In the band of cases that does involve intentional criminality by official actors, however, it is inappropriate for courts to weigh the value of the criminally collected evidence when deciding how aggressively to apply the exclusion sanction. When society designates conduct as criminal, its message of prohibition is especially clear and the need for diligent application of applicable sanctions to those who engage in such conduct looms large. Therefore, once behavior is classified as criminal, the value of a criminal's gain should no longer be considered a valid weight against the application of a sanction.²²⁹ In the Fourth and Fifth Amendment setting this means that the utility of criminally collected evidence to a prosecutor will not be a valid counterweight to exclusion.

A rule that recognizes the special egregiousness of official acts that are deliberately unconstitutional would not spell the demise of the Court's standing doctrine or any other categorical exception to exclusion. It would

228. Using the federal civil rights criminal statute, 18 U.S.C. § 242, as the premier example, criminal conviction of a police officer for deprivation of rights under the color of law requires proof of "willfulness," a level of intentionality not apparent in most search and seizure or interrogation episodes. The statute provides in pertinent part that it is a crime for any person "under color of any law" to "willfully subject[] any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution." 18 U.S.C. § 242 (1994). Under this section, the purpose of an officer to deprive another of the constitutional right must be plain and willful. *See Williams v. United States*, 341 U.S. 97, 101 (1951). Although the courts have increasingly defined criminal willfulness to require evidence that the actor violated a legal duty or obligation known to her, *see Sharon L. Davies, The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341 (1998), in this context the term would require proof that the officer acted with a "bad purpose." *See id.* at 381–87. *See also Bryan v. United States*, 524 U.S. 184, 191 (1998); *United States v. Murdock*, 290 U.S. 389, 397 (1933). Although present in some cases, *see Williams*, 341 U.S. at 102 (finding defendant who obtained confessions through the use of physical force "aimed to deny the protection that the Constitution affords" and thereby satisfied the willfulness requirement); *Screws v. United States*, 325 U.S. 91, 92–93 (1945) (holding sheriff and deputy violated willfulness requirement of predecessor to § 242 by beating handcuffed arrestee with fists and a blackjack until unconscious, causing his death), it is surely not present in most. Indeed, supporters of the exclusion penalty have stressed this fact when refuting the argument that remedies alternative to exclusion (like criminal prosecution of police offenders) would provide a better deterrent for police violations. *See, e.g., Steiker, supra* note 6, at 848. Put bluntly, relative to the run-of-the-mill exclusion challenge, cases with facts like those in *Paymer* are happily rare.

229. *See, e.g., Marks, supra* note 10, at 229 ("In moving to practical problems of enforcement, the society takes the definition of the community as given. Decision makers strip the social utility function of utility gained from prohibited acts and commit resources to enforcement commensurate with minimizing losses to law abiding citizens."). Professor Coffee has made a similar point:

[T]he factor that most distinguishes the criminal law is its operation as a system of moral education and socialization. The criminal law is obeyed not simply because there is a legal threat underlying it, but because the public perceives its norms to be legitimate and deserving of compliance. Far more than tort law, the criminal law is a system for public communication of values. As a result, the criminal law often and necessarily displays a disdain for the utility of the criminalized conduct to the defendant.

Coffee, *supra* note 57, at 193–94 (footnote omitted).

only mean that a district court's use of its inherent "supervisory powers" to thwart the introduction of the evidence is justified where there is a proper finding that the government's violation was willful.²³⁰ In cases in which a violation is not willful, and hence not criminal, the use of such supervisory powers would be inappropriate, and conventional standing principles would likely prevent a claim under the balancing process currently and properly employed by the Court.

