Police Interrogation and American Justice

By Richard A. Leo

Harvard University Press, Cambridge, MA, 2008. 327 pages, $45.00.

REVIEWED BY HEIDI BOGHOSIAN

In *Police Interrogation and American Justice*, Richard A. Leo presents a gripping indictment of what goes on behind the closed doors of police interrogation rooms. From psychological manipulation, to threats of harm and promises of leniency, to lengthy incommunicado questioning, all the way to outright brutality—police engage in conduct that causes suspects to think that they have no choice but to say what is expected of them and to provide coerced and often false confessions. These police practices subvert our system of justice and enable the police to become, in effect, prosecutor, judge, and jury—and sometimes executioner. Leo's book is a powerful contribution to criminal justice public policy.

In contextualizing police interrogation, Leo brings to life the so-called third degree of the 19th and early 20th centuries—the systemic use of psychological and physical torture to elicit confessions. The catalog is vile, yet it is riveting to read how easily sadism arose in those entrusted to safeguard the public. That the tools were mundane makes the horror all the more real—police used chairs, pistol butts, leather straps loaded with lead, slabs of wood, brass knuckles, baseball bats, and copper-bound rulers. Methods of physical and psychological torture included the "sweat box" and the "water cure" (now known as "waterboarding").

The "Report on Lawlessness in Law Enforcement," widely known as the "Wickersham Report," was issued 80 years ago, during Herbert Hoover's administration, and the report urged reform. The changes that ensued from it, however, reveal a treachery that, though less outwardly hideous, is far more damaging to the entire justice system. Leo writes that "the decline of the third degree is also a story about the persistence of police institutions and behavior." The police still believe that those they interrogate are guilty; therefore, the police feel free to force a guilty narrative on suspects in order to convict them.

The third degree, Leo explains, was replaced by the creation of behavioral analysis tools to determine guilt and to elicit confessions. Thus were born the polygraph, truth serums, voice stress analysis, and behavioral and statement analysis. The use of these devices, Leo writes, persuaded suspects that the police could essentially read their minds. "By shifting the focus away from the interrogator and his techniques to the lie-detection machine and endowing it with oracular status in the name of modern science, the detective mystifies the interrogation process." This shift created the illusion that the police officer is focused on finding the truth, Leo explains. Compounding the problem is poor police training about the dangers of psychological coercion. Training manuals and programs dealing with police interrogation have largely neglected the issue of false confessions.

It is not surprising that the third degree, as well as current interrogation techniques, causes defendants to succumb to psychological coercion and to sign false confessions, thereby yielding a high rate of wrongful convictions. Obtaining confessions, after all, is law enforcement's goal, and police are too often unconcerned whether the confessions they obtain are truthful. After inducing confessions, police continue their manipulation by suggesting a narrative of how the crime occurred. Leo writes that "American police interrogators still presume the guilt of the suspects they interrogate; still attempt to overcome their resistance and move them from denial to admission; still try to convince them—if by fraud rather than force—that they have no real choice but to confess; and still exert pressure to shape and manipulate their postadmission narratives."

Interrogation, which takes place in closed rooms and is rarely electronically recorded, is the most secretive of police functions, even though more convictions are obtained through confessions from interrogations than from any other kind of evidence. According to Leo, the interrogation process is kept hidden because detectives understand that it "often involves behavior—psychological manipulation, trickery, and deceit—that is regarded as unethical in virtually all other social contexts."

Perhaps the American mythos that police are fundamentally trustworthy makes false confessions more common. Most persons in custody are not aware of the extent to which police manipulate and lie during interrogations. Suspects confess to end the psychological and physical brutality they are undergoing, to relieve their stress, and perhaps to put an end to their confinement. Suspects may think that they have no choice but to comply with police demands and confess; they believe that the positive results of admitting to some version of the crime with which they are charged outweigh the costs of continuing to deny their guilt. Police frequently lie and say that inculpatory evidence exists, and such lies increase the risk of innocent people falsely confessing.

Making the problem of false confessions worse is the fact that many people believe that innocent people will not confess to something they haven't done. Most people are unaware that police use what Leo calls "highly manipulative, deceptive, and stress-inducing techniques and strategies" to obtain confessions and that such techniques have resulted in many false confessions. Social scientists have documented hundreds of false confessions that have occurred despite procedural safeguards such as *Miranda* rights and legal limits on coercive questioning tactics. In fact, according to studies that Leo cites, false confessions are the primary cause of wrongful convictions in this country. Neither criminal justice officials nor jurors distinguish between true confessions and false ones. The media do not report false confessions, and prosecutors do not acknowledge them.

Although it may be understandable that jurors believe that only the guilty

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confess, it is hard to believe that judges do not know better. Judges should also know that the very existence of a confession carries "its own set of confirmatory and cross-contaminating biases," which means that jurors may view the rest of the evidence through a negative prism. Leo writes that as "the case against a false confessor moves from one stage to the next in the criminal justice system, it gathers more force and the error becomes increasingly difficult to reverse."

Both prosecutors and judges lean toward the presumption that suspects who confess are guilty, and, as a result, the legal system treats these defendants more harshly. "Conditioned to disbelieve defendants' claims of innocence or police misconduct," writes Leo, "judges rarely suppress confessions, even highly questionable ones." In one study of false confessions, researchers found that nearly 75 percent of defendants who gave false confessions and whose cases went to trial were convicted erroneously. According to another study, more than 80 percent of suspects who falsely confessed were convicted. Furthermore, when defendants recant they are usually not believed, because such retractions are viewed as confirming these defendants' deceptive or guilty tendencies.

