

## Missing *Miranda*'s Story

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GARY L. STUART, *MIRANDA: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT* (University of Arizona Press) (2004)

This is a very disappointing book. It gives me no pleasure to say that. I have reviewed seven books prior to this one. Those reviews were either positive or mixed.<sup>1</sup> But Stuart's book is so flawed that finding a way to communicate its flaws is not easy. It is badly researched, badly written, and superficial. Stuart is sloppy over and over about law and about history. He makes mistakes about what led up to *Miranda* and about how it has been applied by later Courts.

Perhaps the greatest flaw in the book is that Stuart does not have a story to tell, or at least not a story worthy of a book. As one of the most written about cases, *Miranda* can justify a new book only if the author has something new to tell us. I first thought the new story was going to be the local Arizona lawyers and judges who dealt with the case in state court, and the part they played in the *Miranda* saga as it moved to the United States Supreme Court. Stuart toys with this story, but it is not very interesting, and he drops it to make *Miranda* the story.

Yet Stuart has so little to say about *Miranda* that fully half the book is devoted to lengthy excerpts from oral arguments, summaries of the Court's opinions, and pointless interviews with lesser known players in the *Miranda* drama. When Stuart tries to be original, he sometimes winds up being bizarre. The Court in 2000 re-affirmed *Miranda*'s constitutionality in *Dickerson v. United States*.<sup>2</sup> Stuart asks: "If *Miranda* Was a Liberal Decision, Why Was *Dickerson* a Conservative Decision?" (Stuart, at 159–61.) What a truly odd notion. So far as I know, no one has accused *Dickerson* of being a conservative decision.

Stuart finds a tentative answer to this question when he notes that following precedent is conservative. This is true, if trivial, but Stuart wasn't willing to stop while he was ahead. He plunges on, noting that Chief Justice Rehnquist, who

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<sup>1</sup> See, e.g., George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091 (2003) (positive review of WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS* (2001)); George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819 (1997) (admiring the scope and coherence of AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997) but ultimately rejecting its core premise).

<sup>2</sup> 530 U.S. 428 (2000).

authored the Court's opinion in *Dickerson*, worked for several years in a Republican administration's Justice Department before joining the Court. "In the estimation of many, his personal history alone justifies labeling his affirmation of *Miranda* in the *Dickerson* opinion as a conservative action." (Stuart, at 161.) I take it we are supposed to believe that if a conservative jurist writes an opinion, we must consider the opinion conservative. More fundamentally, who cares what label we put on *Dickerson*?

The only positive I found in the book is that Stuart occasionally culls out a factual nugget that I did not know. For example, he notes that Earl Warren and Thurgood Marshall were good friends. (Stuart, at 72.) But should we believe this? No authority is cited, and Stuart is wrong about so much in this book that readers would do well to question every un-proven claim.

In this review, I will document some of Stuart's sloppiness about law and history. Then I will discuss the lack of a story. Finally, I will briefly document what he misses about *Miranda*.

### I. SLOPPINESS ABOUT LAW AND HISTORY

I suppose a writer is permitted, indeed encouraged, to simplify the law when writing a book that hopes to "cross over" to the non-specialist and even the non-lawyer. But there is no excuse for making misleading statements about the law. One example occurs in the Preface where Stuart attempts to bring the book up to date by discussing cases decided in 2004. In one of these cases, *Fellers v. United States*,<sup>3</sup> the police arrested Fellers *after* he had been indicted. The police did not provide *Miranda* warnings and he made incriminating statements shortly after the arrest. Later, the police obtained a waiver of his *Miranda* rights, and Fellers repeated his incriminating statements. The issue was whether the waiver of *Miranda* permitted the second set of statements to be admitted. According to Stuart, the Court "held that the second confession must be suppressed because it was the 'fruit' of the first confession and thus a violation of both Fifth and Sixth Amendment rights." (Stuart, at xix.)