At least two arguments are likely to be leveled against this proposition. First, the removal of criminal utility from the social welfare equation in the exclusion context will result in a windfall to defendants like Payner who otherwise lack standing to assert constitutional claims.²³¹ Second, permitting federal trial courts to use their supervisory powers to exclude such criminally acquired evidence will authorize the exercise of "standardless discretion" in application of the exclusionary penalty which may lead to its "indiscriminate application."²³² Neither of these fears is sufficiently weighty to justify lenience in cases involving intentional police criminality. To begin with, the suggestion that defendants who lack standing to assert a constitutional claim will receive a windfall is overblown. It was, after all, the government's interest in the target defendant in *Payner* that motivated its willfully lawless decision to search in the first place. The IRS had no interest in the bank officer whose rights were violated; it intended to use any evidence found against the target of its official investigation, Jack Payner. To suggest that Payner would receive a windfall if the government were penalized for engaging in criminal conduct that was directed against him seems ludicrous.

Moreover, the fear that district courts will exclude evidence willy-nilly if permitted to use their supervisory authority is also largely fanciful. As argued above, in relation to the universe of exclusion cases, the number of cases involving evidence of intentional police misconduct is exceedingly small. Only in the rare case will a trial court even face the question of whether to exercise its supervisory authority by reason of willful police behavior. Not only does this illuminate the very circumscribed dimensions of the concern about over-application of the exclusion penalty, it counsels

230. Support for differing levels of aggressiveness when applying the exclusion sanction in these two settings is found in Professor Cooter's argument that it is sometimes appropriate to adjust sanctions to deter wrongdoing. Cooter argues: "Deterring actors whose fault is intentional, deliberate, or repeated requires a more severe sanction than deterring actors whose fault is unintentional, spontaneous, or committed for the first time." Cooter, *supra* note 8, at 1537.

231. For an excellent exposition of the classic windfall argument, see Kades, *supra* note 6, at 1564-66.

232. *Payner*, 447 U.S. at 733.

an aggressive judicial response to such misbehavior when it comes to light.²³³

In summary, the consideration of the evidence collected by virtue of a police officer's intentionally unconstitutional act is the equivalent of considering the gains enjoyed by any other criminal. As such, borrowing from arguments made by law and economics scholars about the impropriety of considering criminal utility in the social welfare function, exclusion should never be withheld in such cases on the ground that the benefits of admission outweigh its costs.

C. THE GOOD FAITH EXCEPTION

To this point our application of price and sanction theory has led to the conclusion that the exclusion penalty is a sanction. We have also seen that various features of the Court's application or nonapplication of the penalty have either undermined its effectiveness as a sanctioning tool, or threaten to do so. It is equally true that price and sanction theory provides crucial *support* for the Court's development of another important, though widely criticized, feature of the penalty of exclusion—the “good faith exception.” The good faith exception calls upon the courts to determine whether the officers who engaged in constitutionally harmful evidence-gathering activities possessed mental states sufficiently blameworthy to warrant penalty.²³⁴ At a minimum, an officer's mental state must be objectively reasonable to find refuge from exclusion under the exception. In such cases, exclusion is unwarranted on the compelling theory that no deterrent value will be achieved in excluding evidence which an officer reasonably believes she is lawfully entitled to collect.²³⁵ If the officer's mental state is not reasonable, however, the good faith exception will not apply, and exclusion is warranted.²³⁶

233. Even if such willful violations are more common than the cases suggest, this would only provide further support for diligent application of the exclusion penalty, for in this event the need to ratchet up the sanction would become even greater.

234. See *United States v. Leon*, 468 U.S. 897, 918–21 (1984).

235. See *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting).

When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future

Id.

236. This assumes of course that none of the other categorical exceptions apply. See *supra* text accompanying notes 127–62.

The creation of the good faith exception for the exclusion penalty is entirely consistent with the choice of a sanction to penalize official constitutional transgressions. As we saw in Part I, an inquiry into mental states is central to the application of any penalty that we would call a sanction. If a penalty is triggered only by proof of the presence of a culpable mental state of negligence or worse, it is likely to be a sanction. If it does not apply in cases involving reasonable, though harmful action—i.e., if it is not applied on a strict liability basis—the conclusion that it is a sanction is further solidified. This is precisely how the exclusion penalty, as qualified by the good faith exception, seeks to operate. The good faith exception ensures that the exclusion sanction will not be applied on a strict liability basis. Its adoption simultaneously highlights the importance of an officer's good faith conduct in gathering evidence and relays the additional implicit message that police conduct not taken in good faith will be considered wrongful. In short, its creation "fits" Professor Cooter's sanction paradigm.

