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Rethinking Miranda: Custodial Interrogation as a Fourth Amendment Search and Seizure, 37 U.C. Davis L. Rev. 1109 (2004)

Timothy P. O'Neill
The John Marshall Law School, Chicago, 7oneill@jmls.edu

Rethinking *Miranda*: Custodial Interrogation as a Fourth Amendment Search and Seizure

Timothy P. O'Neill[*]

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* Professor, The John Marshall Law School. A.B., Harvard University; J.D., University of Michigan Law School. Each year of teaching has made me more aware of the debt I owe to those who taught me through all stages of my education: Thomas Shea, Edward Flint, Alpheus T. Mason, William Alfred, Doris Kearns Goodwin, James Martin, and David Chambers, to name only a few. But I have learned the most important lessons in life from Virginia O'Neill, Jane Rutherford, Erin O'Neill, and Shane O'Neill. To all of you, this Essay is dedicated.

INTRODUCTION

After thirty-eight years, *Miranda v. Arizona*[1] remains a case in search of a constitutional basis.

Miranda's constitutional problems began with the *Miranda* opinion itself. Based on the Warren Court's then recent decisions in *Gideon v. Wainwright*,[2] *Massiah v. United States*,[3] and *Escobedo v. Illinois*,[4] Ernesto Miranda's defense counsel argued that suspects facing custodial interrogation had a Sixth Amendment right to counsel.[5] Chief Justice Warren, however, began his majority opinion in *Miranda* by announcing that the decision would instead be predicated on the Fifth Amendment's Self-Incrimination Clause.[6] Courts and commentators immediately tried to explain the exact nature of the relationship between the new *Miranda* warnings and the Self-Incrimination Clause.[7] The search for the definitive account of *Miranda*'s constitutional foundation has been

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] *See* Gideon v. Wainwright, 372 U.S. 335, 341-42 (1963) (holding that Sixth Amendment right to assistance of counsel is fundamental right; thus Due Process Clause of Fourteenth Amendment guarantees assistance of counsel to any state defendant charged with felony).

[3] *See* Massiah v. United States, 377 U.S. 201, 205-06 (1964) (stating that Sixth Amendment right to assistance of counsel forbids government from using secret agent to deliberately elicit incriminating statements about crime for which defendant has already been charged).

[4] *See* Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (holding that when suspect is focus of police investigation and police wish to engage him in custodial interrogation, police deny him his Sixth Amendment right to assistance of counsel if they refuse his request to consult with counsel and fail to warn him of his absolute right to remain silent).

[5] *See* John J. Flynn, *Panel Discussion on the Exclusionary Rule*, 61 F.R.D. 259, 278 (1972), *quoted in* YALE KAMISAR, MODERN CRIMINAL PROCEDURE 462 (10th ed.) (2000) ("When certiorari was granted . . . we agreed that the briefs should be written with the entire focus on the Sixth Amendment [right to counsel] because that is where the Court was headed after *Escobedo*, and, as you are all aware, in the very first paragraph [of the *Miranda* opinion] Chief Justice Warren said, 'It is the Fifth Amendment to the Constitution that is at issue today.' That was *Miranda*'s effective use of counsel.").

[6] *Miranda*, 384 U.S. at 439.

[7] *See generally* Symposium: Miranda *After* Dickerson: *The Future of Confession Law*, 99 MICH. L. REV. 879 (2001) (containing comprehensive review of both cases and literature dealing with constitutional issues surrounding *Miranda*).

rivaled only by attempts to prove Fermat's Last Theorem.[8]

The Supreme Court itself first muddied the waters in 1971 when it held that statements obtained in violation of *Miranda*, which could not be used in the prosecution's case-in-chief, could nevertheless be used for impeachment.[9] Then, beginning in 1974, the Burger Court repeatedly held that *Miranda* warnings themselves were not actually required by the Fifth Amendment, but functioned rather as a "prophylactic" that over-protected the right against self-incrimination; in other words, sometimes a statement obtained in violation of *Miranda* actually violated the Fifth Amendment and sometimes it did not.[10]

Regardless, the Supreme Court continued to maintain that any statement obtained in violation of *Miranda* could not be used in the prosecution's case-in-chief. This led the late Professor Joseph Grano to contend that if indeed the prophylactic quality of *Miranda* sometimes resulted in state courts being forced to suppress perfectly constitutional confessions, then *Miranda* was a constitutionally illegitimate decision.[11] In response, commentators such as David Strauss argued that prophylactic rules were constitutionally legitimate,[12] while Stephen J. Schulhofer maintained that all statements produced in violation of *Miranda* actually did run afoul of the Fifth Amendment because they had been, *a fortiori*, compelled.[13]

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[8] Fermat's Last Theorem — which states that the equation $x^n + y^n = z^n$ has no solution for non-zero integers x, y, and z, if n is an integer greater than two — remained unproven for over 350 years. *See, e.g.*, http://www.pbs.org/wgbh/nova/proof.

[9] Harris v. New York, 401 U.S. 222, 225-26 (1971).

[10] *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974) (stating that *Miranda* warnings are not rights themselves under Fifth Amendment, but rather "procedural safeguards" to protect that right). *Tucker* held that the police conduct had not violated respondent's right against self-incrimination, even though the conduct had violated the protections established by *Miranda*. *Id.* at 445. *See also* New York v. Quarles, 467 U.S. 649, 654 (1984) (explaining that *Miranda* warnings are intended to act merely as "practical reinforcement" of one's Fifth Amendment rights). *Quarles* found that the police officers had failed to give the proper warnings before interrogation, but nevertheless held that this conduct did not amount to coercion in direct violation of his Fifth Amendment rights. *Id.* at 654-55. *See also* Oregon v. Elstad, 470 U.S. 298, 305 (1985) (reinforcing notion that *Miranda* warning is "prophylactic rule" but is not constitutional right per se). *Elstad* held that where police officers have merely failed to give proper *Miranda* warnings, the "fruit of the poisonous tree" doctrine does not apply because it requires a constitutional violation as a prerequisite for its application. *Id.* at 305-07.

[11] Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 123-56 (1985).

[12] David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 209 (1988).

[13] Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 453 (1987).

Courts and commentators have not been able to agree on just how to describe a statement produced in violation of *Miranda*. Is it "compelled"?[14] Is it "presumed compelled"?[15] Is it "coerced"?[16] Is there a difference between coercion and compulsion?[17] If not, should there be?

All this, of course, was supposed to have been settled four years ago by *Dickerson v. United States*.[18] *Dickerson* re-affirmed *Miranda*, but shed

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[14] *Id.* at 442.

[15] *See Quarles*, 467 U.S. at 664 (O'Connor, J., concurring in judgment in part and dissenting in part) ("When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers received be presumed compelled and that they be excluded from evidence at trial.").

[16] *See id.* at 684 (Marshall, J., dissenting) ("[*Miranda*] was a decision about coerced confessions.").