This is flatly wrong. While the Court did hold that Fellers's Sixth Amendment right to counsel was violated in the initial encounter, the Court did *not* find a violation of the Fifth Amendment. Moreover, the Court did *not* hold that the second set of statements had to be suppressed. It remanded for the Eighth Circuit to consider whether *Miranda* warnings and waiver permit the fruits of this type of Sixth Amendment violation to be used.<sup>4</sup> Stuart thus missed completely the holding

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<sup>3</sup> 540 U.S. 519 (2004).

<sup>4</sup> Evidence is normally suppressed when found as a result of violation of the Sixth Amendment right not to have statements deliberately elicited in the absence of counsel. *See* *Nix v. Williams*, 467 U.S. 431 (1984) (recognizing an exception to the Sixth Amendment poisoned tree for evidence that would have been inevitably discovered). The issue *Fellers* left unsettled, Stuart's claim notwithstanding, is whether a *Miranda* waiver changes the normal rule.

of the case. That this discussion occurs in the Preface of the book does not give the reader much hope for the rest of the book.

Or consider this passage: "Perhaps the most apt explanation of whence came *Miranda's* explicit warnings occurs in the opinion handed down in *Griswold v. Connecticut*." (Stuart, at 85.) *Griswold* held that due process protected a married couple's right to decide whether to use birth control. Stuart's claim that a case establishing the right to sexual privacy provides an "apt explanation of whence came *Miranda's* explicit warnings" is a remarkable claim. But it turns out not to mean much. The connection is ultimately only that *Griswold* found the right to sexual privacy partly in a penumbra of the Fifth Amendment where Stuart seems to think that the right to explicit warnings can be found.

When discussing the "modern origin" of the right not to be compelled to be a witness, Stuart relies on several cases that are based on the due process right not to be coerced into confessing. (Stuart, at 33.) The two rights are very different, at least in theory and origin. Indeed, the first case he cites, *Brown v. Mississippi*,<sup>5</sup> explicitly noted that the states were free to ignore a defendant's Fifth Amendment right not to be a witness against himself.<sup>6</sup> It is quite odd to find the origin of a modern right in a case that explicitly refused to apply that right to the states.

Stuart stumbles over and over in presenting ideas about due process. At one point, he suggests that one of the *Miranda* briefs drew "a due process connection to the Fourteenth Amendment." (Stuart, at 46.) It's hard to know what this means. The Fourteenth Amendment *contains* a Due Process Clause that forbids *states* from denying "life, liberty, or property without due process of law." Yet two of the three cases he cites as showing this "due process connection" are *federal* cases, neither one of which is based on the right to due process; one is not even based on the Constitution at all.<sup>7</sup> While the third case, *Escobedo v. Illinois*,<sup>8</sup> is at least relevant to the *Miranda* story, it draws explicitly from the Sixth Amendment right to counsel. What these cases have to do with a "due process connection" is mysterious. What a "due process connection" has to do with *Miranda*, which is based on the Fifth Amendment privilege against compelled self-incrimination, is unexplained.

In attempting to describe what the Court did in *Escobedo*, Stuart writes: "Once the 'general investigation' ceased and the witness became the focus of the [police] investigation, he was then entitled to the full protection of the Bill of Rights." (Stuart, at 40.) But that is simply not true. The beginning of judicial proceedings, not the police investigation, is the point at which most Bill of Rights

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<sup>5</sup> 297 U.S. 278 (1936).

<sup>6</sup> *Id.* at 285.

<sup>7</sup> *Johnson v. Zerbst*, 304 U.S. 458 (1938), was a federal habeas corpus case in which the issue was whether the prisoner had validly waived his right to counsel prior to trial. *Mallory v. United States*, 354 U.S. 449 (1957), is based on a federal rule of procedure requiring officers to bring arrested individuals before a magistrate "without unnecessary delay." *Id.* at 453.

<sup>8</sup> 378 U.S. 478 (1964).

criminal procedure protections apply—e.g., the right to confront witnesses, the right to subpoena witness, and the right to notice of the charges. If what Stuart means is that the right to counsel *sometimes* applies prior to the beginning of judicial proceedings, *Escobedo* did create a very narrow right to counsel in that context. But that is a long way from suspects receiving “the full protection of the Bill of Rights” prior to indictment. Perhaps Stuart’s claim is simply a rhetorical flourish. But it is a seriously misleading one.

