INTERROGATION AS A THERMOMETER OF PUBLIC FEAR

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GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND (Oxford University Press 2012)

In the wake of the December 2012 school shooting in Newtown, Connecticut, many Americans rapidly came to regard gun control as crucial to protecting our children from violence.[1] Some of those who had previously seen little reason to question an individual's right to possess firearms experienced doubt and entertained a greater willingness to reconsider and modify their positions.[2] Yes, many thought, an individual has the right to self-protection and may be entitled to own a firearm to that end, but there can and must be limits.[3] Responding to this

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[1] *See, e.g.*, Michael Cooper & Dalia Sussman, *Massacre at School Sways Public in Way Earlier Shootings Didn't*, N.Y. TIMES, Jan. 18, 2013, at A16 ("Newtown, Conn., appears to be profoundly swaying Americans' views on guns, galvanizing the broadest support for stricter gun laws in about a decade, according to a New York Times/CBS News poll."); David Nakamura & Jon Cohen, *Most Support Gun Control: Guards at Schools Also Favored, Poll Finds Newtown Affected Attitudes*, WASH. POST, Jan. 15, 2013, at A1 ("More than half of Americans—52 percent in the poll—say the shooting at an elementary school in Newtown, Conn., has made them more supportive of gun control.").

[2] After the shooting, for example, Representative John Yarmuth (D., KY) released a statement calling for greater firearm regulation: "I have been largely silent on the issue of gun violence over the past six years, and I am now as sorry for that as I am for what happened to the families who lost so much in this most recent, but sadly not isolated, tragedy." Jeremy W. Peters, *Some Unlikely Democrats Join in Push for New Gun Laws*, N.Y. TIMES, THE CAUCUS, Dec. 17, 2002, http://thecaucus.blogs.nytimes.com/2012/12/17/renewed-and-some-new-support-for-gun-control/. And Joseph Scarborough, former Republican Congressman and the host of MSNBC's "Morning Joe," opened his broadcast following the Newtown shootings by stating:

> I am a conservative Republican who received the NRA's highest ratings over 4 terms in Congress. I saw this debate over guns as a powerful, symbolic struggle between individual rights and government control . . . But I come to you this morning with a heavy heart and no easy answers. Still, I have spent the past few days grasping for solutions and struggling for answers, while daring to question my own long held beliefs on these subjects . . . For the sake of my four children, and yours, I choose life and I choose change. It's time to turn over the tables inside the temple, and for the sake of our children, we must do what's right, and for the sake of this great nation that we love, let's pray to God that we do.
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> *Morning Joe: December 17, 2012* (MSNBC television broadcast Dec. 17, 2012).

[3] *See, e.g.*, Neil Heslin, whose six-year-old son was killed at Sandy Hook Elementary School, testified at a hearing on gun laws in Connecticut that, as someone who grew up as a hunter and a gun-enthusiast, he believed that the government should ban assault style weapons. Ray Rivera & Peter Applebome, *Sandy Hook Parents' Testimony to Legislature Reflects Divide on Guns*, N.Y.

change in public opinion, President Barack Obama vocally committed to making both executive and legislative measures restricting access to the most lethal firearms a priority for his second term.[4]

Meanwhile, as the nation seemed poised to move to the left on gun regulation, the National Rifle Association (NRA) weighed in on the national conversation. After a suspenseful few days of silence, NRA Executive Vice President and CEO Wayne LaPierre held a press conference and there asserted, "the only thing that stops a bad guy with a gun is a good guy with a gun."[5] Accordingly, LaPierre argued that the proper response to the recent school shooting was to introduce armed gunmen into schools so that a guard with the children's safety in mind could use deadly force to protect them.[6]

The story of the Newtown shooting and the political fallout regarding gun control is instructive well beyond the issue of guns. Most observers felt inspired by the tragic events at Sandy Hook Elementary School to want to cut back on the scope of an individual right that had manifestly placed innocent children in harm's way.[7] Some observers, however, had the opposite reaction. They saw *constraints*

TIMES, Jan. 28, 2013, *available at* http://www.nytimes.com/2013/01/29/nyregion/connecticut-legislature-hearing-on-gun-violence.html?_r=0.

[4] *See, e.g., Meet The Press: December 30, 2012* (NBC television broadcast Dec. 30, 2012), *available at* http://www.nbcnews.com/id/3032608/#50324240 ("I've been very clear that an assault rifle ban, banning these high capacity clips, background checks, that there are a set of issues that I have historically supported and will continue to support. And so the question is, 'Are we going to be able to have a national conversation and move something through Congress?' I'd like to get it done in the first year. I will put forward a very specific proposal based on the recommendations that Joe Biden's task force is putting together as we speak. And so this is not something that I will be putting off."); WHITE HOUSE, Press Release, Remarks by the President and the Vice President on Gun Violence (Jan. 16, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/01/16/remarks-president-and-vice-president-gun-violence (announcing twenty-three executive actions and calling for congressional action to address gun violence).

[5] Wayne LaPierre, NRA Press Conference (Dec. 21, 2012) (emphasis omitted), *available at* http://home.nra.org/pdf/Transcript_PDF.pdf. For video of LaPierre's comments at the NRA's Dec. 21, 2012 press conference, see PBS News Hour, *NRA's Wayne LaPierre Calls for Armed Security in Every School*, YOUTUBE (Dec. 21, 2012), http://www.youtube.com/watch?v=Lgu9f-qd_Uo.