However, some legal commentators have publicly worried that the good faith exception "weakens the doctrinal desiderata of general deterrence of improper police conduct"²³⁷ by lessening police incentives to learn the difference between constitutional and unconstitutional action and by forfeiting the exclusion penalty's inherent "educative effect" in this ongoing learning process.²³⁸ Others are skeptical of the fundamental premise of the exception, that "the police cannot learn the requirements of the Fourth Amendment from the mistakes of others."²³⁹ Only by imposing the penalty, even in cases of reasonable police conduct, these critics argue,

237. Burkoff, *supra* note 6, at 121 (urging the adoption of a bad faith exception and the rejection of a good faith exception) (emphasis omitted).

238. *Id.* Professor LaFave has made the point in the following way: "[A]dmission of illegally seized evidence under a 'good faith' exception would be perceived or treated by the police as a license to engage in the same conduct in the future." LaFave, *Fourth Amendment*, *supra* note 6, at 358.

239. Meredith B. Brinegar, Recent Development, *Limiting the Application of the Exclusionary Rule: The Good Faith Exception*, 34 VAND. L. REV. 213, 228 (1981). See also Bradley, *supra* note 6, at 295–96, 299 (arguing police "carelessness certainly can be deterred by appropriate sanctions" and even in cases where the police "try their best" but "still make a 'good faith' mistake" they should be "admonished to try harder"); Burkoff, *supra* note 6, at 121–22 (arguing "there is no reason to suppose . . . that a police officer . . . cannot learn that particular conduct is improper whether that lesson is derived from intended or unintended improper action"). For other work critical of the good faith exception, see Dripps, *supra* note 183, at 907 (defending the *Leon* result, but condemning the Court's reasoning); Michael Hunter, *Is the Exclusionary Rule a Relic of the Past? Leon, Sheppard and 'Beyond'*, 12 OHIO N.U. L. REV. 165 (1985); Yale Kamisar, Gates, 'Probable Cause,' 'Good Faith,' and *Beyond*, 69 IOWA L. REV. 551 (1984); Robert L. Misner, *Limiting Leon: A Mistake of Law Analogy*, 77 J. CRIM. L. & CRIMINOLOGY 507 (1986); Wasserstrom & Mertens, *supra* note 6; David Clark Esseks, Note, *Errors in Good Faith: The Leon Exception Six Years Later*, 89 MICH. L. REV. 625 (1990).

will the police be reminded of the weighty substantive requirements of the Fourth Amendment. Failure to apply the penalty will cause neglect of this reminder and trivialize the constitutional mandates.²⁴⁰

Several observations can be made about these concerns. First, the arguments provide additional support for the conclusion reached in Part II, that the exclusion penalty is, and perhaps rightly should be, a sanctioning rather than a pricing device. The crux of the arguments is that failure to impose punishment in all cases of constitutional error dilutes the important normative message that violations of the Amendment are wrongful. These points highlight once again the widely held view that the substantive requirements of the Amendment are mandatory, and violations should be prohibited. Under Professor Cooter's definitions, this would mean that the penalty for violating the Amendment is a sanction not a price.

While critics of the good faith exception apparently support the view that the penalty of exclusion should be imposed as a sanction in cases of constitutionally culpable police error, they shift gears midstream by advocating that the penalty should be imposed as a *price* in other cases—i.e., where the police have acted non-negligently, but harmfully, or, “in good faith.” By advocating that the penalty should be applied even to an officer who reasonably relies in good faith on a judicial officer's erroneous authorization of a search warrant, opponents of the good faith exception advocate the adoption of a pricing mechanism to penalize official error.

