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The Miranda Ruling: Its Past, Present, and Future

By Lawrence S. Wrightsman and Mary L. Pitman

Oxford University Press, New York, NY, 2010.
208 pages, \$75.00.

REVIEWED BY HEIDI BOGHOSIAN

In *Miranda v. Arizona*, 384 U.S. 435 (1966), the U.S. Supreme Court did not prescribe any particular words that law enforcement officers must use when they inform persons in custody that they have a right to remain silent, that anything they say can be used against them in court, that they have a right to a lawyer, and that, if they cannot afford a lawyer, one will be appointed to represent them. As a result, depending on the jurisdiction, an arresting officer may read a suspect one of a great number of differently written *Miranda* warnings. The warnings may vary even within a jurisdiction; in Pittsburgh, for example, there will be a different set of warnings depending on whether one is brought into custody by the police, the sheriff, the university, or the railroad, even though all four departments are located on the same block. In all, at least 886 different written versions exist, many of them in legalese. The specific waiver component of one's rights to remain silent and to have an attorney present can add to the difficulty of comprehension.

The existence of so many written variations of the *Miranda* warnings is just one wrinkle in 44 years of fallout from the Warren Court's decision in *Miranda*. In *The Miranda Ruling: Its Past, Present, and Future*, psychologists Lawrence S. Wrightsman and Mary L. Pitman present an interdisciplinary look—legal and psychological—at whether the current state of *Miranda* conforms to the Court's intended goals. The authors deliver an intelligent examination of how subsequent decisions have subverted the original justices' intentions and fashioned a *Miranda* warning that is more palatable to law enforcement officials. In *Moran v. Burbine*, 475 U.S. 412 (1986), for example, the Court found that the

police's failure to tell the suspect that his family had retained an attorney for him did not deprive him of information essential to his ability to waive his Fifth Amendment rights. A few years later, in *Davis v. United States*, 512 U.S. 452 (1994), the Court held that the burden is on the defendant to unambiguously request counsel.

Tensions that the original Court grappled with in trying to balance the competing interests of civil liberties and law enforcement continue to inform *Miranda*-related jurisprudence. Although popular perceptions, born of the mass media, tend to simplify the dynamic between police and suspects as it relates to the *Miranda* warnings, Wrightsman and Pitman are sensitive to nuance in showing how law enforcement has used the ruling to its advantage. One of the most interesting chapters in the book describes how police are taught to bypass *Miranda*, and what social scientists have observed on the few occasions in which they have watched police interrogations. "Despite what police might say, the purpose of an interrogation is to get a confession. ... [T]he challenge becomes to test the limits of the law in obtaining an admission of guilt." The authors write that post-*Miranda* police interrogation training manuals still advocate the use of trickery by police and even "ignoring invocations of *Miranda*."

In retrospect, the original goal seemed simple enough. The justices who deliberated *Miranda* wanted to ensure that suspects are told of their right to remain silent and to have the assistance of a lawyer. Acknowledging that the primary goal of police interrogation is to gain a confession, courts have long attempted to reconcile the need to mete out punishment to offenders with the presumption of innocence. *Miranda* was intended to assist in balancing the interrogation room dynamic, which is by nature coercive, by allowing suspects to knowingly either invoke or waive their rights. For the most part, it has accomplished only the appearance of doing so. An indication of how few suspects understand the *Miranda* warnings is that, after hearing them, four out of five waive their rights

to remain silent and to have a lawyer present.

Wrightsmen and Pitman identify three stages of reactions to the *Miranda* decision. First, crime control advocates had a negative reaction, saying that the decision would hamper police work and lower conviction rates. Surveys were conducted, and most agreed that *Miranda* would result in fewer confessions and statements. In addition, President Richard Nixon called the Court soft on crime. The second stage comprised a debate over whether *Miranda* changed policing practices and decreased the number of confessions, and the third stage encompassed a realization by advocates of due process that the decision had little impact.