[6] LaPierre, *supra* note 5 ("I call on Congress today to act immediately, to appropriate whatever is necessary to put armed police officers in every single school—and to do it now, to make sure that blanket of safety is in place when our children return to school in January. Before Congress reconvenes, before we engage in any lengthy debate over legislation, regulation or anything else, as soon as our kids return to school after the holiday break, we need to have every single school in America immediately deploy a protection program, proven to work—and by that I mean armed security.") (emphasis omitted).

[7] In the aftermath of the shooting, 58% percent of Americans polled responded that laws on gun sales should be made stricter, according to a *USA Today/Gallup Poll*. That number jumped from the 43% of respondents who shared that same viewpoint in 2011. *See* Scott Clement, *How Newtown Changed Americans' Views on Guns (and How it Didn't)*, WASH. POST, THE FIX, Dec. 28, 2012, http://www.washingtonpost.com/blogs/the-fix/wp/2012/12/28/how-newtown-changed-americans-views-on-guns-and-how-it-didnt/.

on the individual right to own a firearm as the villain in the story.[8] The political winds moved in the direction of restricting the individual right, reflecting the majority's sentiment, but dissenters appeared emboldened rather than chastened by the mass murder of children, and gun sales skyrocketed in anticipation of legal restrictions.[9] Eventually, a proposal to reinstate the federal assault-weapons ban fizzled in Congress.

In their painstakingly researched and insightful book, *Confessions of Guilt*, George C. Thomas III and Richard A. Leo tell us an illuminating and previously untold story about a very different individual right—the right against compelled self-incrimination. The story that Thomas and Leo tell gives us the tools to better understand both the history of the Fifth Amendment right and battles over individual entitlements more generally, including the right to bear arms.

By closely examining the Fifth Amendment's story in particular, Thomas and Leo challenge an existing narrative that many of us have come to regard as the official truth about coerced confessions. This conventional story has our nation steadily progressing over time toward the shining beacon of *Miranda v. Arizona*.[10] "Far from evolving in a more or less straight line to the shining hill of *Miranda*," however, the authors tell us that "the history of law regulating interrogation is contingent and always in flux." (P. 167.)

It is the deep insights of *Confessions of Guilt* that led me to begin this review with the story of the Newtown shooting and gun control. Though the political alignments (and, correspondingly, the substance and merit of the relative rights positions) differ, the story of an experienced threat and a reaction against individual rights is the Thomas/Leo story of the Fifth Amendment. It is a tale of competing reactions to life's contingencies rather than the story of a nation growing up and becoming civilized.[11]

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[8] In the days after the shootings, lawmakers in Oklahoma, Missouri, Minnesota, South Dakota, and Oregon announced that they were willing to consider new legislation that would allow teachers and school administrators to carry firearms in schools. Angela K. Brown, *Texas Town Allows Teachers to Carry Concealed Guns*, USA TODAY, Dec. 20, 2012 7:47 PM, http://www.usatoday.com/story/news/nation/2012/12/20/texas-town-teachers-guns/1781663/.

[9] In Connecticut, where the shooting took place, December 2012 gun sales were up 71% over December 2011 gun sales. Sari Horwitz, Peter Finn & Brian Dowling, *Gun Sales So Brisk, Shortages Develop Increase Linked to Possible Bans*, HARTFORD COURANT, Jan. 23, 2013, *available at* http://www.courant.com/business/hc-gun-sales-20130118,0,2159069.story. When it released its fiscal third-quarter earnings, representing the quarter spanning the shooting and its aftermath, gun maker Smith & Wesson Holdings Corp. had more than tripled its earnings from the same quarter the previous year. Shan Li, *Smith & Wesson Earnings More Than Triple as Demand for Guns Soars*, L.A. TIMES, Mar. 6, 2013, http://www.latimes.com/business/money/la-fi-mo-smith-wesson-earnings-20130306,0,6458306.story.

[10] 384 U.S. 436 (1966).

[11] "Rather than a progression from more to less violence in obtaining confessions, the history of Anglo-American interrogation reveals that it has gravitated from one extreme to another . . . One might think of it as a pendulum rather than a continuum." (P. 8.)

Consider now the conventional story of the Fifth Amendment right against compelled self-incrimination (admittedly oversimplified):

Once upon a time, there lived tyrannical governmental torturers who inflicted severe pain on suspects to induce confessions. Over the years, increasingly enlightened people occupying positions of power and responsibility came to understand that torturing a suspect often produces inaccurate statements. Further, such people appreciated the deeper truth that even when it gives us accurate information, torture is a wrongful and barbaric way to treat anyone, guilty or innocent. In response to such increasing moral maturity, professional police forces developed and built their cases on the basis of evidence, embracing only those confessions that resulted from professional interrogation practices rather than compulsion. In time, we instituted even greater protection for the individual suspect's autonomy in the form of the *Miranda* warnings, a crowning achievement of the forces of progress that signaled a rejection of even mild psychological coercion in the service of extracting confessions.[12]

In *Confessions of Guilt*, Thomas and Leo demonstrate convincingly that this conventional story, what Steven Pinker, in *The Better Angels of Our Nature*, might characterize as the overarching historical trend toward progress in the humane exercise of power,[13] does not apply to the history of interrogation. Rather than participating in a forward march toward enlightenment, Thomas and Leo show us that American confessions law has instead traveled in waves, ebbing and flowing in its sensitivity to suspects' interests in response to events in the world. Like the status of gun control, confessions law reflects the nation's perception[14] of itself as secure or threatened, and that feeling is neither static nor steadily headed in only one direction.

Driving their point home at the start of their introduction, Thomas and Leo ask us to consider "two interrogations separated by the Atlantic Ocean and 170

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[12] *Miranda*, 384 U.S. at 444–45.