Although the application of prices and sanctions in a single area of the law is not unprecedented,²⁴¹ it is inadvisable in this area of the law for several reasons. First, and most pragmatically, application of the penalty without regard for good faith police conduct will fuel public and official disenchantment with the penalty. Naturally, the costs of the exclusion penalty²⁴² appear greater when the reasons for applying the penalty are

240. See Burkoff, *supra* note 6, at 121. Cf. William H. Theis, “Good Faith” as a Defense to Suits for Police Deprivations of Individual Rights, 59 MINN. L. REV. 991, 1022 (1975) (arguing that the notion that an officer's good faith could “mitigate the wrong inflicted by his violation of the guidelines on arrest, search, and seizure implies that these rights are not really important”).

241. Prices and sanctions are used in tort law, for example. See Cooter, *supra* note 8, at 1538–44.

242. I recognize that many criminal procedure commentators reject the proposition that the exclusionary rule itself imposes costs. See, e.g., Yale Kamisar, ‘Comparative Reprehensibility’ and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 36 n.151, 47–48 (1987) (arguing that any costs associated with the exclusionary rule are costs imposed by the Fourth Amendment). The argument is essentially that police adherence to the commands of the Fourth and Fifth Amendments would have the same effect as application of the exclusionary rule, no more and no less. Both situations would result in no useable evidence. In the former, evidence would not be useable because the police complied with the Amendments and obtained no evidence, in the latter, because whatever they obtained was suppressed via application of the rule. Thus the “cost” of the exclusion penalty is in truth a cost of

more clouded, as they are when individual police officers have engaged in no identifiable wrongs. Application of the penalty in such cases could well cause the public to withdraw its support for the exclusion remedy, particularly in light of evidence that public support of the penalty is at times precarious.²⁴³

Application of the exclusion penalty in cases involving no culpable police conduct could also diminish police respect for constitutional boundaries.²⁴⁴ If the police perceive that they are being treated unfairly by being penalized not only for their own constitutional missteps, but also the missteps of others, deliberate acts of official defiance could well increase rather than decrease.²⁴⁵ In short, a broad-stroke application of the sanction in a manner insensitive to these views may result in erosion of both the sanction's natural base of support and official regard for the penalty. Such an application would lead the public to ponder whether the penalty is worth the nickel, and the police to question whether it is worth their compliance—the exact opposite of what critics of the good faith exception hope to achieve.

Second, and more fundamentally, scant utilitarian or retributive reasons exist to justify application of the penalty without regard to personal fault. Contrary to the arguments of those critical of *Leon's* good faith

the Amendments themselves which forbid the errant police conduct to begin with. Compare Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1563 (1972) (stating that “under the exclusionary rule a court attempts to maintain the status quo that would have prevailed if the constitutional requirement had been obeyed”), with Amar, *supra* note 6, at 793–94 (criticizing this argument as “too quick” and arguing that in many situations exclusion confers a huge benefit on criminal actors). I find it unnecessary to enter this interesting but well-canvassed debate here.

243. The recent experience of United States District Court Judge Baer in New York provides some evidence that the public's support for the penalty is precarious. See *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996) (ordering the suppression of drug evidence), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996). Judge Baer's unilateral decision to reverse his own exclusion decision followed heavy criticism of the exclusion decision. For a thoughtful analysis of the *Bayless* decisions, see L. Timothy Perrin, H. Mitchell Caldwell, & Carol A. Chase, with Ronald W. Fagan, *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 671–72 (1998).

244. A study conducted by Myron Orfield suggests that we must retain the good faith exception if we hope to promote official respect for and submission to the exclusionary rule. See Myron W. Orfield, Jr., Note, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987). Orfield surveyed the views of members of the Chicago police force toward the penalty and found that whatever support existed for the penalty was inextricably tied to the existence of a good faith exception. See *id.* at 1051 (“all of the officers responded that the rule should be preserved with a good faith exception”). See also Perrin et al., *supra* note 243, at 732 & n.453 (reporting similar police sentiments).