[17] Traditionally, the Supreme Court has used "coercion" to describe the kind of government malfeasance that led to a confession being found to be "involuntary" and thus inadmissible for any purpose under the Due Process Clause. *See* Haynes v. Washington, 373 U.S. 503, 513 (1963) (finding confession "involuntary" under Fourteenth Amendment Due Process Clause, noting that "confession was obtained in an atmosphere of substantial coercion"); Leyra v. Denno, 347 U.S. 556, 558 (1954) ("The use in a state criminal trial of a defendant's confession obtained by coercion — whether physical or mental — is forbidden by the Fourteenth Amendment."); Brown v. Mississippi, 297 U.S. 278, 280 (1936) (finding confessions procured by police violence against defendant to be "involuntary" under Fourteenth Amendment Due Process Clause and noting "that [the confessions] were procured by coercion was not questioned"). The *Miranda* Court took great pains to note that statements that would have to be suppressed for *Miranda* warning violations — and thus found improperly "compelled" under the Fifth Amendment Self-Incrimination Clause — may not necessarily have been "coerced" under the Due Process Clause. Miranda v. Arizona, 384 U.S. 436, 448-49 (1966). As the *Miranda* Court explicitly held in considering the various confessions involved in the case, "[W]e might not find the defendants' statements to have been involuntary in traditional terms." *Id.* at 457. The Court then went on to describe the *Miranda* warnings as a device necessary to "dispel the *compulsion* inherent in custodial surroundings." *Id.* at 458 (emphasis added). Moreover, Stephen J. Schulhofer has convincingly argued that "coercion" under the "involuntariness" test of the Due Process Clause and "compulsion" under the Fifth Amendment's Self-Incrimination Clause are indeed separate and distinct concepts. *Schulhofer, supra* note 13 at 441-44.

Yet Supreme Court opinions after *Miranda* have never recognized this distinction. *See, e.g.*, George C. Thomas III, *Separated At Birth But Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1086-87 (2001) (discussing how Supreme Court's subsequent refusal to recognize *Miranda*'s distinction between "coerced" and "compelled" statements has essentially transformed *Miranda* into Due Process Clause, rather than Self-Incrimination Clause, case). As previously noted, Justice Marshall in his dissent in *Quarles* — joined by both Justices Brennan and Stevens — inaccurately referred to *Miranda* as a case about "coerced" confessions. *Quarles*, 467 U.S. at 684 (Marshall, J., dissenting). And most recently the Court pointedly referred to the "coercion inherent" in custodial interrogation (Dickerson v. United States, 530 U.S. 428, 435 (2000)), while blithely ignoring that *Miranda* itself, relying on the Self-Incrimination Clause, specifically referred to the "*compulsion inherent*" in custodial interrogation. *Miranda*, 384 U.S. at 458 (emphasis added).

[18] *Dickerson*, 530 U.S. 428 (2000).

absolutely no light on just *why* the Self-Incrimination Clause requires *Miranda* warnings. Chief Justice Rehnquist's opinion for seven members of the Court unhelpfully tells us that "*Miranda* is a constitutional decision,"[19] "*Miranda* is constitutionally based,"[20] and that *Miranda* has "constitutional underpinnings."[21] But nowhere does it explain *why*. Justice Scalia in dissent may not have been far off the mark when he wrote that it would have been impossible for the Court's opinion to have simply said that custodial interrogation not preceded by *Miranda* warnings violated the Constitution; Scalia acerbically suggested that the opinion could not have said this because "a majority of the Court does not believe it."[22]

Dickerson appears to have settled very little.[23] This was borne out last May by the Court's most recent opinion dealing with a *Miranda* issue, *Chavez v. Martinez*.[24] *Chavez* held that there is no Fifth Amendment violation when the police merely obtain statements through custodial interrogation without providing *Miranda* warnings; the Fifth Amendment is only implicated if the statements are actually used in a criminal case against the suspect.[25] How many times did the two primary opinions constituting the majority's holding cite *Dickerson*?[26] Zero. The situation promises to become even more confusing during the 2003 Term in which the Court has already heard two more major cases involving *Miranda* issues.[27]

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[19] *Id.* at 432-38.

[20] *Id.* at 440.

[21] *Id.* at 440 n.5.

[22] *Id.* at 446 (Scalia, J., dissenting).

[23] *See* Stephen J. Schulhofer, Miranda, Dickerson, *and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941, 941 (2001) (writing that *Dickerson* "perpetuated an extraordinarily confusing and illogical notion of what the Fifth Amendment means").

[24] Chavez v. Martinez, 123 S. Ct. 1994 (2003).

[25] *Id.* at 1999-2004 (Thomas, J., plurality opinion joined by Rehnquist, C.J., O'Connor, J., and Scalia, J.); *id.* at 2013 (Kennedy, J., concurring in part and dissenting in part, joined by Stevens, J.).

[26] The decision was cobbled together from parts of Justice Thomas's opinion that announced the judgment of the Court and parts of Justice Souter's separate opinion. *Id.* at 1999-2004 (Thomas, J., plurality opinion); *id.* at 2008 (Souter, J., writing for majority on scope of remand).

[27] *See* United States v. Patane, 304 F.3d 1013 (10th Cir. 2002), *cert. granted*, 123 S. Ct. 1788 (2003) (determining whether *Miranda* violation requires suppression of physical evidence); Missouri v. Seibert, 93 S.W.3d 700 (Mo. 2002), *cert. granted*, 123 S. Ct. 2091 (2003) (deciding whether *Oregon v. Elstad* is limited only to situations in which initial failure to provide *Miranda* warnings was unintentional).

Faced with the Gordian knot of *Miranda*'s relationship with the Self-Incrimination Clause, this Essay will eschew the path of Alexander the Great. That is, it will neither critique nor attempt to undo any of the last thirty-eight years of cases and commentary on *Miranda* and the Fifth Amendment. All of this is beyond the scope of this Essay.[28]

Instead, this Essay will suggest that there is a reason why courts and commentators have had so much trouble reconciling *Miranda* with the Fifth Amendment. Quite simply, the real values of *Miranda* are Fourth Amendment values. *Miranda* is a Fourth Amendment case dressed up in Fifth Amendment clothes. And there is a reason the Court had to choose an ill-fitting Fifth Amendment wardrobe: the Court decided *Miranda* in 1966, two years before it would decide three very significant search and seizure cases that would clarify the relationship between custodial interrogation and the Fourth Amendment.[29]

Why the Fourth Amendment? Because — although this was not clear in 1966 — interrogation is nothing less than an attempt to "search" a person's mind. And when the police obtain answers to their questions, they are "seizing" the person's words.

Although government interrogations always involve Fourth Amendment issues, there is normally no need to consider these issues. On the one hand, a person not in custody has no legal obligation to answer any question. If he refuses to answer, fine. If he responds, however, he is giving his implicit "consent" to the "search" and there is no Fourth Amendment problem.

On the other hand, if the government presents a person with a subpoena or an immunity order, the person has a legal duty to answer. The subpoena or immunity order functions as the equivalent of a warrant; the interrogation is then a legal search; and the answers can be legally seized.

There is, however, one kind of interrogation that implicates the Fourth Amendment in a unique way: interrogation of a suspect in police custody. Although a suspect in custody has the legal right to refuse to answer, the aura surrounding a custodial interrogation might make the suspect believe that the police have the authority to force him to answer

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[28] That is, this Essay accepts as settled law the Supreme Court's repeated assertions over the last third of a century that *Miranda* is a Fifth Amendment case. The analysis offered in this Essay is intended to supplement, but not supersede, the Court's extensive body of *Miranda* holdings based on the Fifth Amendment.

[29] *See* Bumper v. North Carolina, 391 U.S. 543 (1968); Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967); *infra* notes 30, 39, 41 and accompanying text.

their questions. This "false authority" is similar to the non-existent warrant the police used to get the grandmother to consent to the search in *Bumper v. North Carolina*.[30] *Bumper* found that the police officer's lying about the existence of the warrant constituted coercion serious enough to make the grandmother's consent invalid and the resulting search unconstitutional. Similarly, the false authority the police appear to possess from the atmosphere surrounding a custodial interrogation means that the consent an unwarned suspect gives by merely answering the questions is equally invalid, and all answers must be suppressed.