[13] Although Pinker does not explicitly address the use of force in interrogation, he argues that that humans have become less violent on a number of fronts, citing "the taming of chronic raiding and feuding, the reduction of vicious interpersonal violence such as cutting off noses, the elimination of cruel practices like human sacrifice, torture-executions, and flogging, the abolition of institutions such as slavery and debt bondage, the falling out of fashion of blood sports and dueling, the eroding of political murder and despotism, the recent decline of wars, pogroms, and genocides, the reduction of violence against women, the decriminalization of homosexuality, [and] the protection of children and animals." STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 672 (2011). Though one might find merit in Pinker's claims about human interactions with other humans, his claim that humans have increasingly protected nonhuman animals—a claim that requires an unsupportable exemption for the astonishing violence entailed in humans' consumption of animal products—is most charitably characterized as fanciful. *See, e.g.*, Sherry F. Colb, *A Clash of Justice and Nonviolence,* DORF ON LAW (Nov. 30, 2011, 6:30 AM), http://www.dorfonlaw.org/2011/11/clash-of-justice-and-nonviolence.html.

[14] Thomas and Leo emphasize cultural forces and sentiments that go beyond just those evidenced by actual crime rates. In the history of crime and crime control, often, "the numbers matter less than the impression." (P. 115.)

years." (P. 3.) They describe how, in 1832, an English magistrate examined a murder suspect. The magistrate's clerk warned the prisoner, suspected of a "horrid murder . . . that he was not bound to say anything to criminate himself," adding that "anything he had to say 'would be taken down in writing, and, if necessary, produced as evidence on his trial.'" (P. 3.) Thomas and Leo then ask us to travel forward in time to 2004. Just nine years ago, they remind us, the Pentagon issued its approval for the use of "harsher interrogation procedures" for a terrorism suspect held in the Guantanamo Bay prison camp. (P. 3.)[15] These procedures included water-boarding,[16] which many of us regard as torture.[17]

The contrast is startling, because we generally think of 1832 as a far less enlightened time than the present. Yet, Thomas and Leo show us that what we think of as modern enlightened "Miranda" consciousness appeared many years before Ernesto Miranda won his case in the United States Supreme Court in 1966.[18] And more soberingly, they remind us that our own government very recently gave its stamp of approval to the use of coercive interrogation methods amounting to torture and that the public, by reelecting George W. Bush to office, indicated its own acquiescence in that choice.[19] (P. 15.)

Thomas and Leo offer a picture of the body politic that resonates with what we know of the individual human (and, for that matter, nonhuman) mind and body as well. When we are at peace and feeling secure, we are disinclined to use violence against others.[20] We may even experience a sense of good will and warmth toward those whom we encounter from other walks of life. When we feel

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[15] Quoting David Johnston & Thom Shanker, *Pentagon Approved Intense Interrogation Techniques for Sept. 11 Suspect at Guantánamo*, N.Y. TIMES, May 21, 2004, at A9.

[16] *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel of the CIA, *Interrogation of al Qaeda Operative* (Aug. 1, 2002), *available at* http://www.justice.gov/olc/docs/memo-bybee2002.pdf.

[17] *See, e.g.*, Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 504 (2007) (examining historical cases of water torture and finding that "the United States has made it clear, in its courts, both civil and military, and before the national legislature, that water torture, by whatever name it is known, is indeed torture, that its infliction does indeed justify severe punishment, and that it is unacceptable conduct by a government or its representatives."); David Stout, *Holder Tells Senators Waterboarding is Torture*, N.Y. TIMES, Jan. 16, 2009, http://www.nytimes.com/2009/01/16/us/politics/16holdercnd.html?_r=0 ("Addressing the subject of torture at the military prison in Guantánamo Bay, Cuba, [during his confirmation hearings, Eric] Holder told Senator Patrick J. Leahy of Vermont, the committee chairman, 'Waterboarding is torture.' It was so defined under the Spanish Inquisition and when used by the Japanese in World War II, he said, and it remains so today.").

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

[19] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-18, § 1021, 125 Stat. 1298, 1562 (2011) (to be codified in scattered sections of U.S. code).

[20] *See, e.g.*, ERVIN STAUB, THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE 38 (2002) ("The defense of the physical and psychological self are basic goals, but they can be dormant for a person with a strong feeling of personal adequacy who lives under normal (nonthreatening) conditions. People with a weaker sense of their physical safety or weak self-esteem are easily threatened.").

threatened, on the other hand, we secrete stress hormones[21] and may feel a need to erect boundaries between "us" and "them."[22] We also become increasingly willing or even eager to use violence to protect ourselves from the perceived threat, and that willingness grows (and empathy for the source of the threat correspondingly shrinks) with the magnitude of the danger.[23]

In addition to telling a dynamic story of perceived threats and responses in the law of confessions, Thomas and Leo also helpfully dispel myths about the

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[21] *See Stress: Constant Stress Puts Your Health At Risk*, MAYO CLINIC, http://www.mayoclinic.com/health/stress/SR00001 (last updated July 11, 2013) ("When you encounter perceived threats . . . your hypothalamus, a tiny region at the base of your brain, sets off an alarm system in your body. Through a combination of nerve and hormonal signals, this system prompts your adrenal glands, located atop your kidneys, to release a surge of hormones including adrenaline and cortisol.").