The authors' thesis that *Miranda* has had little impact gained support shortly after their book was released. In *Bergbuis v. Thompkins*, 130 S. Ct. 2250 (2010), the Court further shifted the balance between the conflicting values of due process and crime control in favor of law enforcement. The Court ruled that suspects have a duty to speak up and say that they do not want to talk; thus, police may now issue the *Miranda* warnings and begin questioning if the suspect does not give a clear expression that he or she is waiving the right to remain silent. As Pitman and Wrightsman point out, "And while we can decry the lack of a clear rule prior to *Miranda*, we should acknowledge that the laundry list of factors to be considered in judging voluntariness highlighted some aspects that reflect what we consider to be the main problems in implementing *Miranda* ... including the difficulty in comprehension by some suspects and the use of deception by the police."

The discipline of psychology is necessary in any analysis of police procedure, especially interrogations and the use of deception, and any fair assessment of *Miranda*, especially the "knowingly and willingly" factors, calls for a psychological perspective. The authors' analysis of problems in the comprehension of *Miranda* warnings alone makes the case for the decision's ineffectiveness. Juveniles

have an especially difficult time comprehending *Miranda* warnings. Their lesser cognitive capacity (some versions of the *Miranda* warnings run up to 47 words), their lower tolerance for interrogations, and their vulnerability to stress all contribute to the ease with which interrogators may manipulate juveniles.

All in all, writes Richard Leo, author of *Police Interrogation* (which I reviewed in the September 2008 issue of *The Federal Lawyer*), “*Miranda* has mostly helped, not hurt, law enforcement.” Leo adds that *Miranda* “has shifted courts’ analysis from the voluntariness of a confession to the voluntariness of a *Miranda* waiver.” When judges find that police properly informed a suspect of his *Miranda* rights, they do not generally scrutinize the actual methods of interrogation that followed the waiver of those rights.

The current Supreme Court, write the authors, has “remained committed to permitting erosions of the *Miranda* rights. It reflects this bias not only in the decisions it makes on cases for which it has granted *certiorari* but also its decisions about those appeals that it rejects.”

The Miranda Ruling recommends reforms including the presence of an advocate to ensure that suspects are told of their rights immediately and to confirm that any waiver was knowing and intelligent. The authors also suggest that videotaping the procedures may serve as a restraint on police misconduct and allow juries to see the extent of voluntariness in confessions. Although Wrightsman and Pitman are not the first advocates to call for such reforms, their expertise in psychology, their commonsense approach, and their genuine interest in justice may make them among the more credible contributors to the field. **TFL**

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Last Call: The Rise and Fall of Prohibition

By Daniel Okrent

Scribner, New York, NY, 2010. 468 pages, \$30.00.

REVIEWED BY HENRY S. COHN

Journalist Daniel Okrent’s *Last Call* is an engaging social history, accompanied by numerous photographs, of the failed effort to ban alcohol in United States. The book has three parts: the adoption of the 18th Amendment in 1919, life in the 1920s while prohibition was in effect (the strongest portion of the book), and the eventual downfall of prohibition and its repeal by the 21st Amendment in 1933.

In the opening chapters, Okrent traces the “dry” movement from its roots early in the 19th century through its becoming a major force in the 1870s and the triumphant ratification of the 18th Amendment in 1919. Upon its founding in 1873, the Women’s Christian Temperance Union spearheaded the temperance movement, but, by the 20th century, the Anti-Saloon League had become the leading organization lobbying for prohibition. Its director, Wayne B. Wheeler, single-handedly drove incumbent “wet” politicians out of office with his amazing ability to influence public opinion. Wheeler devised tactics that focused on his only goal: ridding alcohol from American shores. He had no problem supporting and receiving aid from the Ku Klux Klan, Protestant progressives, legal reformers, religious extremists, suffragettes, and congressional budget-makers who proposed the income tax as an alternative to revenue that was derived from liquor sales.

The Anti-Saloon League also benefited from the advent of World War I. The dries argued that the war required reining in the brewers of beer (“liquid bread”) so that foodstuffs would be available to feed the soldiers on the battlefield. They also attacked the brewers, mostly Americans of German origin, as favoring the “Hun” in the world conflict.