245. As put by Professor Slobogin, exclusion causes resentment on police forces and “[d]isregarding the degree of officer culpability is likely to exacerbate that sense of unfairness.” Slobogin, *supra* note 6, at 383.

exception,²⁴⁶ penalizing the actions of officers who have engaged in no individual wrongdoing is hard to justify on either utilitarian or retributive grounds. The classic instrumentalist goals of specific and general deterrence are not achieved by penalizing police whose behavior satisfies a standard of constitutional reasonableness because deterrence of constitutional harms can only be achieved if the police have reason to know that they are imposing such harm in the first place. Cases that fall under the good faith exception simply do not fit this condition.²⁴⁷ Assuredly, opponents of the good faith exception would be on firmer ground had the Court extended the exception to cover warrantless searches conducted on an officer's own "good faith" but erroneous belief that the search was reasonable.²⁴⁸ However, the Court has not done this. Thus when an officer satisfies the time-consuming constitutional requirement of securing a warrant, and that warrant is approved by a neutral and detached magistrate, and the officer reasonably relies on that approval and executes that warrant in full compliance with the law, if a defect in the warrant subsequently comes to light, no deterrence goal is achieved (vis-a-vis the individual officer, his superiors, or the nation's police force as a whole) by excluding the evidence the officer collects.

The retributive case for penalizing such police error is even less compelling. Even if the police are fairly punished by the penalty of exclusion for inflicting careless constitutional harms, harms inflicted through police conduct that cannot be characterized as "wrongful" also cannot be justified on the ground of desert. Indeed, such an approach would unmoor the penalty from the fundamental retributivist premise that

246. See, e.g., WHITEBREAD & SLOBOGIN, *supra* note 117, § 2.03, at 26–30; Alschuler, *supra* note 6; Bradley, *supra* note 6, at 287–304; LaFave, *Call of Expediency*, *supra* note 6; Wasserstrom & Mertens, *supra* note 6.

247. On the other hand, cases involving constitutionally careless behavior by the police will support exclusion.

248. Many feared that the Court would extend the exception to allow the introduction of evidence gathered by officers acting without a warrant on the objectively reasonable belief that their actions were constitutionally sound. See, e.g., Fabi, *supra* note 187, at 951 (fearing that the good faith exception would "serve[] as a springboard for further limits and exceptions to the rule"); James P. Fleissner, *Glide Path to an "Inclusionary Rule": How Expansion of the Good Faith Exception Threatens to Fundamentally Change the Exclusionary Rule*, 48 MERCER L. REV. 1023, 1033 (1997) (fearing that the good faith exception would be extended to warrantless searches and seizures); Richard E. Hillary, Note, *Arizona v. Evans and the Good Faith Exception to the Exclusionary Rule: The Exception is Swallowing the Rule*, 27 U. TOL. L. REV. 473, 503 (1996) (arguing a post-*Leon* decision extending the good faith exception to errors made by court clerical personnel represented a "further deterioration of Fourth Amendment rights" and predicting that the exception would eventually "swallow the rule"). However, the Supreme Court has now had 15 years to take this step and has not done so. Thus it is reasonable to conclude that the predictions that the exception would "swallow the rule" were overblown.

wrongdoing, and only wrongdoing, warrants the infliction of punishment.²⁴⁹

Finally, even if constitutional harms imposed by officers acting in good faith were priced in some way, choosing exclusion as the price would not be wise. If punishable at all, constitutional harms inflicted in good faith should not be priced by the same device the Court has fashioned to deliver a message of moral condemnation. Application of a penalty distinct from exclusion²⁵⁰ is advisable to avoid the normative confusion that would result from excluding evidence in the two different contexts for two very different reasons (in the area of culpable conduct to send a message of wrongfulness, and in the area of nonculpable conduct to make state or federal governments internalize the cost of the harm). Moreover, the penalty of exclusion simply does not constitute a sufficiently agile pricing tool. Recall that pricing penalties require actors to internalize the harms they impose on others.²⁵¹ As such, prices attempt fairly precisely to track the costs of harmful behavior.²⁵² It is not possible to achieve such precision through the application of the much blunter tool of exclusion, which treats all evidence-gathering harms in exactly the same way.²⁵³

D. SHOULD THE COURT HAVE CHOSEN A PRICING DEVICE?

Even if the reader is by now persuaded that the device chosen to punish official constitutional transgressions—the penalty of exclusion—is a

249. For a classic explanation of the retributivist viewpoint, see IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE: PART ONE OF THE METAPHYSICS OF MORALS* (John Ladd trans., Hackett Publ'g Co. 2d ed. 1999) (1797).