[22] *See, e.g.*, GORDON W. ALLPORT, THE NATURE OF PREJUDICE: UNABRIDGED 74 (1979) ("[I]n a deep sense we *are* the values that we hold, we cannot help but defend them with pride and affection, rejecting every group that opposes them."); HARVEY A. HORNSTEIN, CRUELTY AND KINDNESS: A NEW LOOK AT AGGRESSION AND ALTRUISM 9, 13–30 (1976) (examining the "many ways in which bonds of *we* and barriers of *they* are erected and eroded by social forces, causing the occurrence of both human kindness and cruelty"); *id.* at 14 ("Real or imagined threats from *them*, can enhance *we*-group solidarity. Indeed, it can even produce bonds where none existed."); Walter G. Stephan & C. Lausanne Renfro, *The Role of Threat in Intergroup Relations*, *in* FROM PREJUDICE TO INTERGROUP EMOTIONS: DIFFERENTIATED REACTIONS TO SOCIAL GROUPS 191 (Diane M. Mackie & Eliot R. Smith eds., 2002) (discussing, within the framework of integrated threat theory, how threat and fear work to create prejudices).

[23] *See* Morgan Cloud, *Quakers, Slaves and the Founders: Profiling to Save the Union*, 73 MISS. L.J. 369, 373–74 (2003) ("[H]istory teaches that in the midst of crises—when the future course of events remains unknown—those charged with preserving the nation will resort to drastic tactics unacceptable in more placid and tranquil times . . . Those arguing in favor of abstractions like liberty and freedom are unlikely to prevail with a populace facing more concrete threats, like invading armies, civil war or weapons of mass destruction."). Thomas and Leo also quote this language directly in their book. (P. 239.) *See also* Walter G. Stephan et al., *Intergroup Threat Theory*, *in* HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 43, 43 (Todd D. Nelson ed., 2009) (discussing intergroup threat theory, where "an intergroup threat is experienced when members of one group perceive that another group is in a position to cause them harm," and outlining negative behavioral responses to intergroup threat, including aggression, discrimination, harassment, retaliation, and sabotage); Tingyan Li & Yufang Zhao, *Help Less or Help More—Perceived Intergroup Threat and Out-Group Helping*, 4 INT'L J. PSYCHOL. STUD. 90, 97 (2012) (presenting research on the willingness of a group to help other groups where the other groups posed varying degrees of threat and concluding that "intergroup threat not only promotes direct negative consequences in terms of negative attitudes and negative behavior, but also engenders indirect negative responses by attenuating prosocial actions toward out-group members."); Ifat Maoz & Clark McCauley, *Threat, Dehumanization, and Support for Retaliatory Aggressive Policies in Asymmetric Conflict*, 52 J. CONFLICT RESOL. 93, 94–95 (2008) (discussing studies following September 11 attacks that showed a "link between threat perception and support for state action against vulnerable out-groups"); Carol Gordon & Asher Arian, *Threat and Decision Making*, 45 J. CONFLICT RESOL. 196, 212 (2001) (The authors propose that "when we feel very threatened, most of us tend to just react. We do not sit down and think about it and rationally decide what to do—we just do something. This reaction is physiologically reinforced by our 'fight or flight' reaction. But when we do not feel very threatened, while our emotions play a role, there is more of a balance between them and our rational selves, which is reflected in our policy choices.").

disappearance of torture at the end of the eighteenth century,[24] as well as myths about *Miranda* truly protecting suspects from coercive interrogation.[25] These two interventions in our collective mythology fall nicely within the primary aim of the book: to teach us that the harshness of what we do to suspects has increased and decreased and increased again over time in response to perceived threats. Torture is not primitive ancient history, and *Miranda* likewise does not signal the end of history.

As Thomas and Leo put it:

> [T]he acceptance of harsh interrogation tactics is always rooted at least in part in the changing perceptions of external and internal threats. When these threats appeared high . . . torture and extreme forms of coercion were used to get confessions . . . When threats to the established order appeared low . . . almost any interrogation was viewed as too harsh. (P. 7.)

The authors provide numerous examples of the changing state of interrogation law in England and in this country that support their thesis about the relationship between perceived threats and the law of interrogation.

Thomas and Leo note, for example, that after the War of American Independence ended, within the governing white population, young America did not face a serious threat of internal upheaval.[26] Unlike England, America also lacked large cities and thus a large urban underclass in the late eighteenth century.[27] In this environment, the authors track a solicitude for the autonomy of criminal defendants and a deep skepticism about confessions and the pressures that might have motivated them.[28]

The authors offer "[a] representative sample" from "the *Pennsylvania Justice of the Peace*: 'A confession forced from the mind by the flattery of hope or the torture of fear, comes in so questionable a shape, where it is to be considered the evidence of guilt, that no credit ought to be given to it, and therefore it is to be rejected.'" (P. 71.) They note that "[b]y 1842 at least three states—Arkansas, Missouri, and New York—had . . . statutes that required magistrates to warn the

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[24] The authors discuss the "third degree" method of interrogation utilized into the twentieth century as well as cases after the late-eighteenth century in which police utilized torture in interrogations. (Pp. 112–45.)

[25] For example, the *Miranda* suppression right does not protect individuals where the goal of custodial interrogation is to obtain information to use outside of prosecution. (Pp. 190–218, 231–36.)

[26] The authors argue that those who did not emigrate to Canada or Europe after the War of American Independence were "united by a belief in the grand American experiment in democracy." (P. 69.)

[27] The authors call attention to the contrast between London's 1.4 million residents in 1815 and New York's 93,000 inhabitants in 1810. (P. 69.)

[28] The authors note that judges of the era of the newly formed Bill of Rights were often skeptical of confessions made by vulnerable suspects to powerful government actors. (P. 69.)

accused of his right not to answer questions and his right to consult with counsel." (P. 72.)