In 1917, Congress adopted the 18th Amendment and, by January 16, 1919,

the requisite 36 states had ratified. The amendment, by its terms, took effect one year later, on January 16, 1920. Okrent stresses that the great number of immigrants who arrived in the United States in the early 1900s strongly opposed ratification, because they liked to drink. In one of the few weaknesses in the book, Okrent does not discuss that ratification was also opposed for more informed reasons. For example, the editor of the *Hartford Courant*, Charles Hopkins Clark, successfully urged Connecticut’s legislature not to ratify because prohibition would prove unenforceable and would be an intrusion on states’ rights.

The chapters on America under prohibition (1920–1933) are excellent. To enforce the 18th Amendment, Congress passed the Volstead Act, which had three major exceptions to prohibition. First, it allowed physicians to write prescriptions to obtain alcohol for “medicinal” reasons. Few doctors adhered to any specific diagnosis, freely allowing access for any “debility.” The second exception was “sacramental.” The regulations permitting both Catholics and Jews to obtain quantities of wine for religious ceremonies were stretched by unscrupulous “members” of congregations to open commercial trade in spiritual products.

The final exception allowed, in Wheeler’s words, “the farmers and housewives of the country to conserve their fruit.” The rural population, a major support group for the Anti-Saloon League, would never have tolerated a crackdown on its fermented juice. The result was that the Midwest farmers had their hard cider, and, in addition, Brooklyn, New York neighborhoods were swamped with grapes from California, soon processed into table wine.

These sweeping exceptions undercut the Volstead Act. In addition, as the *Hartford Courant* had predicted, enforcement of prohibition proved virtually impossible. The secretary of the treasury, Andrew Mellon, who supervised the Volstead Act prohibition agents, was “icily indifferent.” Roy Haynes, Mellon’s chief of enforcement, was rightly seen as a buffoon and an

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incompetent, his statements “patently at odds with reality.” President Harding (1921-1923) enjoyed his alcohol, whereas President Coolidge (1923-1929), not a drinker, was a tight-fisted conservative, who would agree to spend only the minimum necessary for enforcement.

The only federal officer who did not give up on enforcement was an assistant attorney general, Mabel Walker Willebrandt, one of the few women who achieved success in the federal bureaucracy of the 1920s, and a stern interpreter of Volstead Act provisions. But her views were mostly ignored by her superiors.

Other problems for the enforcement of prohibition were Canadian shipments of Scottish whiskey that stocked warehouses in Detroit and Chicago, ships with liquor cruising from Nassau to Boston, and storage facilities in inlets on the Maine coast. With these came the development of organized crime, as rum-running helped launch the careers of Meyer Lansky and Al Capone.

The beginning of the end for the 18th Amendment was the 1928 presidential election. It appeared that the Anti-Saloon League had scored a major victory, as Herbert Hoover, calling prohibition a “noble experiment,” crushed Al Smith and his “wet” allies. The Anti-Saloon League, without the guiding hand of Wheeler, who had died in 1927, pressured Congress to pass the Jones Act in 1929, making Volstead Act violations felonies instead of misdemeanors. But this was the last gasp of prohibition. Al Smith’s campaign, although unsuccessful, had united the wet opposition as never before, and the public was outraged that ordinary folk were punished severely for drinking, while the wealthy hypocritically continued to indulge.

The 1929 stock market crash, followed by years of a weak economy, was the final blow to prohibition. The need for new sources of revenue became imperative, especially as President Franklin D. Roosevelt contemplated the New Deal. Allowing the sale of liquor and taxing it heavily appealed to the economic reform-

ers in the early 1930s. After the 1932 presidential election, Congress quickly passed the 21st Amendment, repealing the 18th. It was ratified in special conventions called in every state, and was the only constitutional amendment ratified in this manner. The repeal did not eliminate liquor regulation but returned the task to the states, which continue to regulate it extensively.