Similar rhetorical flourishes appear in other places. For example, in trying to explain why the Court switched analytical gears from the Sixth Amendment, the basis for *Escobedo*, to the Fifth Amendment, the basis for *Miranda*, Stuart writes: “Thomas Jefferson believed that the Bill of Rights in total puts into the hands of the judiciary a check against any tyranny committed by the legislative or executive branches of the government. As such, the Sixth provides the rights and the Fifth provides the means for implementing those rights.” (Stuart, at 162.) The first problem is that his meaning is unclear. Is he saying that the Fifth Amendment is the only means to implement the rights in the Sixth Amendment? If so, that is a bizarre claim.

A second problem is that he gets the history wrong. While it is true that Jefferson added his voice to the call for a Bill of Rights as a condition for ratifying the Constitution,<sup>9</sup> he did not see the federal judiciary as the remedy for unconstitutional acts by the executive and legislative branches. He believed it was the states, not the federal judiciary, that should use the Bill of Rights to rein in the federal government.<sup>10</sup>

What’s odd about the Jefferson flourish, like the *Escobedo* flourish, is that it adds nothing to his argument. It is merely a confusing, gratuitous claim, one that opens him to the attack I just made and leaves the reader unsure whether to believe anything in the book. Moreover, he never really explains why the Court *did* move from the Sixth to the Fifth, at least beyond the obvious points that the Fifth Amendment does not depend on the beginning of judicial proceedings and it contains the seeds of a right to remain silent.

Here, Stuart misses the real story. In 1965, one year prior to *Miranda*, Yale Kamisar published an article arguing that the Fifth Amendment right against compelled self-incrimination should apply to the police interrogation room.<sup>11</sup> The

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<sup>9</sup> See JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 123–24 (Vintage ed. 1998) (1997).

<sup>10</sup> When Congress passed the Alien and Sedition Acts in 1798, Jefferson prepared the Kentucky resolution designed “to block implementation” of those Acts. See *id.* at 212. The resolution claimed for the states the right to nullify actions that violated the Constitution. See *The Avalon Project at Yale Law School: Kentucky Resolution: 1799*, at <http://www.yale.edu/lawweb/avalon/kenres.htm>. Thus, it was immensely important to Jefferson to have a Bill of Rights so that a state could nullify federal actions it considered to have violated the Constitution.

<sup>11</sup> Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, from Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME* 1 (A.E. Dick Howard ed., 1965).

contribution of Kamisar's article was that it presented the Court a way out of a conundrum it had created. The "rule" from *Escobedo* was so narrow that it was limited only to suspects who asked for a lawyer; perhaps it was also limited only to suspects who had retained a lawyer prior to being arrested. Could *Escobedo* be expanded? That is what most people expected when the Court granted certiorari in the cases it decided in *Miranda*. But *Escobedo* was a 5–4 case with a wobbly superstructure based on the Sixth Amendment, which by its terms applies only to an "accused" against whom a "criminal prosecution" has begun.

Justice Goldberg's opinion in *Escobedo* sought to compare a suspect facing interrogation to an accused facing a criminal prosecution, but the effort was not very convincing. Moreover, the only way Goldberg was able to "sell" the idea at all was to stress (1) that police efforts to solve the murder had gone past the investigative stage to focus on Escobedo and (2) that he had asked for a lawyer. If the Court wanted a broader rule that applied to the investigative stage and whether or not the suspect had asked for a lawyer, it needed a sounder constitutional basis than the Sixth Amendment.

Enter Yale Kamisar.<sup>12</sup> Prior to Kamisar's article, constitutional theorists thought that the right not to be a witness against oneself applied only to the trial or to similar proceedings. After all, the constitutional text says that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself . . ."<sup>13</sup> That certainly *sounds* as if it is limited to courtroom type appearances. The Court had, to be sure, extended the right to other types of hearings on the theory that to compel testimony, under oath, in judicial-type hearings would produce a transcript that could be used in a criminal case.<sup>14</sup> But no one thought that answers to police questions could be used in the same way as answers, under oath, in a trial, a grand jury proceeding, or a commission hearing.