Police Interrogation and American Justice causes one to marvel at the extent to which the parties in the justice system have been complicit in enabling lawless police to effect convictions of suspects by coercing their confessions. Leo offers suggestions for reform, which are fair and reasonable in a country that has the highest incarceration rate in the world. Among his proposals are making audio and video recordings of interrogations; forbidding police from making promises or threats to detainees; permitting expert testimony regarding the effect of coercive questioning techniques in order to educate jurors about false confessions; and enacting safeguards to protect the mentally ill, juveniles, and other especially vulnerable individuals. It is a moral travesty that these basic safeguards are not already mandatory. **TFL**

Heidi Boghosian is executive director of the National Lawyers Guild and a co-host on the nationally broadcast civil liberties radio show "Law and Disorder," whose Web site is lawanddisorder.org/index.php.

The Summer of 1787: The Men Who Invented the Constitution

By David O. Stewart

Simon & Schuster, New York, NY, 2007. 349 pages, $27.00 (cloth), $15.00 (paper).

Reviewed by Charles S. Doskow

For many years it has been my wish that, if I could be transported back in time to any place and time, it would be to the Constitutional Convention of 1787 in Philadelphia, where 55 men toiled in secrecy in the heat of the summer to produce the classic document that has been the foundation of our nation for 221 years. Sometimes called "an assembly of demigods," the convention was anything but that, even though the delegates were a remarkable group of men (all men, all white). Erudite, ambitious, political, and patriotic, they overcame fundamental differences because they believed in the importance of forging a new government for the young nation.

Because I cannot be so transported, I will have to settle for accounts of the convention written by those who have studied and written about its history. We are fortunate that David O. Stewart is one of those authors; he has produced a most readable and remarkable history of the convention. Stewart, a Washington, D.C., lawyer and former Supreme Court clerk, is a gifted writer who brings to life the various personalities who made the Constitution. These men include Benjamin Franklin, who was the sage among them; George Washington, who presided over the convention; James Madison, who kept a personal journal of the proceedings (there was no official record); and Alexander Hamilton.

Other men were at the convention as well. Although they are not as well-known today—Stewart refers to them as "names that would recede to the back pages of history"—without their political skill and vision the Constitution would not have emerged. They include James Wilson of Pennsylvania, John Rutledge of South Carolina, Gouverneur Morris of Pennsyvania, and Roger Sherman of Connecticut—all of whom appear and reappear in Stewart's account, each making invaluable contributions.

The format of the convention makes reporting its chronology difficult. The delegates considered many aspects of the constitution they were drafting on several occasions, often reversing themselves more than once on a given point. But, even though chronological description is almost impossible, Stewart nonetheless somehow keeps the events in order, and the reader never feels lost.

The convention, called to begin on May 15, 1787, actually had its first quorum on May 25. The delegates' job was simple: to invent a national government while recognizing the states as the building blocks on which the central government must rest.

Basic decisions had to be made. The first and most difficult and divisive question was whether representation in Congress would be equal among the states or based on population. After two months of acrimonious debate and negotiation that threatened the convention with failure, the delegates reached what is known as the "Great Compromise" (a term Stewart does not use): representation by population in the House of Representatives and equal representation for each state in the Senate.

After two months of debate, the convention delegates needed a break. While most of the delegates indulged in some form of recreation from July 27 through August 6 (George Washington went fishing and visited Valley Forge), the five-man Committee of Detail produced the first draft of the Constitution. The Committee of Detail was the first of three committees that played a major role in forming a document out of the many votes taken on the floor and in the Committee of the Whole. The Committee of Detail also produced the first

statement defining the scope of Congress' power. Edmund Randolph of Virginia (one of three delegates who ultimately refused to sign the Constitution) prepared the list of 18 "enumerated" powers. It is this provision (Article I, Section 8) that defines the federal government as one of limited powers.

John Rutledge of South Carolina chaired the Committee of Detail and became a dominating figure, defending Southern interests while insisting that the convention had to get on with its work and finish. *The Summer of 1787* stands out from two excellent earlier one-volume histories of the convention as a result of the book's detailed description of the committee's work. (Catherine Drinker Bowen's *Miracle at Philadelphia* (1966) has long been the standard; Carol Berkin's *A Brilliant Solution* (2002) is a more recent brief history of the convention.) The report produced by the Committee of Detail provided delegates a basis on which to debate the remaining issues. Although the delegates declined to accept all the committee's work, after its report noticeable progress was made toward completion of a constitution. Later, several Committees on Postponed Matters—and ultimately the Committee on Style—finished the document we know today. It was written in the hand of Gouverneur Morris, the one-legged ladies' man and raconteur from Pennsylvania, who was one of the premier debaters of the convention.

Two aspects of the convention evoke particular drama: the debates over the nature of the executive branch and over slavery. George Washington presided over the plenary sessions of the convention in which the delegates debated the nature of the executive, including the following questions: Should there be a single executive or a triumvirate? How should the executive be elected and how long should his term be? Should the executive be eligible for re-election? What provisions for impeachment should there be? As for who the first chief executive should be, every man in the room knew the answer to that question.

The fact that there was no question as to whom the first President would be may have caused the delegates to spend less time debating how the President would be chosen. The Electoral College was a pure invention—a complicated, unwieldy, and unreliable device designed to meet most objections and get something on paper. It failed its first serious test in 1800 and was replaced by the Twelfth Amendment in 1803. But the potential problems of the Electoral College didn't seem important in 1787, because it was clear then that there would be no contested election for at least four—and probably eight—years.

As for slavery, despite the many delegates who had moral scruples about it and who had no desire to preserve or enhance it, the Constitution firmly fixed slavery in the American nation. The Southern states made it clear that, unless the peculiar institution was protected, there would be no constitution. The free states paid the price for unity.

Accommodation of Southern interests was the price of both union and the Constitution itself. The document does not contain either the word "slave" or "slavery"; every reference to it in the document (the 3/5 rule for representation, the limitation on outlawing the slave trade for 20 years, and the fugitive slave law) is to "others" or "other persons." These euphemisms became a salve of conscience, the embodiment of the Banquo's ghost overhanging the convention, as it overhung America itself for the next 78 years.