In addition to relating prohibition’s history in detail, Okrent graces his story with clever observations on the effect of prohibition on American culture. He describes the origin and management of the speakeasy; attendance at these semi-secret drinking rooms led to a change in women’s drinking habits and to the creation of “powder rooms” for women. Prohibition saw the start of several enterprises, including Seagram’s whiskey (smuggled from Canada), Welch’s grape juice, Gallo wine, and Walgreens Pharmacy (once a small Chicago outfit that grew by filling liquor prescriptions). Okrent also spends several pages at the end of *Last Call* rebutting, for lack of evidence, the allegation that Joseph P. Kennedy was a bootlegger.

The desire to save the world from John Barleycorn came to pass as part of the progressive era that led to the direct election of U.S. senators, the income tax, and the vote for women. Like these more successful causes, prohibition produced fascinating characters and wonderful stories and legends. Thanks to Daniel Okrent’s *Last Call*, we can experience the thrill of this story today. **TFL**

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Cocaine Nation: How the White Trade Took Over the World

By Tom Feiling

Pegasus Books, New York, NY, 2010. 351 pages, \$27.95.

REVIEWED BY JON M. SANDS

Tom Feiling’s account of the worldwide cocaine trade opens with a telling

story. An indigenous Peruvian recounts how, when the white conquistadores came to the New World, his ancestors consulted the Sun God as to what to do. The Sun God told them to trust the coca leaf. The coca leaf will feed, cure, and comfort you, giving you strength, but the white men, upon discovering the coca, will not know how to control it. The coca, in time, will turn the whites into brutes and idiots.

Tom Feiling would grant the Sun God his due, because brutal and idiotic is how he would sum up the world’s—and especially America’s—policy toward the alkaloid extraction from the coca leaf: cocaine. In his wide-ranging tracing of the global cocaine trade, he examines the sinister drug’s production, distribution, and use. He follows the coca plant from the growers in the Andes to the cocaine manufacturers in Columbia, Bolivia, and Peru, to the cartels refining and packing the product into kilo packages, to the shippers, smugglers, and couriers who deliver it to be wholesaled and retailed in powder or rock form on street corners in the United States and hungrily consumed by addicts. Feiling is most compelling in his stories of these people handling coca in its various forms and at various links in the chain of distribution. These are people driven by poverty to provide the product – driving it across borders, amidst corruption, violence, and threats of death, past suspicious police and sniffing dogs, and facing heavy penalties if caught. For a few hundred dollars, they take these risks to deliver cocaine to cutthroat competitive distributors so that various types of people, from the fabulously wealthy to desperate addicts spending their last money, can, for a short time, feel the best that they will ever feel.

Cocaine Nation examines both sides of the game, as it also includes stories of law enforcement agents and prosecutors seeking to stem the flow with interdiction tools that amount to sieves and sledgehammers for punishment for those few who are unfortunate enough to be snagged. Feiling writes with the passion of someone who has seen the waste in lives and money, and knows there is a better way. His book is a

jeremiad, and as with most prophets, on street corners or on book tours, his calls will be ignored.

Feiling is at his best when he concentrates on individual stories. This is not surprising, in light of his background as an award-winning documentary producer. Stories drive his account, but, unfortunately, for long sections of the book, he believes that he has something new to say about drug use, the drug wars, and cocaine itself. He doesn't. Other books have much more extensive discussions of cocaine use, for example. Feiling does a serviceable job summarizing how, in the late 19th century, coca and cocaine were used in everything from medicine (both reputable and quack) and food and beverages (it really was the real thing in Coca-Cola™), only to peter out in the early 20th century with the advent of stricter pharmaceutical regulations, drug schedules, and consumer concerns. Feiling also recapitulates the re-emergence of cocaine as a high-end, supposedly nonaddictive drug in the discos of the hedonistic 1970s. Feiling notes how cocaine's chicness among celebrities gave it a cachet. It seemed to be everywhere, with songs about it on the airwaves, and lines of it snorted in the restrooms of clubs. The government tended at first to ignore it, believing that it was bad, but not addictive. This was incorrect. When celebrities began dying from it, and yuppies moved from working on trading floors to making trades on street corners, the atmosphere changed.