May the police ever conduct a custodial interrogation? Certainly. They merely need to obtain the suspect's consent before they begin their search, i.e., the interrogation. The suspect must be warned that he has the legal right not to answer questions. He should be told something along the line of — well, something like, "You have the right to remain silent." (Ironically, as we shall see, the current *Miranda* warnings more accurately express rights under the Fourth Amendment than they do the Fifth Amendment.[31])

As this Essay will demonstrate, there are numerous benefits to seeing custodial interrogation in a Fourth Amendment light. First, it eliminates the tiresome Fifth Amendment debates about compulsion, presumed compulsion, and prophylactic rules; quite simply, a custodial interrogation conducted without proper consent is an unreasonable search and seizure under the Fourth Amendment. Second, contrary to *Chavez*'s view of the Fifth Amendment, the Fourth Amendment would find that a constitutional violation occurs at the moment the *first answer* is obtained as a result of a *Miranda* violation. This means that, under the Fourth Amendment, police departments can be civilly sanctioned for flouting *Miranda* even if the statements are never used at a criminal trial — something that cannot be done under *Chavez*'s interpretation of the Fifth Amendment.[32] Third, the Fourth Amendment forbids use of "fruit of the poisonous tree," thus eliminating the Fifth Amendment loophole from *Oregon v. Elstad* that allows police to obtain inadmissible statements through *Miranda* violations and then, merely by having the suspect repeat the statements after proper *Miranda* warnings and waiver, to magically transform them into admissible statements.[33] Finally, the Fourth Amendment approach provides a much more principled

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[30] *Bumper*, 391 U.S. at 546. Note that *Bumper* was decided two years after *Miranda*.

[31] *See infra* notes 71-73 and accompanying text.

[32] *See infra* notes 79-86 and accompanying text.

[33] Oregon v. Elstad, 470 U.S. 298 (1985).

rationale for recognizing the current "public safety" and "routine booking question" exceptions to *Miranda*.[34]

So if the Fourth Amendment approach is superior, why did the Court not use it in *Miranda*? This Essay suggests that the real reason may have been one of timing. If *Miranda* had been decided just two years later — in 1968, rather than 1966 — attorneys and judges may very well have utilized a Fourth Amendment approach based on the three important Fourth Amendment decisions the Court had recently issued.[35] But once *Miranda* decided that custodial interrogation was a Fifth Amendment issue, it permanently set the constitutional contours for the next thirty-eight years.

This Essay is an attempt to think outside the Fifth Amendment box.

I. ARE SPOKEN WORDS CAPABLE OF BEING "SEARCHED AND SEIZED" UNDER THE FOURTH AMENDMENT?

The Fourth Amendment applies only to searches and seizures. Seizure has been defined as "the act of physically taking and removing tangible personal property."[36] The Supreme Court has said that a seizure of property occurs when "there is some meaningful interference with an individual's possessory interests in that property."[37]

Can *intangibles* such as words be seized merely by listening to a person speak? In the past, some have argued that this was not possible. In *Olmstead v. United States*, the famous wiretap case decided in 1928, the Court held that "[t]here was no seizure" because the "evidence was secured by the use of the sense of hearing and that only."[38] Years later Justice Black wrote, "It simply requires an imaginative transformation of the English language to say that conversations can be searched and words seized."[39] Similarly, Justice Harlan stated, "Just as some exercise of dominion, beyond mere perception, is necessary for the seizure of tangibles, so some use of the conversation beyond that initial listening process is required for the seizure of the spoken word."[40]

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[34] *See infra* notes 93-99 and accompanying text.

[35] *See Bumper*, 391 U.S. 543; Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967).

[36] 1 WAYNE LAFAVE, SEARCH AND SEIZURE § 2.1(a), at 375-76 (3d ed. 1996).

[37] *Id.* (citing *United States v. Jacobsen*, 466 U.S. 109 (1984)).

[38] Olmstead v. United States, 277 U.S. 438, 464 (1928).

[39] *Berger*, 388 U.S. at 78 (Black, J., dissenting).

[40] *Id.* at 98 (Harlan, J., dissenting).

Yet it is now clear that the spoken word *can* be seized under the Fourth Amendment. In 1967 — only one year after *Miranda* — the Court decided the watershed case of *Katz v. United States*[41] and rejected the rationale of *Olmstead*. In considering the government's warrantless wiretapping of a telephone conversation made in a public phone booth, the Court held that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constitutes a 'search and seizure' within the meaning of the Fourth Amendment."[42] That same year in *Berger v. New York*, another wiretap case, the Court stated that "authorization of eavesdropping for a two month period is the equivalent of a series of intrusions, searches, *and seizures* pursuant to a single showing of probable cause."[43]

Katz and *Berger* also show why listening to another's words can constitute a search as well as a seizure. Although Professor LaFave notes that the U.S. Supreme Court "has never managed to set out a comprehensive definition of the word 'searches' as it is used in the Fourth Amendment,"[44] it has at times defined what a search *is not*. In *Olmstead* in 1928, the Court held that placing a tap on telephone wires outside a house in order to hear Olmstead's telephone conversations inside the house "did not amount to a search . . . within the meaning of the Fourth Amendment" because the "wires are not part of his house or office, any more than are the highways along which they are stretched."[45] *Olmstead* was the source of the doctrine that there could be no search under the Fourth Amendment without a trespass into a "constitutionally protected area."[46]

All this changed during the Warren Court era. In 1961 the Court held that the secret recording of oral statements constituted a search and seizure under the Fourth Amendment even without any technical trespass under local property law.[47] And, as discussed above, in 1967 the Court in both *Katz* and *Berger* formally rejected *Olmstead* by holding that

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[41] Katz v. United States, 389 U.S. 347, 351 (1967).

[42] *Id.* at 353; *see also* Caldarola v. County of Westchester, 343 F.3d 570, 574 (2d Cir. 2003) (holding that police videotaping of arrestee's "perp walk" was seizure of arrestee's *image* and noting, "The Fourth Amendment seizure has long encompassed the seizure of intangibles as well as tangibles.").

[43] *Berger*, 388 U.S. at 59 (emphasis added).

[44] LAFAVE, *supra* note 36 at 380.

[45] Olmstead v. United States, 277 U.S. 438, 465 (1928).

[46] Silverman v. United States, 365 U.S. 505, 512 (1961).

[47] *Id.*

a warrantless wiretap constituted both an unconstitutional search and an unconstitutional seizure.[48]

The underlying rationale supporting the idea that spoken words can be the object of both a search and a seizure was strengthened by the Court's decision three years ago in *Kyllo v. United States*.[49] There the Court held that the use of a "thermal imager" that could measure the amount of heat emanating from a house constituted a search under the Fourth Amendment. The dissenters argued that no search occurred because the thermal imaging device could not penetrate the walls of the house, but could merely "passively measure heat emitted from the exterior surfaces of [the] home."[50] Yet the majority rejected this purported distinction between "through-the-wall" and "off-the-wall" surveillance as being inconsistent with the reasoning of *Katz*. As the *Kyllo* majority noted:

> [J]ust as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house. . . . We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth.[51]

In terms of seizing the spoken word, how far can this rationale be extended? The spoken word is the palpable manifestation of a person's innermost thoughts. Should not a person also be protected from the government "getting inside his head" to discover his thoughts?