The authors describe the case of New York as instructive. In 1828, New York created protective examination rules for people accused of crime who were to be questioned by justices of the peace.[29] By the 1850s, however, the population of New York had rapidly increased, along with crime, and the first New York police force recognizable as such by modern standards had been established and had supplanted magistrates as the primary interrogators of suspects.[30] Police were given no similar directive to warn suspects, and New York courts were "moving toward a less skeptical view of confessions. The legislature of this era seemed more concerned with crime control." (P. 86.)[31]

It was around this time that John Henry Wigmore gained influence in his advocacy of the "rationalist approach" to interrogation. (Pp. 108, 88–89.) Wigmore emphasized the importance of convicting guilty defendants and downplayed the relevance of suspect autonomy to the criminal justice project.[32] The only legitimate reason for suppressing a confession, by the lights of Wigmore and some of his contemporaries, was the risk of a false confession.[33] Pressuring a suspect to answer questions truthfully was a positive good to be encouraged rather

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[29] The authors discuss the build-up to and eventual passage of 1828 act. (Pp. 78–85); *see also* N.Y. REV. STAT. vol. II, ch. 2, tit. 2, §§ 14, 15 at 708 (1829) ("The magistrate shall then proceed to examine the prisoner in relation to the offence charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed of the charge made against him, and shall be allowed a reasonable time to send for and advise with counsel. If desired by the person arrested, his counsel may be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner. At the commencement of the examination, the prisoner shall be informed by the magistrate, that he is at liberty to refuse to answer any question that may be put to him."). The regime closely tracked the rules that John A. Graham proposed in 1923 to guide a magistrate in addressing a suspect: "1st. Prisoner, you are entitled to counsel. 2nd. Your confession must be free and voluntary, without fear, threats, or promises. 3rd. You are not bound to answer any question which may tend to criminate yourself. 4th. Whatever you confess against yourself, may be made use of on your trial in aid of your conviction." (P. 82.) (citing People v. Maxwell, 1 Wheeler 163 (N.Y. Crim. Recorder 1823)).

[30] One police superintendent correctly testified to a police commission that "there [was] no statute that ma[de] it the duty of the Police" to give warnings that were required of Magistrates. (Pp. 85–86.)

[31] Citing Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations, and* Miranda*-Like Warnings in the Nineteenth Century*, 81 TUL. L. REV. 777, 810–11 (2007).

[32] "[C]ases were 'absurdities' to Wigmore because they exalted autonomy over the goal of preventing false confessions while convicting guilty defendants." (quoting 1 WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 820, at 927 (1904 ed.)). (P. 88.)

[33] The authors discuss "the ascendancy of Wigmore's theory that confessions should be suppressed only when there is a fair risk that the interrogation might produce a false confession" (citing State v. Sherman, 90 P. 981, 983 (Mont. 1907)) (Pp. 108–09.); *see also* WIGMORE, *supra* note 32 §§ 821, 822.

than an evil to be prohibited.[34] The U.S. Supreme Court, with the notable exception of *Bram v. United States*,[35] approached confessions in a similarly rationalist mode and generally found confessions to be admissible in the absence of brute force.

The authors show us that state confessions law between the late nineteenth and early twentieth century again reflected a similar change in values. (Pp. 93–98.) For instance, in 1890, the Michigan Supreme Court ruled that telling a suspect that he had "better tell the truth" was an improper inducement. (P. 93.)[36] But twenty years later, in 1910, the Michigan court distanced itself from the robust autonomy talk of the 1890 case.[37] (Pp. 93–94.) Likewise in California, the authors show a major change from 1890, when the Supreme Court of the state suppressed a confession that responded to a statement that it would be better for the suspect to make a full disclosure. (P. 94.)[38] By 1908, in contrast, a California court found a confession admissible and affirmed a death sentence, notwithstanding substantial pressure by the police on the suspect. (P. 94.)[39] Changes in the law of other states tell a similar tale: as crime rates rose at the turn of the nineteenth century, pressure that previously would have appeared "undue" became acceptable and even laudable. (Pp. 95–95.) And the authors tell us that "[o]ther than in Georgia ... we found no cases after 1903 holding that an exhortation to tell the truth rendered a confession inadmissible." (P. 101.)

The threat story gives us a very helpful lens through which to make sense of retrograde changes in the law of interrogation: "[C]rime posed a much greater threat in the early twentieth century than in the late eighteenth century." (P. 108.)[40] On the harsh interrogation method known as "the third degree," the

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[34] The authors note that a Montana Court upheld a confession given after the chief of police told the suspect "if a person told the truth, as a rule, he got out of it a whole lot easier than he would by telling a lot of lies." (P. 110) (citing State v. Dixon, 260 P. 138 (Mont. 1927)); WIGMORE, *supra* note 32, § 823.

[35] Bram v. United States, 168 U.S. 532 (1897) (finding a confession involuntary where the interrogator confronted a suspect, who was possibly stripped of his clothes, with a claim that a witness had implicated the suspect in a murder). While this was "one of the quickest turns in doctrine in the history of the law of confessions," the authors also note that *Bram* "fell into disuse" for seven decades after it was decided. (Pp. 91–93.)

[36] Quoting People v. McCullough, 45 N.W. 515, 517 (Mich. 1890).

[37] The 1910 court distanced itself from its own earlier descriptions of the rights of suspects during interrogations, stating that the earlier decision, taken "baldly and without explanation of qualification," did "not accurately state the law." (Pp. 93–94.) (citing People v. Dunningan, 128 N.W. 180, 181 (Mich. 1910)).