Kamisar, however, argued that the right not to testify against oneself had little meaning if a suspect has already confessed to the police. He argued that the "real" trial is in the police interrogation room, what Kamisar called the "gatehouse," where the police out-maneuvered and out-smarted the suspect who lacked a lawyer or any knowledge that he did not have to answer police questions. When the case got to trial—the "mansion" in Kamisar's metaphor—and he has a lawyer, of what value is the lawyer in the face of the confession? Here is part of the argument in Kamisar's characteristically colorful style:

The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what

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<sup>12</sup> For much more on Yale Kamisar's contribution to criminal procedure scholarship, including his contribution to the *Miranda* case, see Tribute, 2 OHIO ST. J. CRIM. L. 1–114 (2004).

<sup>13</sup> U.S. CONST. amend. V (emphasis added).

<sup>14</sup> See *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) (commission hearing); *Brown v. United States*, 356 U.S. 148 (1958) (de-naturalization proceeding); *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (grand jury hearing).

happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? Ah, there's the rub. Typically he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.<sup>15</sup>

Noting that wealthy privileged suspects routinely faced police interrogators with counsel at their side, Kamisar further argued that “preserving respect for the individual and securing equal treatment in law enforcement”<sup>16</sup> require the state to make counsel available to suspects who face police interrogation. He concluded: “To the extent that the Constitution permits the wealthy and the educated to ‘defeat justice,’ if you will, *why shouldn't* all defendants be given a like opportunity?”<sup>17</sup>

Although the Court in *Miranda* does not give Kamisar the credit that he deserves for providing a doctrinal alternative to the Sixth Amendment, complete with an equality superstructure, the Court does cite his article in two places. A careful reader of the *Miranda* opinion would have seen the citation. A writer of a book about *Miranda* would, one hopes, read the sources the Court cites. Yet no reference to Kamisar's path-breaking 1965 article appears in Stuart's book.

It is odd that Stuart spends time discussing John Frank's contribution to the *Miranda* briefs and no time discussing Kamisar's contribution to the *Miranda* analytical structure. Stuart tells us that Frank, like most everyone else, saw the issue as lodged in the Sixth Amendment right to counsel. (Stuart, at 46–47.) By this account, Frank added nothing that helped move the Court to a Fifth Amendment solution. That he was “the lead counsel in the *Miranda* case” (Stuart, at 31) does not justify the attention given to him throughout the book.

More troubling is Stuart's use of the very same “gatehouse” metaphor that Kamisar made central to his article. The title of Kamisar's article is “Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From *Powell* to *Gideon*, from *Escobedo* to . . . .”<sup>18</sup> Here is part of what Kamisar had to say in 1965 about “gatehouses” and “mansions”:

In this “gatehouse” of American criminal procedure—through which most defendants journey and beyond which many never get—the enemy of the state is a depersonalized “subject” . . . “game” to be stalked and cornered. Here ideals are checked at the door, “realities” faced, and the prestige of law enforcement vindicated. Once he leaves the “gatehouse” and enters the “mansion”—if he ever gets there—the enemy of the state is repersonalized, even dignified, the public invited, and a stirring

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<sup>15</sup> Kamisar, *supra* note 11, at 19.

<sup>16</sup> *Id.* at 79.

<sup>17</sup> *Id.* at 80 (emphasis in original).

<sup>18</sup> The ellipsis was of course filled in by the Court a year later with the word “*Miranda*.”

ceremony in honor of individual freedom from law enforcement celebrated.<sup>19</sup>

Here is part of what Stuart says:

[B]efore *Miranda*, the vast majority of suspects checked their information bags at the gatehouse. These were not reopened until they appeared, as if by magic, in the courthouse when the magistrate asked if the confession were [sic] freely and voluntarily given. After . . . *Miranda*, America engaged in the great debate over how to reconcile what apparently went on in the gatehouse with what obviously happened in the courthouse. The most glaring difference was that one was private and the other public. What came to light in the courthouse was often very different from the dark tales told in the gatehouse. (Stuart, at 154.)