In the film *What Women Want*,[52] the character played by Mel Gibson developed the ability to know what women were thinking. What if this ability could be turned into a mechanical device? Assume the government created a mechanism — let's call it a "thought imager" — that could read a person's mind. All the government agent would have to do is point it at a person from up to fifty yards away and the screen would produce a read-out of that person's thoughts. The person would never know that the thought imager was being used on him. Would this constitute a search under the Fourth Amendment?

Before answering, recall what *Kyllo* said about the sanctity of a person's house: "[T]he Fourth Amendment draws 'a firm line at the

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[48] *See supra* notes 41-43 and accompanying text.

[49] Kyllo v. United States, 533 U.S. 27 (2001).

[50] *Id.* at 42 (Stevens, J., dissenting).

[51] *Id.* at 35.

[52] WHAT WOMEN WANT (Paramount Pictures 2000).

entrance to the house.'"[53] The Court rejected the argument that the amount of heat emanating from the house was trivial information, stating, "In the home, our cases show, *all details are intimate details*, because the entire area is held safe from prying government eyes."[54]

Why does the home get this favored protection under the Fourth Amendment? The answer is obvious: "houses" is one of the four categories the Fourth Amendment explicitly protects from unreasonable searches and seizures.

But recall another of the four favored categories: "persons." We normally think of Fourth Amendment protection of persons in terms of seizures (i.e., arrests and *Terry* stops) and searches of a person's body and clothing. But after *Kyllo*, it seems clear that the Fourth Amendment would protect a person from the warrantless use of our hypothetical thought imager. If, when we consider that inside a house "all details are intimate details," how much more intimate are the very thoughts inside a person's head?

II. IF BOTH THOUGHTS AND SPOKEN WORDS MERIT PROTECTION UNDER THE FOURTH AMENDMENT, WHY AREN'T MORE SUPPRESSION MOTIONS PREDICATED ON THE FOURTH AMENDMENT?

There are at least three reasons why more motions to suppress defendants' statements are not predicated on the Fourth Amendment. First, wiretaps have only a limited, albeit important, impact on criminal law. Second, of course, there is no thought imager. But third, and perhaps most importantly, the Fourth Amendment has little actual effect on the admissibility of most words spoken by a person to a government official. This is true for several reasons.

First, consider a situation similar to that in *Colorado v. Connelly*, in which a person walks up to a police officer on the street and confesses to a crime.[55] Obviously the Fourth Amendment would not prevent the prosecution from using this confession against the defendant at trial. As the Supreme Court made clear in *Katz*, "What a person knowingly exposes to the public, even in his own home or office, is not subject to

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[53] *Kyllo*, 533 U.S. at 39 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

[54] *Id.* at 37 (emphasis added).

[55] *See* Colorado v. Connelly, 479 U.S. 157, 160, 165 (1986) (stating that confession made by person whose psychosis arguably interfered with his ability to make free and rational choices was nonetheless "voluntary" because improper state action was sine qua non for finding of "involuntariness").

Fourth Amendment protection."[56] No Fourth Amendment interest is implicated.

Second, consider a situation where a person confesses to a "false friend" who is actually a secret government agent. The Court again has come to the same conclusion: no Fourth Amendment implications. When a person willingly speaks to someone who appears to be a non-governmental official, he runs the risk that that person may actually be a false friend.[57] The Supreme Court affirmed this in a post-*Katz* decision in which the government agent/false friend was also armed with a radio transmitter.[58]

But these cases deal with a person telling someone "what's on his mind" with little or no prompting. What about cases involving police interrogation? Interrogation, after all, is merely a method for finding out what is going on in a person's mind, i.e., searching inside a person's head. And taking *information* is as much of a seizure as taking things.[59]

Is interrogation different from an ordinary police search? Should an officer be forbidden from posing questions to a person on the street without first obtaining a warrant?

Think about a police officer's questioning of a person in a *non-custodial* environment. Assume arguendo that asking a question is indeed an attempt to search a person's mind and to seize the words he uses for an answer. The officer's attempt to question without a warrant is perfectly proper under the Fourth Amendment for one very important reason: the person is free to refuse to answer. Obviously, the officer has no legal right to obtain an answer. Therefore, a question by an officer in a non-custodial setting is also a per se request for Fourth Amendment consent. If the person answers the question, he is agreeing to share the workings of his mind and the information he possesses with the officer; in Fourth Amendment terms, he is consenting to a search of his mind. In other words, the person's answer *implicitly* includes consent to the search and seizure.

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[56] Katz v. United States, 389 U.S. 347, 351 (1967).

[57] *See* Hoffa v. United States, 385 U.S. 293, 302-03 (1966) (holding that conversations relayed by paid government informant are not protected by Fourth Amendment as speaker is not protected when he voluntarily confides information to listener who later betrays his confidence and reports conversation).

[58] *See* United States v. White, 401 U.S. 745, 754 (1971) (holding that Fourth Amendment rights are not implicated when paid informant carries electronic recording device that relays conversation to police).

[59] *See supra* notes 38-45 and accompanying text.

On the other hand, a person is always free to refuse the request for Fourth Amendment consent by simply not answering the question. Recall that the Fourth Amendment does not require an officer to explicitly tell a suspect in a non-custodial setting that he has a right to refuse.[60] Thus, a non-custodial person's voluntarily choosing to answer the question can be construed as giving consent under the Fourth Amendment. And under the Fourth Amendment, consent obviates the need for a warrant.[61] This is why police are allowed to conduct non-custodial questioning without a warrant.

Conversely, the government has the power in certain cases to *force* a person to allow the government to search his mind and seize his answers. As Stephen J. Schulhofer has noted, "[T]he general rule is that the government can legitimately compel witnesses to say what they know. . . ."[62] The government can do this through subpoenas to testify not only at trial, but also before a grand jury or government agencies. Where the person has interposed a valid assertion of his Fifth Amendment right against self-incrimination, the government can trump this with a court order granting immunity and forcing the person to testify.[63] Subpoenas and immunity orders function as equivalents to the Fourth Amendment "warrant requirement."

Thus, in most government interrogation situations there is no conscious need to consider the Fourth Amendment implications — even

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[60] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (holding that express knowledge of right to refuse consent is not dispositive but only one factor in determining whether consent was voluntarily given in non-custodial setting).

[61] *See* Lee v. City of Chicago, 330 F.3d 456, 465 (7th Cir. 2003) (holding that consent is exception to warrant requirement, and that even when consent is retracted, officer with probable cause may retain goods she received while consent was operative); Fox v. Van Oosterum, 176 F.3d 342, 357 n.4 (6th Cir. 1999) (Clay, J., concurring in part and dissenting in part) (stating that because consent is exception to the warrant requirement seizure should consequently be limited to what was actually permitted by owner).

The U.S. Supreme Court has said, "[W]e have held repeatedly that mere police questioning does not constitute a seizure." Florida v. Bostick, 501 U.S. 429, 434 (1991). But, as *Bostick* itself illustrates, this has always assumed a *non-custodial setting*; indeed, *Bostick* goes on to say that police may ask questions of any individual *"as long as the police do not convey a message that compliance with their requests is required." Id.* at 435 (emphasis added). And, of course, that is precisely the message that is conveyed during custodial interrogation: that the suspect *must answer* the police questions. This is why custodial interrogation implicates Fourth Amendment interests. *See infra* notes 68-72 and accompanying text.

[62] Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 313 (1991).

[63] *See, e.g.*, 18 U.S.C. § 6002 (2002) (stating that court may order person to testify and person must comply, but no testimony received under that order may be used against that person in his or her own criminal case).

though there are very real Fourth Amendment interests at stake. Subpoenas, immunity orders, consent, refusal to answer in a non-custodial setting — in most situations one of these options will sufficiently satisfy the Fourth Amendment.