[38] Citing People v. Thompson, 84 Cal. 598, 605 (1890).

[39] Citing People v. Siemsen, 153 Cal. 387, 392 (1908).

[40] "Partly because of urbanization, partly because of immigration, partly because of industrialization, Americans in [the post Civil War decades] were fearful. The nation was torn apart by racial prejudice, its law-and-order fabric dangerously fraying. The immigrants, particularly those who could not speak English and who frequented saloons, were perceived as the 'other.' Some Italian immigrants brought with them organized crime .... The freed slaves were perceived, in many

authors use news articles and cases to show that "police responded with the third degree when they perceived that they were losing the 'war' against crime, particularly in the large cities." (P. 123.) Further on this theme, "[a]s long as the police were viewed as clever stalkers of guilty, dangerous criminals, the third degree could be seen as a necessary strategy to protect Americans from crime and deviance." (P. 123.)[41]

The Thomas and Leo story is fascinating and illuminating. It exposes us to the fact that people who lived long before we did may nonetheless have had "civilizing" lessons to teach us. It reminds us too that we are vulnerable to the effects of threats and fear, not only as individuals but as a nation as well. The authors predict convincingly that we will see further development in the law of confessions that continues to be well-calibrated to our ongoing sense of security or threat. (Pp. 219 – 39.) They elegantly demonstrate that the two separate and very different tracks along which interrogation law currently travels—interrogation to solve crimes and interrogation to disrupt terrorism—allow us to glimpse the truth of their historical analysis in real time. Like any book well worth reading, this one is interesting, humbling, and instructive.

Thomas and Leo conclude by urging us to video-record interrogations. (Pp. 220–23.) Such video-recordings, they argue, will keep courts (and the public) conscious of what takes place during custodial interrogation. (P. 221.) Thomas and Leo do not nurture any illusions that recording will put an end to coercion or that it will prevent us from reacting to threats in the way that we have always reacted to threats. What they say, however, is that the transparency that video-recordings provide will help ensure that we do not allow interrogation practice to get away from us. (P. 222.)[42] That is, it will allow the democratic process to constrain what might otherwise reflect the heightened sense of threat that naturally accompanies the work of police officers who spend more time in the presence of perpetrators than most of the rest of us do.[43] This is sage advice, as transparency

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states, as the 'other.' The stereotypes of blacks critical to their enslavement did not magically disappear." (P. 116.)

[41] The authors note that a 1926 *Saturday Evening Post* story stated that the use of force by police was, "[r]aw work, but they had to do it." (P. 123.) (citing "The Third Degree," L.A. TIMES, Mar. 13, 1926 (referring to the Mar. 26, 1926 *Saturday Evening Post* story)).

[42] The authors state that "[t]he beauty of recording is that the full picture is there for the judge and jury to see, warts and all." (P. 222.)

[43] Thomas and Leo note that, whether intentional or inadvertent, police sometimes introduce "missing" information to a suspect so that the suspect's final confession narrative is "capable of persuading the key parties in the criminal justice system as the case goes forward." (P. 220.) Therefore, the authors argue, videotaped confessions would allow the other actors in the criminal justice system to review confessions for the subtle and not-so-subtle influences interrogators have on their suspects' confessions.

can help ensure a better fit between our values and the practices of the police who serve and protect us.[44]

Let us turn now from Thomas and Leo's narrative of interrogation and torture back to the story with which I began this review: the story of the Newtown shootings and gun control. In understanding this story, Thomas and Leo would, I think, regard the public's sudden willingness to support gun control as confirming their account of confessions law. When people feel threatened, as they do after a school shooting, they naturally experience a greater willingness to cut back on the individual's right to own firearms in the interest of protecting innocent children and the public more generally.

When we consider the gun control analogy, an additional puzzle piece might immediately leap to mind to help shed additional light on the confessions story: not everyone reacts the same way to a school shooting (or to virtually anything else). Perhaps most of us want to disarm potential shooters when we read about the Newtown case, but some of us react in the way that the NRA did—by wanting to arm ourselves and other law-abiding people to protect against the threat of school shooters.[45] In other words, some Americans feel most threatened in the wake of a school shooting by the prospect of bad guys with guns attacking good guys without guns.[46] From their perspective, it is the uneven distribution of guns rather than the individual right to own firearms that makes us vulnerable to school shootings.[47]

This reality—that people do not all experience threats in the same way—can help explain why, as Thomas and Leo acknowledge, interrogation law does not *always* neatly move in tandem with perceived threats. To take just one example, crime rates were on the rise by 1966 when the Supreme Court decided *Miranda v.*

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[44] To be sure, coercion that would be unacceptable to the public might still occur outside of the viewing range of the recording equipment, whether behind the camera, before the camera begins rolling, or in segments deleted from the "tape" or its equivalent. Nonetheless, a routine practice of recording the entirety of police-suspect interactions from the moment of arrest, combined with the presence of police witnesses who may be unwilling to tolerate plain violations of recording requirements, would likely serve to minimize this sort of "hidden" misconduct.

[45] *See* LaPierre, *supra* note 5.

[46] *See, e.g., Piers Morgan Live: March 15, 2013* (CNN television broadcast Mar. 15, 2013), *available at* http://piersmorgan.blogs.cnn.com/2013/03/15/david-bossie-on-his-resistance-to-a-gun-ban-theres-the-potential-for-you-to-be-armed-and-thats-what-stops-crimes/ (debating assault gun weapons ban with David Bossie, who asserted, "If you disarm everyone in America, they do know that you're not armed. That's the one fact that you can't get away from . . . There's no sign on your back saying 'I'm armed.' There's the potential for you to be armed and that's what stops crimes.").