The success or failure of the Constitutional Convention turned on several issues, although none was as urgent as slavery. The delegates were conscious of the real danger of failure, which would result in the states' continued existence under the ineffective Articles of Confederation. At a time when England, Spain, and France threatened the young republic, assurance of a means to defend the country was critical. And, because the states engaged in predatory commercial rivalry, federal regulation of commerce was equally important. Fortunately for the nation, the spirit of compromise ultimately prevailed.

At the conclusion of the convention, several delegates, including Franklin, referred to the spirit of compromise that had made the document possible. "I cannot help expressing a wish that every member of the Convention who may still have objection to [the Constitution] would with me, on this occasion, doubt a little of his own infallibility—and to make manifest our unanimity, put his name to this instrument." Only three delegates refused to sign the document; one of those later changed his mind and joined the campaign for ratification.

The delegates met daily from 10 a.m. to 3 p.m., and then repaired to the various inns and boarding houses where they lived during the convention. There they sat at tables, dining and conversing at length, no doubt reprising the arguments of the day. I include those dining tables in my fantasy of joining these men in 1787.

To say that *The Summer of 1787* reads like a novel is inadequate. It reads better than most novels and it is a major contribution to the literature about the Constitution. **TFL**

Charles S. Doskow is dean emeritus and professor of law at the University of La Verne College of Law in Ontario, Calif., and a past president of the FBA Inland Empire Chapter.

We Shall Overcome: A History of Civil Rights and the Law

By Alexander Tsesis

Yale University Press, New Haven, CT, 2008. 369 pages, $35.00.

The Execution of Willie Francis: Race, Murder, and the Search for Justice in the American South

By Gilbert King

Basic Civitas Books, New York, NY, 2008. 362 pages, $26.00.

REVIEW BY CAROL A. SIGMOND

Divide et impera. Although they take different tacks, these two books both remind us that there is nothing new in the current debate about whether women and racial minorities are allies or rivals in the fight for equality. Both books also remind us of how, for more than 200 years, a minority group—privileged white men—has managed

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to convince women and minorities to become rivals of each other instead of allies.

In *We Shall Overcome: A History of Civil Rights and the Law*, Alexander Tsesis addresses 200 years of uneven progress toward equal political and civil liberties of Americans who are neither white nor male. He traces the halting and occasionally collaborative—but more often competing—paths toward equal rights of African-Americans and women, and, to a lesser extent, of other minorities, such as Asian-Americans and gay Americans. Tsesis begins by pointing out that the principles of individual rights and liberties expressed in the Declaration of Independence and Bill of Rights originally applied primarily to propertied white men; white women and, of course, slaves of both sexes, were largely excluded from the blessings of liberty. It is therefore not surprising that the first crack in the wall allowed in more white men, as the right to vote was extended to nonpropertied white men as well as to a few propertied black men—six out of the 12,500 free black males residing in New York City in 1825. As the property barriers to male political participation gradually eroded, and as women gained education and pushed for property rights and other rights, the larger hypocrisy of slavery was having an increasingly corrosive effect on the nation.

Tsesis reminds us that our young nation was quickly embroiled in debate over slavery, which the Constitution had left largely to the states. Some optimistic souls—among them, apparently, George Washington—believed that slavery would gradually disappear. But slave owners stoutly defended their property rights and their right to expand slavery to new states. Congress' enactment of the Missouri Compromise in 1820 ended the last meaningful opportunity to force an end to slavery in the United States without armed conflict. The Missouri Compromise prohibited slavery in the Louisiana Territory north of the parallel 36°30', except in Missouri. The compromise ultimately failed, and Congress repealed it in 1854, enacting the Kansas-Nebraska Act, which allowed settlers to determine whether or not a territory would permit slavery. This victory for slaveholding interests was followed by the infamous *Dred Scott* decision in 1857, which held that Congress had no power to prohibit slavery in the territories.

For a time, the movement to free the slaves and the efforts by women to achieve equality, beginning with gaining the right to vote, developed along parallel tracks and in a collaborative fashion, with the abolitionist movement including many educated white women. The collaboration between the abolitionist movement and the women's rights movement appears to have peaked with the 1848 Seneca Falls Conference on women's rights, at which Frederick Douglass spoke in support of both abolition and women's rights.

The Civil War lasted from 1861 until 1865. On Jan. 1, 1863, President Abraham Lincoln proclaimed the emancipation of the slaves in the 11 states of the Confederacy. Following the surrender at Appomattox, the Radical Republicans pushed through the 13th, 14th, and 15th Amendments. Although the women's rights movement pressed for these amendments to grant women the same rights they granted to newly freed male slaves, the Radical Republicans denied this request, and their denial, Tsesis points out, planted the seeds of the future rivalry between women and minorities in the struggle for equality, as some women turned their anger at being denied the right to vote onto the newly freed slaves.

In 1869, the women's movement divided into the National Woman Suffrage Association (NWSA), which opposed the 15th Amendment unless it granted women the right to vote, and the American Woman Suffrage Association (AWSA), whose members were staunch abolitionists and believed that women's suffrage could be better achieved through state-by-state campaigns. Frederick Douglass was asked not to attend the 30th-anniversary celebration of the Seneca Falls Conference on women's rights in 1878; as an African-American man who had advocated suffrage for freed slaves ahead of women, he was not welcome at the event. The women who attended the celebration lashed out at the newly freed slaves, astonishingly blaming them, along with the Radical Republicans, for the continuing disenfranchisement of women.