Yet this has blinded us to the one government interrogation situation that does have serious Fourth Amendment implications: custodial interrogation by the police.

III. THE FOURTH AMENDMENT IMPLICATIONS OF CUSTODIAL INTERROGATION: WHY HAVE THEY BEEN IGNORED?

When the U.S. Supreme Court decided in *Miranda v. Arizona* that custodial interrogation was governed by the Fifth Amendment's Self-Incrimination Clause rather than the Sixth Amendment's right to counsel, it established the Self-Incrimination Clause as the sole constitutional predicate for determining *whether* custodial interrogation could occur. True, the Due Process Clause's "voluntariness" test could still be used to define the parameters of *how* a custodial interrogation could be conducted.[64] But the issue of *whether* a custodial interrogation can occur has been discussed for the last third of a century solely in Self-Incrimination Clause terms.

Why have the Fourth Amendment implications of custodial interrogation been ignored?

One reason may be the Rehnquist Court's insistence that, whenever possible, criminal procedure should not be governed by amorphous "substantive due process" standards. As the Court has noted, "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation."[65] Related to this quest is the Court's interest in finding the one, most explicit, constitutional guarantee germane to any single issue.[66]

As previously noted, if *Miranda* had been decided in 1968 following the Court's decisions in *Katz*, *Berger*, and *Bumper*, the Court may very well have used a Fourth Amendment, rather than a Fifth Amendment, approach to custodial interrogation.[67] But once the Supreme Court

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[64] *See supra* note 17 and accompanying text.

[65] Dowling v. United States, 493 U.S. 342, 352 (1990).

[66] *See, e.g.*, Graham v. Connor, 490 U.S. 386, 394-95 (1989) (rejecting use of "substantive due process" for claims of excessive force in effecting an arrest and insisting that Fourth Amendment alone should govern such issues).

[67] *See supra* notes 29, 41-43 and accompanying text; *infra* note 68 and accompanying text.

decided to use a Fifth Amendment approach, the playing field was defined for the next thirty-eight years.

The allure of *Miranda* has meant that the legal community has refused to view custodial interrogation warnings through anything but the Self-Incrimination Clause. Yet, unquestionably, custodial interrogation is an area that also needs to be viewed through a Fourth Amendment lens.

IV. WHAT IS THE RELATIONSHIP BETWEEN CUSTODIAL INTERROGATION AND THE FOURTH AMENDMENT?

As previously discussed, although Fourth Amendment issues are involved in all government interrogation situations, we rarely have reason to consider them. Subpoenas, immunity orders, consent, refusals to answer when the person has the right to refuse — all these eliminate the need to consider the relation between the Fourth Amendment and government interrogations.

There is, however, one exception. Custodial interrogation implicates Fourth Amendment values in a unique way that has been too long ignored.

Think of a police officer attempting to question a suspect in custody. *Miranda*, based on a Self-Incrimination Clause rationale, characterizes custodial interrogation as presenting an atmosphere of *compulsion* that tends to force the suspect to answer questions.[68]

Yet, for Fourth Amendment purposes, this atmosphere can be characterized in a different way. Under the Fourth Amendment, custody lends a kind of *false authority* to the officer's attempt to interrogate. Although the officer has no real authority to make the suspect answer questions, the custodial atmosphere may make the suspect believe that the officer actually possesses this power.

Note how unique this situation is in terms of government interrogation and the Fourth Amendment. In interrogation situations where the government has obtained either a subpoena or an immunity order, the person *does have* a legal duty to answer. On the other hand, in non-custodial situations, the person is free to answer or to refuse to answer. In all these situations, there is no need to give extensive thought to the Fourth Amendment.

However, in terms of government interrogation and the Fourth Amendment, custodial interrogation is unique, perhaps sui generis. In Fourth Amendment terms, the suspect may very well believe —

[68] Miranda v. Arizona, 384 U.S. 436, 458 (1966).

erroneously — that the police have the legal power to search his mind and seize his words.

For Fourth Amendment purposes, custodial interrogation can be analogized to the fact situation in *Bumper v. North Carolina*.[69] Bumper's grandmother allowed the police to search her home after one of the officers said, "I have a search warrant to search your house." At the hearing to suppress the rifle found during the search, the government was unable to produce any search warrant. The Supreme Court held that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion — albeit colorably lawful coercion. *When there is coercion there cannot be consent.*"[70]

To put it bluntly, an atmosphere of custodial interrogation is the equivalent of the police officer's lying about the existence of the warrant in *Bumper*. In both cases, the police have no legal authority to do what they wish to do, but this is not clear either to Ms. Bumper or to the suspect in custody.

These concerns explain why, under a Fourth Amendment analysis, the police must obtain consent before they can interrogate a suspect in custody.[71] Since they lack legal authority, the police need voluntary Fourth Amendment consent before they can use questions to search a suspect's mind and seize his answers. *Miranda*-like warnings are necessary to assure the suspect that, contrary to appearances, the police have no legal authority to force him to "open his mind" to allow a search and seizure of anything he knows.

The Fifth Amendment guarantees that a suspect cannot be compelled to be a witness against himself at a criminal trial. But the Fourth Amendment goes further. The Fourth Amendment protects him from the government's obtaining *any information of any nature whatsoever*. That is because the suspect has a reasonable expectation of privacy over everything in his head — not just information that may incriminate him. To paraphrase *Kyllo*, the Fourth Amendment draws a firm line at the entrance to a person's *mind*. Unlike the Fifth Amendment's interest only

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[69] Bumper v. North Carolina, 391 U.S. 543 (1968).

[70] *Id.* at 550 (emphasis added); *see also* Kaupp v. Texas, 123 S. Ct. 1843, 1847 (2003) (per curiam) (holding that teenager's response of "OK" to police demands that he get out of bed at 3 a.m. and immediately accompany them to station for questioning was not real "consent" since it was "a mere submission to a claim of lawful authority" (quoting Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion))).

[71] *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 439-40 (1991) (stating that Fourth Amendment is implicated only when, viewed from totality of circumstances, reasonable person would believe he is not free not to respond to the officer's questions).

in self-incriminating statements that can be used at a criminal trial, the Fourth Amendment's interest in autonomy protects the person from revealing *anything* to the government, unless the government either possesses proper authority or the person chooses to consent. To again paraphrase *Kyllo*, a person's *head*, no less than his home, is an area that is held safe from prying government eyes — and ears.

Schneckloth v. Bustamonte held that police ordinarily have no duty to tell a person that he has the right to refuse consent to a search.[72] But *Schneckloth* specifically held that it had no application whatsoever to a situation involving a person *in custody*.[73] Much like the illusory warrant in *Bumper*, custodial interrogation surrounds the police with a false aura of authority that must be neutralized by *Miranda*-like warnings.

V. WHICH FOURTH AMENDMENT VALUES ARE IMPLICIT IN THE CURRENT *MIRANDA* WARNINGS?

It is odd that courts have ignored the Fourth Amendment values involved in a custodial interrogation situation. It is particularly odd because the *Miranda* warnings themselves reflect Fourth Amendment values at least as accurately as they reflect Fifth Amendment values.

The first *Miranda* warning states, "You have the right to remain silent." The Fifth Amendment protects a person from being compelled to make incriminating statements against his interest that will later be used at a criminal trial. Yet the promise of "You have the right to remain silent" goes beyond this. Indeed, the right to remain silent is a perfect way to describe the Fourth Amendment values at stake. The Fourth Amendment prevents the government from looking into the mind of the suspect for information of any kind. In the words of *Kyllo*, all "intimate details" are protected from "prying government eyes."[74] The right to silence has more to do with the autonomy guaranteed by the Fourth Amendment than it does, strictly speaking, with the values of the Self-

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[72] Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973).