[47] In its concise, bumper-sticker form, the argument is, "when guns are outlawed, only outlaws will own guns." But Italian philosopher and jurist, Cesare Marchese di Beccaria, made the same argument in his 1764 treatise, *An Essay On Crimes and Punishments*: "The laws of [false utility] are those which forbid to wear arms, disarming those only who are not disposed to commit the crime which the laws mean to prevent. Can it be supposed, that those who have the courage to violate the most sacred laws of humanity, and the most important of the code, will respect the less considerable and arbitrary injunctions, the violation of which is so easy, and of so little comparative importance?" 124–25 (Stephen Gould trans.,1809).

Arizona. Thomas and Leo note that "[i]n 1966, the FBI index crime rate was in the midst of a decades-long sharp ascent." (P. 164.)[48] Yet, despite the decision's incomplete protection for suspects and the fact that it was subsequently whittled away by an increasingly conservative Supreme Court, *Miranda* did initially promise what was intended to be robust protection for suspects against the coercive experience of custodial interrogation. How could that happen when the crime rate was on the rise?

Thomas and Leo offer two separate accounts. In one, they suggest that *Miranda* consisted primarily of lofty rhetoric and may ultimately have served to facilitate the successful introduction of confessions rather than to protect suspects against police overreaching.[49] In the service of this argument, they show quite effectively how some of the confessions that were admitted after *Miranda* might possibly have failed a proper application of the Due Process confessions test that had preceded that seemingly revolutionary case. (Pp. 210–12.) In this account of *Miranda*, the decision may not actually be a high point at all but may simply have amounted, perhaps unwittingly, to an instrument for making confessions more uniformly admissible.[50]

In a second and perhaps inconsistent account, the authors contend that things were not so bad in 1966:

> By 1966, the stresses and strains that produced the third degree in American law had moderated. The Depression had ended, the Second World War was won, the 1950s were a calm decade, organized crime was no longer on the ascendancy, America had become the world-dominant military and economic power, and the Vietnam War had yet to drain our self-confidence. (P. 175.)

There is something to be said for both of these alternative points of view. *Miranda* did in fact accomplish far less than one might have expected, which may explain why police officers are no longer especially hostile to it. Law enforcement officials may now regard *Miranda* as their friend and some even supported its continued existence when challenged in *Dickerson v. United States*.[51] And at the

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[48] Citing JUST. RESEARCH & STATS. ASS'N, CRIME & JUSTICE ATLAS 2000 36–39 (2000).

[49] The authors show, for example, that prosecutors can use and have used *Miranda* waivers "offensively" against claims of involuntariness. (Pp. 210–12.)

[50] "If the goal was to make it easier to show that suspects consented to the interrogation, and thus gave 'voluntary' statements, then, yes, it succeeded admirably in the large universe of cases—roughly 80%—where suspects waive their rights." (P. 176.) (citing Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 859 (1996) and Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996))).

[51] 530 U.S. 428 (2000). Former Attorney General Griffin Bell and other law enforcement officials filed an amicus brief in the case arguing that Miranda "promotes effective law enforcement"

same time, one can find ways of characterizing 1966 as a tranquil time relative to other times in our history.

Yet such efforts to downplay the importance of *Miranda,* as well as the perceived threat of crime at the time, may miss something significant. First, at least as understood by its dissenting justices, *Miranda* looked—in 1966—like a decision that would pose a serious obstacle to the successful interrogation of suspects. Thomas and Leo themselves take note of Justice White's dissent, which stated alarmingly:

> In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. (P. 164.)[52]

These are not the words of a justice who perceives his colleagues in the majority to be handing a new tool to law enforcement. The *Miranda* majority itself understood the ruling as likely to create a burden for law enforcement, acknowledging that, in fulfilling its duty to "shoulder the entire load," the government must "produce the evidence against [an individual] by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."[53]

From the point of view of the justices, then, *Miranda* was not going to facilitate the easy introduction of compelled statements but might instead make it more difficult to obtain even voluntary confessions. As Thomas and Leo observe, "the police chief of Los Angeles . . . predict[ed] that *Miranda* 'would effectively end the use of confessions in convicting criminals.'" (P. 165.) Police chiefs around the country condemned the decision as "a shield for the guilty." (P. 165.) "In sum," as Thomas and Leo put it, "in the fall of 1966, the police felt outgunned and abandoned by the Supreme Court." (P. 165.)

But if the populace and law enforcement authorities around the country were indeed feeling threatened in 1966, and if the Supreme Court really did attempt to move interrogation law in a pro-autonomy direction, even at the risk—highlighted by the dissenting justices—of preventing police from effectively combating crime,

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by providing a bright line rule for police officers to follow. Brief of Griffin B. Bell, et al. as Amici Curiae in Support of Petitioner, Dickerson v. United States 530 U.S. 428 (2000) (No. 99-5525).

[52] Quoting Miranda v. Arizona, 384 U.S. 436, 542–43 (1966) (White, J., dissenting).

[53] *Miranda*, 384 U.S. at 460 ("To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." (quoting 8 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2251, at 317 (McNaughton rev. 1961))).

how can we explain this development, consistent with Thomas and Leo's otherwise persuasive thesis?