While the ideas are not precisely the same, the similarity of the metaphor and some of the phrasing certainly requires a citation to Kamisar. There is none. Kamisar's article is never mentioned. Stuart either didn't read Kamisar's groundbreaking article or decided not to cite him for the metaphor Kamisar made famous.<sup>20</sup>

## II. WHERE'S THE BEEF (THE STORY)?

The first twenty-two pages take us from Miranda's rape of a young woman on the night of November 27, 1962 through his arrest, interrogation, and conviction. Then we have a brief summary of the crimes and interrogations of the other three defendants whose cases were joined in *Miranda*. What follows is a mushy stew of the "law and order" climate of 1964, some pretty superficial discussion of the right to counsel and the law of confessions as it existed in 1964, how the Arizona Supreme Court ruled on *Miranda*'s appeal, and a summary of some of the briefs filed in the United States Supreme Court. While Stuart's account here is sometimes engaging, most of what he covers was covered in more detail and with greater flair in Liva Baker's excellent book.<sup>21</sup>

By page 51 we have arrived at the oral arguments. These consume thirty pages. Next we get a sturdy if not scintillating explanation of the *Miranda* opinion and Miranda's retrial and conviction (the prosecution used evidence other than his

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<sup>19</sup> Kamisar, *supra* note 11, at 20 (citations omitted).

<sup>20</sup> With characteristic generosity, Kamisar noted in his article that the metaphor was not original with him, that he heard it in a presentation made by Dean Claude Soble at Northwestern University School of Law. See Kamisar, *supra* note 11, at 20 n.53. Kamisar told me several years ago that the original metaphor may have been "mansion" and "outhouse" but that someone persuaded him to change "outhouse" to "gatehouse."

<sup>21</sup> LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 24–25, 49–50, 106–10 (1983).

confession to the police). Many people probably do not know that Miranda served ten years for the crime that led to the famous *Miranda* case. (Stuart, at 95.) After being released from prison, he died in a bar fight in 1976. (Stuart, at 95–96.) Both individuals suspected of killing Miranda waived their *Miranda* rights and “told police their stories without benefit of counsel,” but both were released “pending further investigation” and “both disappeared and were never seen again.” (Stuart, at 99.)

That Miranda’s killers were never seen again is new information to me. It does not appear in Liva Baker’s account of Miranda’s demise, though she includes details that Stuart does not mention. In this instance, Stuart tells the reader how he obtained this new information (interviews with two Phoenix police officers) and, thus, he advances our knowledge on the *Miranda* story. I wish more of the book were equally illuminating.

Beginning on page 100, Stuart provides a truncated and superficial summary of “the ongoing debate” over *Miranda*. More troubling than the superficial nature of the summary is that it misses entirely the debate that has been going on for the last ten years or so about the apparent lack of effectiveness of the warnings.

Part Two of Stuart’s book is entitled “*Miranda* in the Twenty-First Century.” Stuart provides a detailed treatment of *Dickerson v. United States*,<sup>22</sup> the 2000 case that put to rest any doubts about the constitutionality of *Miranda*. To my mind, *Dickerson* is not worth nearly that much ink. Despite Paul Cassell’s best efforts, few doubts about *Miranda*’s constitutionality existed in 2000 that needed to be put to rest. But even if I’m wrong about that, what Stuart leaves out, almost entirely, is the real story of *Miranda*, how the doctrine evolved, and what it is like today. I’ll take that up in Part III.

Following the lengthy discussion of *Dickerson*, Stuart tells us about three cases that, when he wrote the book, were awaiting decision by the Court in the 2003–2004 Term. They have since been decided, and he discusses the outcomes briefly in the Preface. Though these cases fit his “twenty-first century” motif, they are not as important as several other *Miranda* cases decided in the almost forty years between *Miranda* and the 2003–2004 Term. For reasons I cannot comprehend, Stuart ignores the intervening cases.