In 1890, the NWSA and the AWSA merged to become the NAWSA—the National American Woman Suffrage Association—which worked for women's suffrage. NAWSA achieved its goal in 1920 with the ratification of the Nineteenth Amendment. But, as women were closing in on success in the state-by-state battle for suffrage, African-American men and women were living under the heel of Jim Crow. Southern white women faired little better, with rights and privileges remaining the exclusive domain of white men in the South. The National Association for the Advancement of Colored People (NAACP) was formed in 1909 and began the legal battles that culminated in *Brown v. Board of Education,* the Civil Rights Act of 1964, and the Voting Rights Act of 1965.

Willie Francis, a young African-American male, lived and died at the time the NAACP was masterminding the end of the doctrine of separate but equal. His story, depicted in Gilbert King's *The Execution of Willie Francis: Race, Murder, and the Search for Justice in the American South*, illustrates one of Alexander Tsesis' points in *We Shall Overcome*: the conflicts that have arisen between minority and women's groups in their efforts to gain full equality help neither group.

Willie Francis was the youngest of 13 children in a poor African-American farming family living in St. Martinsville, La. In 1944, when he was 16, Francis worked as a stock boy for the local druggist, Andrew Thomas, who was single and reputed to be a ladies' man. On Nov. 9, 1944, Thomas was found shot to death at his home, and the evidence suggested that there had been a planned confrontation that went wrong and that there might have been two shooters using two guns. Five shots had been fired, one through the center of Thomas' forehead. Bullets were recovered, but they were lost and therefore never analyzed.

Francis was arrested for the crime.

He had Thomas' wallet, suggesting robbery as a motive, and also had the holster for a gun that belonged to Deputy Sheriff August Fuselier; in addition, Francis was able to identify the location of Fuselier's gun. Francis signed a confession admitting to having killed Thomas, but the confession was odd. Some parts were typed and had correct spelling and grammar, appearing to have been dictated by a third party, who, King suggests, was the local chief of police. Claude Thomas, the druggist's older brother, may have played a role in procuring the confession. The confession also contained handwritten insertions that appear to have been in Francis' own words and in his own handwriting. The two most interesting curiosities in Francis' confession were his claim that he had not stolen anything and his reference to a secret between himself and the dead man. Francis' exact words were: "it was a secret about me and him."

Francis was tried and convicted of the murder and sentenced to death. As an African-American charged with killing a white person, Francis' trial was perfunctory. His confession was enough to convict under the then prevailing standard of justice. No one investigated the motive for the crime or how Francis came to shoot the victim through the head despite having had no firearms training. Other oddities were ignored as well. Francis claimed to have stolen the gun and holster months before the killing, but no one looked into whether a proper report of the theft had been made. Other than denying that robbery was the motive and writing words on the wall of his cell suggesting that he had killed Thomas by accident—together with the words, "of course I am not a killer"—Francis said little else about Thomas' death.

Francis was held on death row in the nearby town of New Iberia, La. His jailers, both in St. Martinsville and New Iberia, had been criticized for engaging in rough conduct in order to discourage African-Americans from voting or exercising other civil rights, yet they appear to have treated Francis with some dignity—if not before his confession, then at least apparently afterward. The jailers do not appear to have coerced the various statements Francis wrote on his cell wall.

On May 3, 1946, Francis was scheduled to return to St. Martinsville to be executed in a mobile electric chair, named "Gruesome Gertie." The day before his scheduled execution, a state employee and a prison trustee, neither of them the regular executioner, drove the chair to St. Martinsville. After a night of drinking, they set up the chair and prepared to execute Francis.

Francis' scheduled last day on earth began early, as a trustee shaved Francis' head and then his jailer, the notorious Sheriff Gilbert Ozenne, drove him to St. Martinsville. Ozenne had the route to St. Martinsville pass by Francis' home to allow Francis a last look at it. At the jail, Francis' father was waiting with a hearse to take his youngest son to the undertaker for burial, and some of his siblings wished him good-bye.

Prepared for death by two Catholic priests, Francis walked to the electric chair; he was strapped in, and the hood was lowered over his head. The executioner said, "Good-bye Willie," and pulled the lever. But Francis did not die. He shouted that he was not dead and begged to be released. Francis was returned to death row. Apparently, a wire had come loose while the electric chair was transported, and the two operators were too hungover from a night of drinking to check the chair carefully before strapping Francis in it.

In the year or so that followed the botched execution attempt, heroic legal efforts were made by a local white attorney, Bertrand DeBlanc, a well-known African-American attorney, Alexander Pierre Tureaud, and others, including J. Skelly Wright, who was later the federal district court judge in New Orleans who desegregated the public schools and still later a judge on the U.S. Court of Appeals for the District of Columbia Circuit. DeBlanc, who was Francis' primary lawyer after the failed execution, never contested Francis' guilt but argued only that subjecting Francis to execution a second time would violate the Eighth Amendment. DeBlanc opposed efforts by other attorneys, particularly Tureaud, to reopen the question of Francis' guilt or innocence. There were appeals to the Louisiana probation and judicial authorities and to the governor—all to no avail. Finally, the Supreme Court held that a second attempt at execution would not constitute cruel and unusual punishment (*Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947)), and Francis was executed on May 9, 1947.

During the year he lived between the failed and the successful executions, Francis achieved a bit of fame. One product of that fame, a pamphlet prepared to help raise money to pay for the post-execution legal challenge to the death penalty, contained Francis' words and a partial picture of the words he had written on his cell wall. Francis never seems to have told anyone his real motive for killing Thomas, nor did he leave behind any insight into his words, "it was a secret about me and him."