And then there is crack. Crack cocaine is chemically indistinguishable from powder cocaine. It is simply a cocaine base mixed with baking soda and water, and heated. ("Crack" gets its name from the cracking sound cocaine makes when baking.) It then forms into small rock-like pieces, easy to package and sell. And sell it does. Crack became a scourge of the inner cities and was used predominantly by African-Americans. This was the era of the crack scare, when law enforcement and medical science warned of a crack epidemic, and the death of basketball star Len Bias gave a face to the dangers. In the midst of the hysteria, Congress upped the penalties for crack, imposing a punishment ratio

of 100 to 1 to that of powder cocaine. The effects of this law over the past quarter-century have been devastating to African-Americans and have had a corrosive impact on the respect for and efficiency of law enforcement. Only now are things beginning to change.

Yet all of this is old hat. Feiling started writing this book in 2006, and it was first published in Great Britain under the title *The Candy Machine: How Cocaine Took Over the World*. Although "candy" in the title may imply that cocaine is a luxury item in Europe, it does not reflect the widespread use of cocaine in the United States. *Cocaine Nation* may be a more apt title in the United States, but the book seems a bit dated. References to the George W. Bush administration's policies on drug enforcement and Latin America are yesterday's news.

Nevertheless, Feiling does provide something new in his emphasis on the worldwide trade, especially the rising use of cocaine in Europe and the way the attitudes and responses of European nations differ from those of the United States. Treating drug abuse more as a health problem than as a crime is an alternative that America has chosen not to follow. For more than 40 years, ever since Richard M. Nixon declared a "war on drugs," every administration and every Congress has continued the losing fight. Feiling acknowledges the terrible cost of drug abuse but wonders if the tragedy of wasted trillions of dollars, skewed law enforcement, and lost lives in prison is worth it. The recurrence of the problems created by alcohol prohibition are obvious. Feiling notes that, although some politicians and law enforcement officials are dead-set against any relaxation of the drug laws and state that repealing them would be akin to legalizing murder, there are just as many—and Feiling relates his conversations with many of them—who believe that a different approach is needed.

Feiling is insightful in stressing that the effect of America's approach is not confined to within its own borders. Our heavy-handed criminal law enforcement warps our relations with other nations, especially those in Latin America. Coca has long been used by indigenous people in the Andes. It

provides benefits when chewed, but, with the pull of markets in America and elsewhere, coca has become a money crop, not for the dirt poor farmers, who are exploited, but for the drug cartels and the governments. American policy has played havoc and exacted an awful price from Latin America, where cartels constitute shadow governments, and some countries are referred to as "narco-states." The toll is currently being paid in the violence of the drug cartels in Mexico. But even with the violence, the dire poverty and lure of money does not diminish the availability of couriers, or "mules," as they are called in the trade. Smuggling cocaine in cars, on planes, and in ships, these indigent people risk years, if not decades, in prison if they are caught. We punish them so severely because we have chosen to tie the level of punishment to the quantity of drugs involved, rather than to the role of the distributor. This is yet another legacy of our misbegotten drug policies.

Feiling's book would have worked better as a series of magazine articles. It would have had more immediacy, and the focus would have been sharper, zeroing in on particular players. As a series of magazine articles, it would have mattered less that the book will soon be supplanted by new facts and figures of cocaine use, costs, and inmates sentenced. Feiling's suggestions for policy changes, which emphasize treating addiction and cutting cocaine use, are all earnest and might even work. But, given the reluctance of Congress to appear soft on crime, the institutional and bureaucratic imperatives of many agencies (What would the Drug Enforcement Administration do?), Feiling's suggestions for legalization or at least decriminalization are quixotic, apart from the question of whether they are good policy.

Nevertheless, there is some hope for a more rational drug policy. Just this past August, President Obama signed the Fair Sentencing Act of 2010, which reduced the disparities between sentences for crack and powder cocaine offenses from 100 to 1 to 18 to 1,

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increased the amount of crack required for mandatory minimums, and eased some other aspects of the drug laws. The statute does not go far enough, but it is a start to reducing the brutality of our punishment and the idiocy of our policies. *Cocaine Nation* may give some policy makers something beneficial to chew on after all. **TFL**

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Portrait of an Addict as a Young Man: A Memoir

By Bill Clegg

Little, Brown and Company, New York, NY, 2010. 222 pages, \$23.99.