Next, Stuart discusses *Miranda* in the aftermath of September 11, 2001. This would be a riveting subject if the horror of 9/11 had any consequences for the *Miranda* doctrine. But Stuart reports none. It is true that John Walker Lindh raised an interesting *Miranda* issue: whether *Miranda* applies to soldiers in a war zone. But Lindh pleaded guilty and the issue was never resolved. Stuart seems to think that Jose Padilla and Esam Hamdi had or have *Miranda* claims (Stuart, at 136–38), but Stuart makes only a cursory reference to Hamdi’s claim and never discusses what Padilla’s claim might be.

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<sup>22</sup> 530 U.S. 428 (2000).

The next chapter is "Looking Back on *Miranda*." Here, Stuart summarizes interviews with twenty-four mostly minor players in the *Miranda* drama. (Stuart, at 140–52.) There is little here that is interesting. Three examples will suffice. John Frank, lead counsel in the *Miranda* cases, is quoted as saying that George Washington "thought that no person should be forced into testifying against himself." (Stuart, at 141.) Is that General George Washington, who was not a lawyer? Stuart cites no authority for Washington's purported belief. I imagine none exists. Judge Mary Shroeder is interviewed, even though on Stuart's own account she never worked on *Miranda*'s case while a member of the firm that represented him on appeal. So why is she interviewed? It is because "she has seen *Miranda*'s progeny at several different levels" (Stuart, at 149), whatever that means. Stuart interviews a Phoenix lawyer who spent "two decades of his career prosecuting criminals and the last decade defending them." (Stuart, at 151.) His view is that *Miranda* is "no longer of any practical significance" because "everybody knows about" the right to remain silent. Stuart writes: "What could be more important than that?" (Stuart, at 151.) But if everybody knows about the right to remain silent, why should we care today whether *Miranda* warnings are given? Stuart provides no answer.

A series of disjointed essays comes next. At pages 152–55 appears "Did *Miranda* Retard Law Enforcement?" Stuart offers no clear answer. "False Confessions, the Temple Murder Case, and the Tucson Four" follows. (Stuart, at 155–59.) False confessions are a serious problem, but there is no indication that *Miranda* has any effect, or was intended to have any effect, on false confessions. It was hard for me to figure out why this essay was in the book.

Stuart asks whether *Miranda* was motivated by political ideology or by a concern with police misconduct in the interrogation room. (Stuart, at 162–67.) He gives the reader a bit of history of each of the justices who voted in the majority, then claims "one can not easily conclude that a common ideology drove their decisions." (Stuart, at 166.) So, he concludes that *Miranda* was based on concern with police interrogation methods. Of course. One need only read the *Miranda* opinion to conclude that, as Stuart himself notes (Stuart, at 163) before drifting off into his search for a "common ideology."

Next we get "When Did *Miranda* Become a 'Constitutional' Decision?" (Stuart, at 167–68.) Stuart notes that neither police detective he asked this question, which he said "seemed profound in the asking," could provide much of an answer. (Stuart, at 168.) First, why would you ask police detectives a question about constitutional law? Second, when Stuart answers his own question, he gets it wrong. He said the "literal answer" was when *Dickerson* was decided in 2000. (Stuart, at 167.) But *Dickerson* held that *Miranda* was based on the Constitution *when it was decided*. The *Miranda* Court said again and again that it was interpreting the Constitution. Moreover, consider the style of the case: *Miranda v. Arizona*. If the case had not been based on the Constitution, the Court would have lacked the authority to impose its new regime on the states.

I cannot avoid concluding that there is no story in this book that coheres. I believe that Stuart cobbled together these disparate chunks because he thought he had some obligation to do so. He says in the Preface: “I wanted to write this book because I know many of the principal figures personally.” (Stuart, xxi.) That is not reason enough to write a book. A writer needs a story to tell.

### III. THE UNTOLD STORY

The story of how *Miranda*, 1966 style, evolved into *Miranda*, 2005 style, is one that draws on politics, the gradual undoing of pieces of the Warren Court criminal procedure revolution, the ability of police to persuade suspects to waive their *Miranda* rights, and the stubborn insistence on talking to the police that many suspects bring to the interrogation room. Stuart tells almost nothing of this story.