Having skillfully raised questions about Francis' guilt, King offers an explanation for the death of Andrew Thomas and discloses what King believes was the "secret about me and him." A young woman, Stella Baker, née Vincent, was also working in Thomas' drugstore at the time of the latter's death. Shortly before Francis' execution, she left St. Martinsville, never to return. She got married and, at the time of her death, was living in Florida. As she was dying at the age of 50 following a life-long struggle with anorexia, she confessed to one of her sisters that she had been racked with guilt for more than 30 years for not having come forward after having seen an "incident" involving Thomas and Francis that was too terrible for her to discuss. Baker's daughter told King that she believed that her mother had witnessed a sexual assault on Francis by Thomas. King postulates that Thomas was gay, which in 1940s Louisiana was not accepted, to say the least.

This version of events suggests that, even though Francis may have been involved in the fatal confrontation with Thomas, he may have been guilty of manslaughter at most. King suggests that the tragedy of Francis' execution arises from Baker's failure to tell someone, including DeBlanc (her brother-in-law), about Thomas' sexual assault on Francis. King offers no explanation for Baker's silence, except to observe

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how awkward it would have been for Baker to have spoken about what she had seen. She would have been impugning the reputation of the scion of a powerful white family to protect a poor African-American—a monumental risk for her in 1940s Louisiana.

If we apply the thesis set forth by Alexander Tsesis in *We Shall Overcome*, then Baker's failure to speak up about what she had seen and the perfunctory investigation and trial of Francis—including the failure to investigate matters such as the identity of a possible second shooter, the purported theft of the gun, the loss of the ballistics evidence, and Francis' motive for killing Thomas—may be explained as a product of the combined impacts of Jim Crow and the low status of women. A woman living in a society with meaningful equality, who witnessed a crime by a rich and powerful person against a poor and helpless one, has options other than life-consuming guilt resulting in an early death. If women in Baker's world had had real access to higher education as well as real opportunities to have a career and to hold positions of authority such as judges, police officers, or attorneys, then Baker would have been more able to speak up, because she would have felt less isolated and friendless.

If Francis had been other than a poor African-American living under the heel of Jim Crow in the old South, he would have had a chance to reveal his secret, perhaps to an African-American police officer or defense attorney. Francis would have been able to tell someone what had happened between him and Thomas, without fear of being lynched or worse. Francis might even have been able to name Stella Baker—a white woman—as a witness to the assault.

But the white males of the Jim Crow era were determined to preserve their privileged position. Southern white males held all the positions of power and influence, and these men were determined to protect Thomas' secret—no matter what the consequences to others. As a result, Baker had no ability to safely recount what she has seen, and Francis died: *divide et impera*. Two lives were ruined, Francis' by a wrongful execution and Baker's by a life of ill health and an early death. Both outcomes were deemed an acceptable price to pay to protect the power of white men in the old South.

We can conclude from both these books that only when women and the various racial, ethnic, and social minorities act in concert will they be able to share equally with white men in the control of society and provide, to quote Tsesis, "the blessing of liberty on ourselves and our posterity" for all Americans. **TFL**

Carol A. Sigmond is a partner with Dunnington, Bartholow & Miller LLP, in New York City. She is chair of the New York County Lawyers Association's Construction Law Committee, a member of the board of directors of the New York County Lawyers Association, a member of the New York State Bar Association's House of Delegates, and a member of the American Arbitration Association's Construction Industry Arbitration Panel.

In the Common Defense: National Security Law for Perilous Times

By James E. Baker

Cambridge University Press, New York, NY, 2007. 404 Pages, $30.00

Reviewed by Arthur Rizer

James E. Baker, the author of *In the Common Defense* and a judge on the U.S. Court of Appeals for the Armed Forces, is no stranger to national security issues. Before joining the court, Baker served on the front line of national security as a Marine infantry officer. After he graduated from law school, he worked in numerous government positions before serving President Clinton as the legal adviser to the National Security Council. In addition, Baker teaches national security classes as an adjunct professor at Georgetown University Law Center.

In the Common Defense is not an academic book; rather, it is more like a procedural manual designed to provide a snapshot not only of national security law but also of the field of national security in general. Baker outlines the military chain of command in detail, including both operational command and administrative command, in order to educate the reader as to who the national security decision-makers are. The book covers an impressively wide area; even though a reader who is very familiar with national security issues may not learn a great deal from the text, the footnotes are filled with insights and also include Baker's personal views, formed during his years in the field of national security.

Turning to the substance of *In the Common Defense*, the book's starting point is that the United States faces numerous national security threats, with the most treacherous being the threat of terrorist groups' obtaining and using weapons of mass destruction (WMDs), particularly nuclear weapons, against the American people. The threat of WMDs, as Baker notes, lies not only in the physical destruction they can cause but also in the means they prompt us to use to counter their threat—specifically, the degradation of the American way of life through the erosion of personal liberty. Although Baker does not state it in these terms, it appears that the overarching thesis of his book is the need to maintain the balance between preventing the next terrorist attack and protecting American freedoms. Baker stresses the importance of the role of the legal profession in this endeavor: it must ensure that practical, yet legal, policy is implemented when anticipating or responding to terrorist threats.

Baker argues that the means to achieve this balance is through an appropriate process—*how* the decision is made is just as important, if not more important, then *what* the decision is. Sometimes, in an emergency, the process may consist simply of the President's asking his closest aide for his or her opinion, and then taking action. Other times, the appropriate process for protecting national security is for the President to lobby Congress to enact a bill, such as the PATRIOT Act. Baker writes, "Process need not be an-

tithetical to timely decision, operational time-lines, or to secrecy. Process must find the right balance between speed and strength, secrecy and input. But process can always meet deadlines."

Baker ends each chapter of *In the Common Defense* not merely with a conclusion that wraps up the information and reiterates the major points but also with an appraisal of the significance of the information presented and how it applies to the bigger picture. Baker uses simple and concise language, which makes *In the Common Defense*—unlike most books on the topic of national security—enjoyable to read. It is one of those rare law books that you can both learn from and find entertaining. **TFL**

Arthur Rizer is an attorney with the U.S. Department of Justice. The views expressed in this review do not necessarily represent the views of the Department of Justice. By coincidence, just as Rizer was completing this review, he discovered that the author would be his professor in the course, "Managing National Security Law" at Georgetown University Law Center.