REVIEWED BY ELIZABETH KELLEY

Andrea Simakis, a columnist for the *Cleveland Plain Dealer* who calls herself “The Pop Diva,” wrote that the last thing the world needs is another memoir by a celebrity telling about his or her addiction. She was referring to this past summer’s best-selling book, *Portrait of an Addict as a Young Man*, by Bill Clegg. Simakis is a great writer, and, before she became the Pop Diva, she wrote some wonderful pieces about criminal justice issues. But I respectfully disagree with her on this one. What we need are more celebrity memoirs of addiction, not fewer.

Today, Bill Clegg, author of *Portrait of an Addict as a Young Man*, is a literary agent at the William Morris Agency in New York City. Clegg’s story is a familiar one: Raised in a solid, wholesome, middle-class home, he came to New York City and was dazzled. Through talent, hard work, and the right connections, he became a literary agent, eventually owning his own agency and representing a talented and successful roster of writers. On the outside, he lived a great life with all the trappings, including A-list parties and designer clothes. Meanwhile, he became addicted to alcohol and to crack cocaine.

Portrait of an Addict as a Young Man is the story of Clegg’s descent into

hell, and it’s not G-rated. The book is filled with stories of his encounters with male prostitutes, late-night calls to his drug dealer, and paranoid hallucinations. On one of his last benders, he wandered in Manhattan for days, going from hotel to hotel—and eventually from dump to dump because no one would take him in—looking no longer the dapper literary agent but looking instead like the unshaven, unkempt, emaciated junkie that he was.

The past few months have seen saturation coverage of Lindsay Lohan, and this proves my point that we need more celebrity memoirs of addiction, not fewer. In most circumstances, people pay attention to criminal justice issues only if a family member is involved or if the case concerns a celebrity. Would anyone pay attention to Lindsay Lohan if she were a slaughterhouse worker in Iowa who was addicted to meth or if she were a housewife in Shaker Heights addicted to prescription drugs?

In addition, celebrity memoirs of addiction show that substance abuse afflicts people from all economic classes. Like most criminal defense lawyers, I get so tired of the automatic assumption that the only people who ever get wrapped up in the criminal justice system are the poor. Most of us in the defense bar have represented people from all walks of life and economic classes—and many of those people have substance abuse problems. One of the many lessons to be learned from *Portrait of an Addict as a Young Man* is that an addict can descend in no time at all from sponsoring a luncheon at La Grenouille to crawling on the carpet at an airport hotel in New Jersey looking for crack crumbs.

Celebrity memoirs of addiction show that people with substance abuse problems have to work on their sobriety every day of their lives. I hope that Lindsay Lohan will have the opportunity to learn this. Both Mackenzie Phillips, in her book *High on Arrival*, and Jane Valez-Mitchell, in her book, *iWant*, show that, although they are now sober and successful, they put great energy into maintaining a healthy lifestyle.

You can get through *Portrait of an Addict as a Young Man* in a couple of evenings, both because it is about the size, appropriately enough, of James Joyce’s *Portrait of the Artist as a Young Man* and because you won’t want to stop reading. But the book left me with one nagging question that Clegg does not address: Why wasn’t he ever arrested for drug possession? Certainly, we can speculate that because he mixed in tony circles, he managed to avoid detection, or at least detection by people carrying handcuffs. But what about when Clegg descended into the more crime-ridden parts of New York City in search of crack? What about when he took a cab? Police officers and others sometimes work undercover as cab drivers. In addition, Clegg was always calling his dealer for an emergency delivery, and, for all Clegg knew, that dealer could have been working with law enforcement, perhaps to cut a deal for himself.

Nonetheless, Clegg avoided arrest and gained sobriety, although he doesn’t dwell on his journey to rehabilitation. But I don’t mean that as criticism: Clegg’s portrait of an addict in the depths of addiction is powerful enough. **TFL**

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