[73] *Id.* at 240 n.29 ("[T]he present case does not require a determination of the proper standard to be applied in assessing the validity of a search authorized solely by an alleged consent that is obtained from a person after he has been placed in custody. We do note, however, that other courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to a search was given by a person in custody."); *id.* at 248 (concluding that "when the subject of a search *is not in custody* and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given"(emphasis added)).

[74] Kyllo v. United States, 533 U.S. 27, 37 (2001).

Incrimination Clause.[75]

This observation explains another aspect of *Miranda*: all statements, both exculpatory and inculpatory, are suppressed if there is a *Miranda* violation.[76] The Court refuses to make a distinction. Again, this remedy is more consistent with Fourth Amendment values, which would find that the constitutional violation occurred at the moment the police obtained *any* statement through an improper search and seizure. A Fifth Amendment analysis, on the other hand, would distinguish statements based on whether they were actually self-incriminating.

Thus, the current *Miranda* warnings may actually apprise a suspect of his Fourth Amendment rights more accurately than they do his Fifth Amendment rights. The title of a recent article by Professor Steve D. Clymer succinctly summarized its topic: *Are Police Free To Disregard* Miranda?[77] Looking at *Miranda* in a Fifth Amendment light, Clymer cogently argues that *Miranda* is simply a rule of evidence admissibility that does not impose direct restraints on the conduct of police in the interrogation room.

But the *Miranda* warnings do not say, "You have the right not to have your incriminating statements used against you if there happens to be a trial." What *Miranda* says is, "You have the right to *remain silent*." There is a difference. *Miranda*'s use of this phrase hints at what the Warren

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[75] It is interesting to consider why the *Miranda* Court may have used the phrase "You have the right to remain silent." *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective, in* R.H. HELMHOLZ, THE PRIVILEGE AGAINST SELF-INCRIMINATION 197 (1997) (stating that traditionally right against self-incrimination did not include any "right to remain silent" per se); Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment, in* R.H. HELMHOLZ, THE PRIVILEGE AGAINST SELF-INCRIMINATION 109 (explaining that right to remain silent was not historically encompassed in one's right against self-incrimination); *see also* Minnesota v. Murphy, 465 U.S. 420, 428 (1984) (holding that privilege is generally not self-executing; person must usually assert privilege in face of government questioning). *See generally* Timothy P. O'Neill, *Why* Miranda *Does Not Prevent Confessions: Some Lessons from Albert Camus, Arthur Miller and Oprah Winfrey*, 51 SYRACUSE L. REV. 863, 866-874 (2001).

There appear to be two sources for *Miranda*'s use of the phrase "You have the right to remain silent" in 1966. First, in 1965 the Supreme Court had discussed a criminal defendant's right under the Self-Incrimination Clause to refuse to testify on his own behalf *at trial*. Griffin v. California, 380 U.S. 609 (1965). Second, in 1964 in *Escobedo v. Illinois*, 378 U.S. 478, 491 (1964), the Court referred to a suspect's "absolute constitutional right to remain silent" in the face of custodial questioning; yet this was discussed in the context of the Sixth Amendment right to counsel rather than the Fifth Amendment right against self-incrimination. Suffice it to say the "right to remain silent" probably has as much, if not more, to do with Fourth Amendment autonomy values, as expressed in subsequent cases such as *Katz* and *Kyllo*.

[76] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[77] Steven D. Clymer, *Are Police Free To Disregard* Miranda?, 112 YALE L.J. 447 (2002).

Court was really concerned about: controlling police behavior and defending the suspect's autonomy in the interrogation room, and not just in the courtroom.

However, because *Miranda* was decided before *Katz*, *Berger*, and *Bumper*, the Supreme Court in 1966 lacked the *constitutional vocabulary* to describe custodial interrogation in Fourth Amendment terms. Only after *Katz*, *Berger*, and *Bumper* can we now understand that police questioning is a search; that getting the suspect's answers is a seizure; and that attempting interrogation in a custodial atmosphere provides the police with false authority — like the illusory warrant in *Bumper* — that must be neutralized by both *Miranda* warnings and the suspect's voluntary Fourth Amendment consent. As seen through a Fourth Amendment lens, the police are forbidden from obtaining even one single answer without proper warnings and waiver.

Under a Fifth Amendment analysis, a violation of *Miranda* does not result in a constitutional violation in the interrogation room itself.[78] But under the Fourth Amendment, the constitutional violation is complete after even the first improper question and answer. This difference illustrates why understanding the Fourth Amendment aspect of custodial interrogation is so crucial.

VI. WHAT IS THE LEGAL SIGNIFICANCE OF RECOGNIZING THE FOURTH AMENDMENT IMPLICATIONS OF CUSTODIAL INTERROGATION?

At this point let us assume arguendo that custodial interrogation implicates Fourth Amendment values as well as the Self-Incrimination Clause. Let us also assume that the current *Miranda* warnings sufficiently apprise the suspect of his rights under both constitutional provisions. Finally, assume that a proper *Miranda* waiver constitutes an effective waiver of rights under both the Fourth Amendment and the Self-Incrimination Clause. The issue then is whether recognizing the Fourth Amendment implications of custodial interrogation makes any appreciable legal difference in confession cases.

First, it is clear that, under either a Fourth or a Fifth Amendment analysis, if a suspect in custody waives his *Miranda* rights, all his resulting answers are admissible at trial.[79] Conversely, under either analysis, if a suspect in custody invokes his *Miranda* rights, the

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[78] *See supra* notes 24-26 and accompanying text; *infra* notes 86-88 and accompanying text.

[79] This assertion assumes, of course, that the resulting confession is "voluntary" under the Due Process Clause. *See supra* note 17 and accompanying text.

interrogation must cease. But if the police interrogate the suspect *without* a proper *Miranda* warning and/or waiver, the results are very different depending on whether you employ a Fourth or a Fifth Amendment analysis.

Under traditional *Miranda* Fifth Amendment analysis, the statements cannot be used in the prosecution's case-in-chief. However, if they are nevertheless "voluntary," they can be used for other purposes, i.e., impeachment.[80]

But what if the statements obtained through a *Miranda* violation are never used in a criminal case? Are a suspect's Fifth Amendment rights nevertheless violated *at the moment* the police obtain the presumptively compelled statements? The U.S. Supreme Court recently answered "No" in *Chavez v. Martinez*.[81] The four-Justice plurality concluded that "mere coercion [caused by a *Miranda* violation] does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness."[82] The "failure to read *Miranda* warnings to Martinez did not violate Martinez's constitutional rights and cannot be grounds for a Section 1983 action."[83] And Justice Kennedy, in an opinion joined by Justice Stevens, stated, "I agree with [the plurality] that failure to give a *Miranda* warning does not, without more, establish a completed [constitutional] violation when the unwarned interrogation ensues."[84] Instead, "*Miranda* mandates a rule of exclusion" and "[t]he exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy."[85]

But if *Miranda* is viewed as a requirement to obtain consent for a search under the Fourth Amendment, the result is much different. First, assume the police, as in *Chavez*, begin questioning a suspect in custody without following *Miranda* in some way. The police then obtain an answer to their first question. At this point *Chavez* holds there is no Fifth Amendment violation. But there *is*, however, a Fourth Amendment violation — the single question and answer constitutes a search and seizure performed without consent or a warrant.