An Entrenched Legacy: How the New Deal Constitutional Revolution Continues to Shape the Role of the Supreme Court

By Patrick M. Garry

Pennsylvania State University Press, University Park, PA, 2008. 192 pages, $35.00.

Reviewed by Matthew J. Dowd

One of the more controversial cases involving the Constitution's Commerce Clause in recent years is *Gonzales v. Raich*, in which the U.S. Supreme Court held that Congress has authority under the Commerce Clause to prohibit the intrastate cultivation and use of marijuana for medicinal purposes. Supporters of states' rights believe that the Commerce Clause could not and should not be used to criminalize the intrastate medical use of marijuana, particularly in states such as California, which have chosen, through a democratic process, to permit such use. Many commentators pilloried Justice Scalia for concurring with the majority opinion and apparently abandoning the federalism revival of the Rehnquist Court.

Less well-known is the post-Supreme Court outcome of *Gonzales v. Raich*. Angel Raich had scored a partial victory when the Supreme Court remanded her case to the Ninth Circuit to consider her other claims. There, in *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007), the court of appeals found that Raich could raise the common-law defense of necessity if the authorities chose to prosecute her for smoking marijuana. More relevant to this book review, however, is some of the Ninth Circuit's language concerning Raich's due process claims. Raich had argued that the Controlled Substances Act violated her fundamental substantive due process rights, as protected by the Fifth Amendment. In responding to this argument, Judge Harry Pregerson, writing for the panel majority, stated the following:

> For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected. Until that day arrives, federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering.

This approach—namely a constantly shifting and ever-expanding roster of "fundamental" but unenumerated rights—has been the target of originalists, including Justice Scalia, for a number of years. In *An Entrenched Legacy: How the New Deal Constitutional Revolution Continues to Shape the Role of the Supreme Court*, Professor Patrick Garry also argues against the constant fabrication of fundamental rights, but he suggests a new explanation for this phenomenon. Garry asserts that much of the questionable jurisprudence of unenumerated constitutional rights stems from the New Deal's abandonment of the Constitution's structural provisions. In Garry's view, the Founders intended these structural provisions—namely, the separation of powers and federalism—to serve as the primary defenders of individual liberty. Garry suggests that the New Deal and the resulting rise of the administrative state both empowered and forced the courts to undertake a larger role in deciding issues of individual liberty that were traditionally within the realm of state law.

An Entrenched Legacy starts with the saga of the New Deal, which Garry describes as a constitutional revolution, explaining that, "[d]uring the New Deal period, the goal of protecting liberty through the maintenance of limited and divided government yielded to the desire to ensure economic security through a powerful and activist central government." Next, Garry summarizes the structural provisions of the Constitution that, in his view, should be restored as the main protectors of individual liberty.

Garry develops his thesis by showing how "the increased power of agencies has brought about increased powers for the federal judiciary—an increase which has come largely at the expense of Congress." He notes that "[t]his shift of power from Congress to the courts has not occurred through any announced doctrinal changes, but through the indirect effects of the transfers of power from Congress to administrative agencies." Although many scholars take the view that the Supreme Court is "a nonplayer in the separation of powers arena," Garry disagrees. He contends that, through administrative law principles such as the hard-look doctrine and limits on *Chevron* deference, "the Court has come to occupy a stronger position, especially regarding the policymaking role traditionally assigned to Congress." Thus, although the New Deal was originally seen as a program that weakened the role of the courts by empowering executive agencies, its ultimate effect has been to increase the judiciary's influence.

An Entrenched Legacy concentrates on the issues of federalism, its revival,

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and the Court's nationalization of jurisprudence related to individual rights. Garry describes the federalism revolution known to most readers, during which the Rehnquist Court sought to restore power to the states. But Garry focuses on "the notion of federalism as a structural protection of liberty"—an idea that many legal scholars generally ignore. Garry suggests that "the Court could reconnect its jurisprudence with the structural ways in which the Constitution protects liberty as a whole." By doing so, the Court would complete "the second half of a federalism revolution—a stepping back from substantive individual rights as the only protection of individual liberty." Garry details how the courts have expanded their activities into the individual rights arena, touching on a wide array of topics, including abortion, *Miranda* warnings, habeas corpus rights of enemy combatants, freedom of speech, and Establishment Clause issues. Using solid logic and clear and effective prose, Garry connects the different doctrinal areas with the underlying theme of his book.

The Supreme Court's now famous (or infamous) footnote 4 of *Carolene Products* has provided the basis for much of the Supreme Court's arguably unnecessary and expansive 14th Amendment jurisprudence. *Carolene Products* addressed the constitutionality of a seemingly arcane federal statute limiting the interstate shipment of a certain type of milk. Yet, through its suggestion that a higher level of scrutiny should be applied to certain discriminatory legislation, the Court paved the way for the judiciary's expanded role in adjudicating individual rights. As Garry argues, "this justification did not arise from a constitutional model based on the original meaning of the Constitution; instead, it was basically a rationalization necessitated by the Court's retreat from the doctrines of federalism and separation of powers."

One potential weakness of Garry's emphasis on the original meaning of the Constitution—at least in the area of civil liberties—is that the Reconstruction Amendments (that is, the 13th, 14th, and 15th Amendments) radically altered the structure of the Constitution. No longer would the states be solely responsible for deciding issues of race-related civil liberties. In addition, if the 10th Amendment reserved certain powers to the states, then perhaps the 14th Amendment revoked some of those powers. Although the original understanding of the Constitution ought to be given great weight in construing the powers of the federal government, that original understanding must be viewed through the prism of the 14th Amendment when delineating the structural provisions of the Constitution. Even so, the present scope of unenumerated rights within the scope of the 14th Amendment would certainly surprise the legislators of the 1860s.