250. There are other conceivable penalties for the violation of Fourth Amendment rights, including (primarily in this context) civil damages.

251. See *supra* text accompanying notes 45–48.

252. “For efficiency, the price must fully reflect the external harm caused by the behavior. . . . [A]ccuracy is crucial to induce behavior that is efficient or otherwise desirable.” Cooter, *supra* note 8, at 1532.

253. On the other hand, the same analysis that supports the Court’s adoption of the good faith exception adds strength to my earlier call for the creation of a complimentary “bad faith” doctrine under which all evidence obtained in willful violation of another’s constitutional rights would be excluded regardless of the applicability of any of the categorical exceptions discussed in Part II. One possible argument against the development of a bad faith doctrine is that it will send the courts “on an expedition into the minds of police officers” and “produce a grave and fruitless misallocation of judicial resources.” *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (per curiam) (White, J., dissenting). I find this argument unpersuasive. Subjective intentions and motives are frequently the subject of judicial inquiry and legal standards. See Paul Brest, *Reflections on Motive Review*, 15 *SAN DIEGO L. REV.* 1141, 1142 (1978) (arguing that many laws make an actor’s motive a determinative issue to liability). Moreover, as perhaps put best by Justice Holmes: “If justice requires [a] fact to be ascertained, the difficulty of doing so is no ground for refusing to try.” *THE COMMON LAW*, *supra* note 14, at 41.

sanction, and that price and sanction theory reveals that the Court's application of the sanction has been flawed in some respects and justified in others, a question remains as to whether the Court should have adopted a pricing penalty instead.

Professor Cooter has argued that lawmakers should sanction rather than price behavior in two situations: where the optimal amount of the occurrence of the behavior "is nil",²⁵⁴ and "when lawmakers have better information about community standards than about external costs."²⁵⁵ The paradigm example of the first situation is premeditated murder. A helpful example of the second situation, is any behavior deemed "criminal," for society has reached a consensus that such behavior should be completely rather than optimally deterred, and the lawmakers generally possess greater information about those standards than the external costs inflicted by the behavior.

Therefore, cases in which an officer's constitutionally defective behavior rises to the level of criminality (i.e., when the officer willfully violates the constitutional rights of another) would plainly fall within the first situation. The optimal occurrence of such violations would be nil, and a sanctioning approach would be advisable. Where, however, an officer's behavior is constitutionally objectionable but not criminal, the Supreme Court's cost-benefit approach suggests that the optimal occurrence of such practices may not be nil. If true (and many would disagree that it is), a sanctioning approach might nevertheless be advisable for reasons associated with the second situation. That is, a question remains as to whether the courts have better information about the preferred community standard (exclusion of tainted evidence) or better information about the external costs imposed by defective evidence-gathering behavior.

Although I do not feel compelled in this Article to take a definitive position on the question of whether a pricing or sanctioning penalty is preferable to address constitutionally defective evidence-gathering acts, I will offer to others intrigued by this question some thoughts that have led me to conclude, at least preliminarily, that a sanction is the better choice. First, if the exclusion penalty were replaced by a pricing penalty, to come up with the correct "price" for violative police behavior, lawmakers would have to be able accurately to calculate the amount of external harm caused by a violation of the Fourth and Fifth Amendments, as well as the cost to the police to comply. This may be extremely difficult to do in this area of

254. Cooter, *supra* note 8, at 1548.

255. *Id.* at 1549.