It is difficult for us today to appreciate the “law and order” mentality of the late 1960s. A taste can be gotten from the remarks of Senator John McClellan of Arkansas when he rose to urge the Senate to pass the Omnibus Crime Control and Safe Streets Act of 1968:

[C]rime and the threat of crime, rioting, and violence, stalk America. Our streets are unsafe. Our Citizens are fearful, terrorized, and outraged . . . . [I]f this effort to deal with these erroneous Court decisions [such as *Miranda*] is defeated, every gangster and overlord of the underworld; every syndicate chief, racketeer, captain, lieutenant, sergeant, private, punk, and hoodlum in organized crime; every murderer, rapist, robber, burglar, arsonist, thief, and conman will have cause to rejoice and celebrate . . . [A]nd every innocent, law-abiding, and God-fearing citizen in this land will have cause to weep and despair.<sup>23</sup>

Richard Nixon placed four justices on the Supreme Court.<sup>24</sup> The Court began rather quickly to retreat from the idea that *Miranda* was required by the Fifth Amendment. This retreat made it easier, at the margin, to prove compliance with *Miranda*. But, in my view, the doctrinal superstructure of *Miranda* has far less significance than the real-world evolution of police interrogation.

In sum, the police learned to adjust to *Miranda*. And nothing seems to quench the desire of many suspects to waive *Miranda* so they can tell “their side of the story.” The much vaunted and feared warnings—perhaps the end of confessions, some thought—have instead become pieces of furniture in the interrogation room. The furniture must be moved every now and then, so that the

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<sup>23</sup> 114 CONG. REC. 11,200–01, 14,146, 14,155 (1968). For a more complete account of this attempt to supersede *Miranda*, see Yale Kamisar, *Can (Did) Congress “Overrule” Miranda?*, 85 CORNELL L. REV. 883 (2000).

<sup>24</sup> Chief Justice Warren Burger (1969), Associate Justices Harry Blackmun (1970), Lewis Powell (1972), and William Rehnquist (1972).

police can dust and vacuum, but the *Miranda* furniture is amazingly easy to move. Police almost always give the warnings prior to custodial interrogation. Yet studies show that roughly eighty percent of suspects waive *Miranda* and talk to the police.<sup>25</sup>

Imagine so many suspects agreeing to talk after the police have provided warnings that say, in effect, “talking to us can only hurt you; you don’t have to talk to us; and you can have a free lawyer to discuss your predicament.” Yet eighty percent waive and most of those incriminate themselves. This is, to me, the real *Miranda* story, one that Stuart misses entirely.

I believe that *Miranda* was never the powerful medicine it seemed to be and that the police adjusted quite nicely to whatever medicinal effect it had. On my account, *Miranda* is hardly the “historic” victory Stuart wants it to be. (Stuart, at 154–55) It is, instead, simply one more point on the spectrum of judicial attempts to find the right balance between interrogator and suspect in the police interrogation room. The judicial points on that spectrum began roughly three centuries ago and stretch out into the distant future.<sup>26</sup>

Stuart has no obligation to tell *my* version of the *Miranda* story, of course. I present it here to balance the picture. If I have piqued your curiosity about the politics that produced *Miranda*, I recommend Liva Baker’s book, *Miranda: Crime, Law and Politics*, published in 1983. If you are curious about the development of the doctrine and the empirical studies examining *Miranda*’s effect, I recommend an article Richard Leo and I published in 2002: *The Effects of Miranda v. Arizona: “Embedded” in Our National Culture?*<sup>27</sup>

I do not recommend Stuart’s book.

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<sup>25</sup> See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 860, tbl. 3 (1996) (finding a waiver rate of 84% from information provided by prosecutors); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276, tbl. 3 (1996) (finding a waiver rate of 78% based on observation of interrogations); George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1972, tbl. 2 (2004) (finding waivers in 68% of a sample of appellate cases).

<sup>26</sup> See George C. Thomas III, *The End of the Road for Miranda v. Arizona?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1 (2000).

<sup>27</sup> 29 CRIME AND JUSTICE: A REVIEW OF RESEARCH 203 (2002).