One must not mistake Garry's position as one that advocates that all issues of individual liberties should be decided solely by the states. Garry appreciates that "[f]ederalism is not a system wherein states hold all the power." Rather, federalism and separation of powers, Garry believes, require that state legislatures—not the unelected federal judiciary—be the *primary* protectors of liberty. This proposition might have been difficult to accept during the days of the Warren Court, and, even today, much of the lay public probably considers the federal courts to be the main—if not the sole—defender of individual liberties. But times are changing. State law, more than federal law, now often controls issues of personal liberties. This is true, as Garry notes, with physician-assisted suicide, particularly after *Gonzales v. Oregon*, in which the Supreme Court held that the federal Controlled Substances Act does not allow the U.S. attorney general to prohibit doctors from prescribing regulated drugs for physician-assisted suicide, as permitted under Oregon law.

Although Garry would prefer that the states made most decisions about individual liberty, he recognizes that sole reliance on the states would not be feasible. This is evident from the advances in civil rights that occurred during both Reconstruction and the second half of the 20th century. Without federal court enforcement of the 14th Amendment, Oliver Brown would have lost to Topeka's Board of Education in 1954, and Richard and Mildred Loving's interracial marriage would have been barred by the state of Virginia. Although Garry does not explicitly say so, perhaps he would accept the use of substantive due process in cases where a fundamental wrong must be corrected.

Another remedy that Garry suggests, as have other legal scholars, is greater reliance on the right to travel. This right protects a citizen's right to move to a new state and to enjoy the same privileges and immunities as those who already reside there. In *Shapiro v. Thompson*, for example, the Supreme Court invalidated a Connecticut statute that denied welfare benefits to those who had lived in the state for less than a year. Although the right to travel, like substantive due process, is an unenumerated right, Garry asserts that the two rights are different in a significant way: "[W]hile substantive due process seeks to protect liberty through judicial creation of certain selected 'substantive' rights, the right to travel simply seeks to support and facilitate the liberty-preserving features of federalism envisioned by the framers." If the states have more say in issues of individual liberties, then the right to travel will allow people to vote with their feet.

Garry mentions another area that is ripe for a federalism revival—same-sex civil unions and marriage, an issue in which states have taken the lead. Notwithstanding the recent decision of the California Supreme Court, most states continue to follow the centuries-old tradition of defining marriage as a union solely between a man and a woman. This varied response among the states exemplifies Justice Brandeis' description of the states as laboratories, and it is the response that Garry would like to see in other areas.

To be certain, Garry's thesis may be hard for some to accept. Many readers are likely to question whether the states, in light of their less than stellar civil rights records during the mid-20th century, can adequately protect individual liberty. Indeed, during Garry's book presentation at the Cato Institute earlier this year, one of the speakers, Abe Krash, a retired partner at Arnold

& Porter who assisted Abe Fortas in the seminal Sixth Amendment case, *Gideon v. Wainwright*, argued passionately against the fundamental thesis of *An Entrenched Legacy*.

Others may wonder whether Garry's main disagreement is simply with modern jurisprudence related to the Due Process Clause. One might dismiss Garry's position as one that is rooted in conservative politics, but to do so would be too reflexive. After all, he criticizes the Bush administration's position in *Gonzales v. Raich*, because, he writes, "the administration sacrificed federalism principles for a specific political issue (its antidrug campaign) and in doing so favored national over state regulation." Garry believes that "federalism is neutral with respect to specific substantive issues," whereas "substantive due process has proved to be historically unreliable," because it protected the right of contract during the *Lochner* era but no longer does. The unreliability of substantive due process probably stems from the attractiveness of the "living" Constitution approach, as detailed by Justice Stephen Breyer in his book, *Active Liberty: Interpreting Our Democratic Constitution* (reviewed in the October 2006 issue of *The Federal Lawyer*). The Ninth Circuit's analysis in the remanded *Raich* case, quoted above, epitomizes this living Constitution approach. Another prime example is *Lawrence v. Texas,* in which the Supreme Court struck down the Texas statute outlawing homosexual sodomy. Garry correctly notes that "[p]erhaps the most far-reaching consequence of *Lawrence* involves its future effect on morals laws of any kind." As Justice Scalia noted in his dissent in *Lawrence*, the rationale of the Lawrence majority "effectively decrees the end of all morals legislation."

One might also ask whether our country has changed so much since the 18th century that we can no longer operate under a system that faithfully adheres to the original concepts of federalism and separation of powers. Perhaps the separation of powers between the legislative and executive branches is outmoded; consider that, as Garry states, "[o]ut of perceived necessity ... the Court has acquiesced in the constitutionality of the administrative state." In addition, the nondelegation doctrine is currently without force; since 1935, the Supreme Court "has refused to enforce the doctrine in a way that actually prohibits a delegation of legislative authority to the executive branch." Perhaps our country is so far-removed from its agrarian genesis that certain accommodations are necessary. Alexander Hamilton would be pleased with the strength of our federal government, but other Founders would be shocked by the magnitude of the administrative state. Today, however, more often than not, the average American expects the law to be the same throughout the country and wants the federal government to solve all our problems, no matter how local they are. With this expectation on the part of the public, some may wonder whether a federalism approach to individual liberties remains viable.

Garry, however, believes that the Constitution's structural approach to liberty can accomplish much more than most people appreciate. The Court's "abandonment of a structural approach to liberty ... ignored the fact that only the structural provisions of the Constitution can provide for a balancing of two fundamental but often seemingly contradictory principles—that constitutional doctrines must be flexible enough to apply across time to unforeseen circumstances, and that future generations must nonetheless adhere to the unchanging text of the Constitution."