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[80] *See* Harris v. New York, 401 U.S. 222, 223-24 (1971) (allowing voluntary statements obtained as fruit of *Miranda* violation to nevertheless be used for impeachment purposes).

[81] Chavez v. Martinez, 123 S. Ct. 1994, 2004 (2003) (Thomas, J., plurality opinion); *id.* at 2013 (Kennedy, J., concurring in part and dissenting in part).

[82] *Id.* at 2002 (Thomas, J., plurality opinion).

[83] *Id.* at 2004 (Thomas, J., plurality opinion).

[84] *Id.* at 2013 (Kennedy, J., concurring in part and dissenting in part).

[85] *Id.*

Under a Fourth Amendment analysis — but not under a Fifth Amendment analysis — there is a constitutional violation *at the very moment the police officer receives the first answer to his first question in the interrogation room.* A Fourth Amendment analysis would thus allow a court to issue a permanent injunction to guarantee that a police department never adopts a policy to go "outside *Miranda*."[86] The *Chavez* decision, on the other hand, makes it clear that such an injunction could never be obtained through the Fifth Amendment.[87] Moreover, a Fourth Amendment analysis allows suspects denied their *Miranda* rights to file section 1983 suits against police departments even if the statements are never used at a trial; *Chavez* held that such a suit cannot be brought under the Fifth Amendment.[88]

Second, the Fourth Amendment approach makes it much easier to categorically condemn police departments that refuse to follow *Miranda.* The Fifth Amendment's emphasis on compulsion and coercion — concepts that intimate actual government misconduct — makes it hard to justify suppressing confessions that are obtained without outrageous police misconduct. Indeed, the remedy proposed by *Chavez* — a remand to determine if the police behavior violated substantive due process under the notoriously stringent "egregious official conduct" standard of *County of Sacramento v. Lewis*[89] — may be nothing more than a chimera. But the Fourth Amendment approach is much easier to implement. Just as the politest police officer in the world violates the Fourth Amendment if he makes even the briefest search of a home without a warrant or a warrant exception,[90] so too is a Fourth Amendment violation complete with the first courteous question-and-answer following a *Miranda*

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[86] *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998) (popularizing expression "outside *Miranda*" to describe practice of police departments consciously deciding to forego giving *Miranda* warnings, thus forfeiting opportunity to use any resulting statements in state's case-in-chief; in return, however, they retain ability to use statements for investigative leads and for impeachment at trial). Although Professor Weisselberg condemns this police practice, the Court's recent decision in *Chavez* will make it harder to combat. *See supra* notes 81-85 and accompanying text. The Court will shed more light on this issue in its forthcoming decision in *Missouri v. Seibert*, 93 S.W.3d 700 (Mo. 2002), *cert. granted*, 123 S. Ct. 2091 (2003). *See generally* Charles D. Weisselberg, *Panel Five: Deterring Police From Deliberately Violating* Miranda: *In the Station House After* Dickerson, 99 MICH. L. REV. 1121 (2001) (discussing questioning "outside *Miranda*").

[87] *See supra* notes 81-85 and accompanying text.

[88] *See supra* notes 81-85 and accompanying text.

[89] *See* County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (holding that abusive executive action will only be said to be arbitrary if it is "most egregious official conduct").

[90] *See, e.g.*, Arizona v. Hicks, 480 U.S. 321, 324-25 (1987) (holding that even slightly moving turntable to examine serial number constitutes search under Fourth Amendment).

violation.

Third, the fact that the very first answer in the interrogation room is itself a Fourth Amendment violation means that future statements that are made after proper *Miranda* warnings and waiver could be suppressed under a "fruit of the poisonous tree" analysis.[91] This would supersede *Elstad*'s Fifth Amendment analysis that distinguished statements suppressed "merely" as products of a *Miranda* violation from statements that were actually involuntary; under *Elstad*, only the latter could yield the excludable fruit of the poisonous tree.[92] In place of *Elstad*, a court using a Fourth Amendment analysis could simply use a traditional *Wong Sun* attenuation analysis, which would undoubtedly result in more subsequent confessions being suppressed.[93]

Thus, recognizing the Fourth Amendment implications of custodial interrogations would make it much easier to enforce the entire *Miranda* regime. The *Chavez* decision, predicated on the Fifth Amendment, may result in increasing numbers of police departments ignoring *Miranda* with no possible sanction. *Chavez* rewards police departments for being disingenuous, if not downright dishonest. But enforcing *Miranda* through the Fourth Amendment would require police departments to obey the commands of *Miranda* or face either injunctions or section 1983 sanctions.

VII. WHAT ARE THE ASPECTS OF THE CURRENT INTERPRETATION OF *MIRANDA* THAT WOULD *NOT* CHANGE UNDER A FOURTH AMENDMENT ANALYSIS?

It is important to emphasize that viewing *Miranda* through a Fourth Amendment lens supplements, but does not supersede, *Miranda*'s current role as a Fifth Amendment case. Therefore, the Fourth Amendment analysis will not change several key aspects of existing *Miranda* doctrine.

First, a Fourth Amendment analysis arguably will not change the Court's current policy of allowing statements obtained through *Miranda* violations to be used for the purpose of impeachment. These statements,

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[91] *See* Wong Sun v. United States, 371 U.S. 471, 484 (1963) (holding that evidence must be excluded which is either direct or indirect product of illegal procedure). The only way evidence may be used that has been obtained as a result of an illegal procedure is if there exists an "intervening independent act of a free will." *Id.* at 486.

[92] Oregon v. Elstad, 470 U.S. 298, 308-09 (1985). Again, the Supreme Court will soon re-examine some facets of the *Elstad* doctrine in *Missouri v. Seibert*, 93 S.W.3d 700 (Mo. 2002), *cert. granted*, 123 S. Ct. 2091 (2003).

[93] *Wong Sun*, 371 U.S. at 484.

inadmissible in the prosecution's case-in-chief, may nevertheless be used for impeachment under current *Miranda* doctrine.[94] Rethinking *Miranda* under the Fourth Amendment would not change this outcome, for evidence seized in violation of the Fourth Amendment can also be used for impeachment.[95]

Second, a Fourth Amendment analysis would not scuttle the current *Miranda* exceptions. In fact, Fourth Amendment analysis provides far more persuasive reasons to support the two currently recognized exceptions.

For example, the Supreme Court has held that a statement obtained in violation of *Miranda* is nonetheless admissible in the prosecution's case-in-chief under the "public safety" exception.[96] But Justice O'Connor in her separate opinion in *New York v. Quarles* cogently observed that while public safety may justify an officer's refusal to give *Miranda* warnings before interrogating a person in custody, there is no principled way to allow the resulting statements into the prosecution's case-in-chief under the aegis of the Self-Incrimination Clause. As Justice O'Connor noted, because *Miranda* is predicated on the Self-Incrimination Clause, a statement obtained through a *Miranda* violation must be "presumed compelled" under that clause.[97] The admission of such a statement in the prosecution's case-in-chief, she persuasively argues, is clearly unconstitutional.

Thus, the public safety exception is completely ad hoc and unprincipled under the Fifth Amendment. Yet the exception can convincingly be explained under a Fourth Amendment analysis. If the statement is seen as something the police have seized without either a warrant or consent, then the State can turn to the large body of law on "exigent circumstances" to justify the seizure under the Fourth Amendment.[98] The Fourth Amendment provides a much more

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[94] Harris v. New York, 401 U.S. 222, 223-24 (1971).