human behavior. Several amorphous questions would have to be resolved, such as: What is the value of the harm suffered when a person's privacy interest is invaded by the police? Does the value shift upward when the privacy loss is suffered inside the normal security of one's own home? Downward when it occurs in some other venue such as a workplace? A public restaurant? A hotel room? Is the value affected when the invasion takes place in the presence of others, such as one's spouse, children, boss, colleagues? Does it vary with the nature of the item in which the privacy interest resides? Does it fluctuate with the number of items seized? Is it enhanced when it involves an intrusion onto or beneath the body surface? Or more fundamentally, what is the value of a constitutional right? This list includes only some of the vexing questions that would assuredly plague courts called upon to put a price tag on lawless official intrusions.

There is an additional policy reason to prefer the Court's present sanctioning approach (with, in my view, some modifications) to a pricing approach in this area. As explained in Part I, assuming reasonable imposition, a sanction will encourage greater compliance with underlying legal standards than will a price. Because of the sharp discontinuity associated with sanctions, most officers facing a sanctioning penalty will comply even if violations sometimes go undetected. This is not true for pricing penalties: "[I]f a price sometimes goes uncollected, then most self-interested people will change their behavior," toward imposing more harms.²⁵⁶ If the goal of the exclusion penalty is greater police compliance with constitutional dictates, that goal is enhanced by the choice of a sanctioning penalty over a pricing penalty.

CONCLUSION

This Article examines the merits of taking a fresh look at the penalty of exclusion through the lens of price and sanction theory. The question of whether we in fact employ a pricing or a sanctioning strategy when penalizing police misbehavior is a deserving topic of reflection for several reasons. First, if, as is argued here, the exclusion penalty is a sanction, it is designed to communicate society's view that police violations of constitutional rights are wrongful and prohibited, rather than permissible for a price. Second, if exclusion is a sanctioning device, as I argue here, it is fair to expect it to stand up to scrutiny as such. This in turn raises the question whether the Supreme Court's application of the penalty over time

256. Cooter, *supra* note 8, at 1551.

has been consistent with sanction theory or has undercut the penalty's ability to operate as a potent sanctioning instrument.

While the Court's development of the deterrence rationale and categorical restrictions on the penalty make the penalty appear more and more price-like, close examination of the text of the Fourth and Fifth Amendments and the Court's decisions reveal that the exclusion penalty is best described as a sanction. However, the cost-benefit analysis currently used by the Court to determine when the benefits of applying the sanction justify its costs skews the sanction's normative message. The Court's failure to emphasize the prohibited nature of official constitutional violations in cases in which it has retreated from the penalty has resulted in a state of confusion about the mandatory nature of the constitutional requirements. The practice of "going outside *Miranda*," displays the full impact of this confusion.

Moreover, in cases where the police misconduct is intentional, because sanctions seek to prohibit regulated conduct and because intentional police misconduct is a criminal act, the moral message underlying the choice of a sanction rather than a price is that the conduct is impermissible and that the penalty for that conduct will not take into account the cost the law imposes when it denies the state the right to engage in the prohibited behavior (i.e., will not take into account the state's gain from the unlawful conduct). Although benefits from violative police conduct are conceivable, those benefits should not play a part in the determination of the appropriate penalty for the conduct where the conduct rises to the level of criminality. Put slightly differently, a penalty that sanctions criminal conduct should not be affected by the criminal's gains. In the exclusionary rule context, this means that, in cases involving police criminality, the Court's current consideration of the "cost" suffered when the penalty is applied (the loss of probative evidence valuable to the state) is inappropriate.

The same is not necessarily true for a sanction that penalizes noncriminal conduct, such as a sanction for an unintentional police deprivation of constitutional rights. Although such a sanction also seeks to prohibit rather than price the behavior, the misbehavior does not arise to a criminal act. Thus, it might nevertheless be appropriate to mitigate the sanction imposed for such conduct by weighing the "cost" imposed when the state is denied the use of wrongfully, but not criminally, secured evidence. This conclusion is consistent with the way in which the Court currently applies the exclusionary penalty.