An Entrenched Legacy is a short book, which is a refreshing change for a legal text. It is crisp and informative, providing the right amount of detail to inform the novice and refresh the experienced lawyer.

The United States is unusual in that it embodies the principles of separation of powers and federalism. One challenge for our unusual nation, which Garry adroitly identifies, is to realize that we apparently have abandoned these principles. Whether the root of the problem is the New Deal or simply an overly expansive view of the 14th Amendment may be debatable. Garry proffers his explanation for why the federal judiciary has become a much more pervasive part of Americans' lives than the Founders envisioned. His book raises interesting questions and challenges the reader to consider these issues from a new perspective. Whether one agrees or disagrees with Garry's thesis, *An Entrenched Legacy* should be read by anyone interested in the interplay between constitutional structure, administrative law, and the expanding role of the federal judiciary in deciding issues of personal liberties. **TFL**

Matthew Dowd is an associate at Sterne, Kessler, Goldstein & Fox, and a registered patent agent. A recent graduate of the George Washington University Law School, he has passed the New York bar exam but has not yet been admitted to the bar. In fall 2008, he will serve as clerk for Chief Judge Paul R. Michel at the Court of Appeals for the Federal Circuit.

Beyond Japan: The Dynamics of East Asian Regionalism

Edited by Peter J. Katzenstein and Takashi Shiraishi

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REVIEWED BY CHRISTOPHER C. FAILLE

Let's start with a simple list of three events that made the headlines in the mid-1980s:

- In 1983, Benigno Aquino, a political opponent of the Marcos regime in the Philippines, was assassinated at Manila National Airport, catalyzing the social unrest that threw the Marcos government into crisis.
- In 1984, the prime minister of the United Kingdom, Margaret Thatcher, traveled to Beijing, China. During that state visit, she signed a joint declaration (with her opposite number, Deng Xiaoping, general secretary of the Communist Party of the People's Republic of China) on the question of Hong Kong.
- In 1986, the Communist Party in Vietnam instituted a policy of *doi moi*, analogous to—but a year ahead of—Gorbachev's market-oriented policy of *perestroika* in the Soviet Union.

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More events might be selected, but these will make the point. The mid-1980s were years of dramatic shifts in the political and diplomatic currents throughout East Asia. Japan, however, was a rock of stability within those tricky waters. Peter Katzenstein reminds us in the opening essay of this anthology that this was a time when Japan was "riding high [while] the United States was consumed by premonitions of national crisis." Business schools in the United States were teaching courses that were heavy on Zen principles and the lessons of the samurai, hoping to convey the presumably deep cultural reasons for Japan's mercantile success.

Much has changed in the 20-plus years since the mid-1980s, but a sense that East Asia is a region-in-the-making has remained a constant in many quarters. For all we can tell now, East Asia may never acquire the political and economic unity of the European Union, but there does seem to be a huge single multinational entity brewing in East Asia. This development is attributable both to the domestic pressures felt by governing elites of each nation in the mix and by global strategic imperatives. East Asia is the world's factory, and both Europe and North America depend on the region to continue to play that role.

One crucial difference between the mid-1980s and the 2000s, however, is that, in the earlier period, the governing assumption was that, if East Asia were to become a coherent strategic region, it would have to do so under Tokyo's leadership. There was much talk of the nations involved as "flying geese," with Japan serving as the pivot of the V-formation.

But the intervening years haven't been kind to Japan or, by implication, to the flying geese model. As Natasha Hamilton-Hart observes in her contribution to this book, "Over the decade starting in 1991 more than 171 [Japanese] banks and depository institutions went bankrupt, and although 130 of these involved small-scale credit cooperatives ... failures beginning in 1995 involved larger institutions." These failures included those that, beginning in 1996, prompted Japan's Ministry of Finance to arrange rescues of some of the larger commercial banks and securities firms. The Ministry of Finance was hardly a shogun in shining armor itself. A series of scandals and official denials of the obvious persuaded the Japanese public "that the old alliance that had presided over Japan's financial system was corrupt, out of touch with reality, and flailing desperately," as Hamilton-Hart puts it.

Such facts bring us to the question at the heart of the book: What are the dynamics of East Asian regionalism once history has moved beyond the era of Japanese ascendance? It does not (yet) appear that the People's Republic of China is in a position to offer itself as the region's new lead goose. This assessment stems from Beijing's own domestic concerns and priorities, and from the distrust with which any claim to leadership on its part would no doubt be met by many in the rest of the region. Still, the idea is no longer as absurd as it would once have been.

I should explain that one important regional organization is known oddly as "ASEAN Plus Three." The 10 proper members of the Association of South East Asian Nations (ASEAN) are, in alphabetical order, Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. These countries are commonly joined in their conferences by representatives of three other nations located to the north; South Korea, Japan, and the People's Republic of China.

In May 2000, the finance ministers of the ASEAN Plus Three nations met in Chiang Mai, Thailand, to establish a system of bilateral exchange arrangements designed to counter speculative moves of their currencies and to prevent a recurrence of the 1997–1998 currency crises. This was the start of what has remained a close and largely successful working relationship among those ministries.

China is by no means dominant in the councils—financial or other—of the ASEAN Plus Three. Still, as Naoko Munakata observes in his contribution to this book, the news about the Chiang Mai initiative is that China is a player at all. Beijing is "projecting an image as a responsible regional power" and showing increased confidence in its ability to shape its environment.

For now, the East Asian region will get along without a lead goose, as it tests whether coordination can work without hierarchy. **TFL**

Christopher Faille, a member of the bars of the state of Connecticut and of the federal district court therein, is the co-author, with David O'Connor, of a textbook on basic economic principles. He maintains a blog, "Pragmatism Refreshed," at cfaille.blogspot.com.