[95] United States v. Havens, 446 U.S. 620, 628-29 (1980) (allowing use of evidence obtained in violation of Fourth Amendment to impeach defendant's testimony on direct examination); Walder v. United States, 347 U.S. 62, 65-66 (1954) (affirming introduction of unlawfully seized heroin capsule to impeach defendant's direct testimony in court). Note, however, that a Fourth Amendment approach would allow for the possibility of an injunction to prevent a police department from going "outside *Miranda*" in order to regularly obtain such impeachment. Such an injunction cannot be obtained under *Chavez*'s reading of the Fifth Amendment. *See supra* notes 86-87 and accompanying text.

[96] *See* New York v. Quarles, 467 U.S. 649, 655-56 (1984) (stating that officers are excused from failing to inform suspect of *Miranda* warnings if public safety so necessitates).

[97] *Id.* at 664 (O'Connor, J., concurring in judgment in part and dissenting in part).

[98] *See, e.g.*, Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 299 (1967) (stating that "hot pursuit" constituted "exigent circumstances" sufficient to allow officers to enter

satisfactory way of justifying the use of the statement by characterizing public safety as an exigent circumstance.

The same is true for the "routine booking question" exception to *Miranda*. In *Pennsylvania v. Muniz*,[99] eight members of the Court held that the police did not have to read *Miranda* warnings to an arrestee before asking him routine booking questions. Four of the eight justices held that the answers to such questions were not "testimonial" and therefore were not covered by the Fifth Amendment.[100] The other four justices held that these answers were indeed testimonial and thus covered by the Fifth Amendment, but that there was a routine booking question exception to *Miranda*.[101] Once again, this so-called Fifth Amendment exception is jerrybuilt and ad hoc.

Notice again how much easier it is to justify a routine booking question exception under a Fourth Amendment analysis. Here we can rely on the Court's well-developed "special needs" exception to the Fourth Amendment.[102] The Fourth Amendment allows us to justify an exception to *Miranda* because of the compelling need of law enforcement to obtain basic information about arrestees. Again, the Fourth Amendment provides a more satisfying doctrinal route to reach the same end.

Finally, there is one area where the defense can obtain relief from the Fifth Amendment side of *Miranda* that is not available from a Fourth Amendment analysis: federal habeas corpus. Viewing *Miranda* through a Fifth Amendment lens, habeas corpus is clearly available.[103] Yet from a Fourth Amendment perspective, habeas relief is obviously unavailable.[104]

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suspect's home without warrant minutes after robbery had been committed).

[99] Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990).

[100] *Id.* at 606 (Rehnquist, C.J., concurring in part, concurring in result in part, and dissenting in part). Justices White, Blackmun, and Stevens also joined this opinion.

[101] *Id.* at 599-601. This part of the opinion, written by Justice Brennan, was joined by Justices O'Connor, Scalia, and Kennedy.

[102] *See, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 875 (1987) (holding that supervision of probationers constitutes "special need" that necessitates more relaxed standard for searches); O'Connor v. Ortega, 480 U.S. 709, 722 (1987) (stating that employer's need to enter employee's office, desk, or files constitutes "special need" and search therefore does not require warrant); New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (stating that education and supervision of students is "special need," thus relaxing standard for school searches).

[103] *See* Withrow v. Williams, 507 U.S. 680, 682 (1993) (allowing habeas corpus review of *Miranda* violations that occur in state prosecutions).

[104] *See* Stone v. Powell, 428 U.S. 465, 493 (1976) (holding that habeas corpus is not vehicle for challenging Fourth Amendment violations in state prosecutions unless petitioner did not receive "full and fair hearing" on issue in state court).

CONCLUSION

Miranda v. Arizona was a landmark opinion. But its revered place in the legal pantheon may have discouraged lawyers — especially criminal defense lawyers — from questioning the basis for the decision. As this Essay contends, if *Miranda* had been decided just two years later, the Supreme Court could have used its recent decisions in *Katz*, *Berger*, and *Bumper* to provide a Fourth — in addition to a Fifth — Amendment basis for its *Miranda* warnings. If it had done so, the right to remain silent would have also been seen as the right to refuse consent for a police search and seizure conducted through custodial interrogation. And the *Miranda* warnings would have been required to additionally insure that the suspect *knew* he had the right to refuse to consent to police interrogation. The false authority created by the atmosphere of custodial interrogation — no less than the illusory warrant in *Bumper v. North Carolina* — would have to be neutralized before uncoerced consent could be given.

But because the Supreme Court did not have the benefit of *Katz*, *Berger*, and *Bumper* in 1966, the *Miranda* decision clumsily tried to force a square Fourth Amendment peg into a round Fifth Amendment hole.

As previously demonstrated, understanding the Fourth Amendment values underlying the *Miranda* decision helps to explain some of the most inexplicable decisions that have glossed *Miranda* over the years. Cases such as *Harris v. New York*, *New York v. Quarles*, and *Pennsylvania v. Muniz* — decisions whose results find no support in traditional Fifth Amendment analysis — are more understandable when viewed through a Fourth Amendment lens.

Moreover, the Fourth Amendment approach makes simpler work of the two major *Miranda* issues pending before the Court. The first case, *United States v. Patane*, asks whether physical evidence obtained through use of a statement obtained in violation of *Miranda* must be suppressed.[105] The Fifth Amendment problem is that although the statement was obtained in violation of *Miranda*, it was neither coerced nor involuntary. Thus, *Patane* is another case that questions whether a statement obtained in violation of *Miranda* has truly been unconstitutionally obtained. Yet under a Fourth Amendment analysis, the answer is clear. The suspect's very first answer obtained without proper consent has been illegally seized. Period. Fruits of an illegal seizure are always suppressed, subject, of course, to the *Wong Sun*

[105] United States v. Patane, 304 F.3d 1013 (10th Cir. 2002), *cert. granted*, 123 S. Ct. 1788 (2003).

attenuation doctrine.[106]

The second case, *Missouri v. Seibert*,[107] squarely faces the *Oregon v. Elstad*[108] issue of whether the good or bad faith of the police is relevant when police first obtain statements improperly through a *Miranda* violation, and then are later able to obtain the same statements after properly following *Miranda*. But under a Fourth Amendment analysis the good or bad faith of the police is irrelevant.[109] The first statements were obtained in violation of the Fourth Amendment. Period. Whether the subsequent statements are admissible will again depend on the *Wong Sun* attenuation doctrine applied to the particular facts of the case.[110]

It is too late in the day to suggest that the Court no longer view *Miranda* as a Fifth Amendment case. But it is certainly not too late to suggest that *Miranda* should now be viewed as a Fourth Amendment, as well as a Fifth Amendment, case.

Well over a century ago in the landmark case of *Boyd v. United States*,[111] the Supreme Court confronted a situation in which it declared, "[T]he Fourth and Fifth Amendments run almost into each other."[112] It is time that the Supreme Court said the same about *Miranda v. Arizona*.

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[106] *See supra* notes 91-93 and accompanying text.

[107] Missouri v. Seibert, 93 S.W.3d 700 (Mo. 2002), *cert. granted*, 123 S. Ct. 2091 (2003).

[108] *See supra* note 10 and accompanying text.

[109] *See* United States v. Leon, 468 U.S. 897, 913 (1984) (holding that officer's good faith reliance on neutral magistrate's issuance of warrant renders evidence seized pursuant to that warrant admissible). This so-called "good faith" exception is irrelevant because custodial interrogation is not accompanied by a warrant.

[110] *See supra* notes 91-93 and accompanying text.

[111] Boyd v. United States, 116 U.S. 616 (1886).

[112] *Id.* at 630.