I would suggest that the Newtown story can help us answer that question. We do not all uniformly find the same things threatening, and we do not all respond in exactly the same way to perceived threats. Many of us feel threatened by high crime rates and want the police to respond to that threat by locking up the perpetrators, whatever it takes. Others, however, feel most threatened by the prospect of police harassment, false imprisonment, and potential brutality behind closed doors.

When police become desperate to identify perpetrators—something that understandably occurs during a spike in crime rates or after a particularly highly publicized or iconic violent crime (such as the rape of the Central Park Jogger in 1989)[54]—police may be motivated to turn up the dial on interrogation practices. In these circumstances, those who ordinarily fear the police may become especially fearful of the government. One might therefore expect to see dissenting voices, in the public at large and occasionally on the Supreme Court, identifying with those who are most frightened of the police rather than of the criminals. Just as one might see more "good guys with guns" as the solution to school shootings,[55] one might come to see coercive interrogation tactics as a threat to safety and security rather than as an effective way of reducing the threat of violent crime.

When I teach my course in constitutional criminal procedure, I begin the semester by asking my students what would happen if there were no police to enforce the laws against violent predation. In that event, a student will point out, violent and rapacious criminals would run rampant, leaving the law-abiding public to cower behind closed doors, feeling terrified. Then I ask what would happen if there were no limits on what the police could do to enforce the criminal law. Another student will observe that we would then have a police state in which people are reluctant to leave their homes for fear of being accosted or brutalized by the police, accused of fabricated misdeeds, and deprived of their liberty or worse. In both scenarios, we have uncontrolled violence, chaos, insecurity, and a loss of freedom of movement. Having the benefit of both police and constitutional limits on those police helps provide checks and balances so that neither private crime nor official abuse unduly interferes with the individual's security and freedom.

Thomas and Leo hint at the complex nature of threats at various points in their discussion of "deviance," in referring to police conduct that the public finds reprehensible. For the most part, the authors emphasize how criminal misbehavior, terrorism, or other perceived internal or external threats to Americans (including supernatural threats posed by "witches" (Pp. 67–68.)) give rise to a greater willingness to tolerate harsh methods of interrogation thought necessary to

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[54] *See* THE CENTRAL PARK FIVE (Florentine Films 2012).

[55] *See* LaPierre, *supra* note 5.

neutralize the threats.[56] On occasion, however, the authors recognize that like crime, official practices too can cause the public to feel threatened, and can accordingly lead to opposition and a concomitant push to rein in law enforcement excess.[57]

For example, the authors say that the "third degree" fell into disrepute and disuse because it eventually came to be "recognized as its own form of deviance." (P. 121.)[58] Thomas and Leo similarly characterize the U.S. Supreme Court's discussion of harsh interrogation tactics in Ashcraft v. Tennessee, a 1944 decision.[59] The Court there refers to "foreign nations with ... governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power.... So long as the Constitution remains the basic law of our Republic, America will not have that kind of government." (P. 153.) As Thomas and Leo aptly describe the implication of this statement, "[t]he *Ashcraft* Court is asking the state courts, what's the trouble of a few unsolved murders if the alternative is a regime like Nazi Germany?" (P. 153.)

In these cases, Thomas and Leo depart somewhat from their usual frame of correlating harsh interrogation with perceived threats from crime or external enemies. Rather than saying simply that crime levels dropped and therefore reduced the perceived need for harsh interrogation methods, they suggest instead that the police behavior itself came to play a role similar to private crime in eliciting a public outcry and judicial steps to curb the abuse, separate from criminal trends.[60] In general, however, Thomas and Leo stick to the compelling story of interrogation practices as a reflection of the public's insecurity in the face of threats posed by someone other than the police themselves.

Thomas and Leo are generally right to stay with that story. In a democracy such as ours, the ordinary course of events is for police conduct to respond, more or less, to public sentiment. When the public becomes more fearful of crime, as it has at various points in our history, the police react by "cracking down" on suspected criminals, a crackdown that can include harsh or otherwise troubling

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[56] These harsh interrogation tactics were not limited to suspects. The authors note that in the early nineteenth century, in serious criminal cases, law enforcement officials would often hold material witnesses in custody and put them into "sweat boxes" to elicit evidence. (P. 122.)

[57] "[P]olice responded with the third degree when they perceived that they were losing the 'war' against crime, particularly in the large cities, and . . . police turned away from the third degree when the public began to perceive their conduct as deviant." (P. 123.)

[58] The authors partially attribute the fall of "third degree" tactics to public outcry and legal actions in the early 1930's, which left police departments "stung . . . by the depictions of police as corrupt thugs." (P. 138.)

[59] Ashcraft v. Tennessee, 322 U.S. 143 (1944).

[60] The severity of police tactics, alone, however, does not provide the whole story about what led to reform. For example, the authors draw attention to how people's perception of police tactics changed in an historical era in which public awareness of "the evils of fascism" probably contributed to police departments' respective decisions to try to improve their own image by reducing the use of third degree tactics. (P. 139.)

interrogation methods that culminate in rapid and viscerally satisfying convictions.[61] When this happens, suspects suffer both an increased probability of false convictions and the cruelty and harassment that accompany a failure of empathy in the face of those who are feared and regarded as the enemy.

By the same token, when people generally feel safe from crime and other threats, they do not clamor for "law and order" in quite the same way, and police find themselves under correspondingly less pressure to produce results quickly and dramatically. In such times, police are less likely to feel the desperation that fuels abusive interrogation practices, and the public is likewise more inclined to sympathize with suspected criminals and extend humane treatment to them.

This story is a good one, and it is far more sophisticated and sensitive to the facts of our history than the conventional narrative of steady progress toward the autonomous and dignified suspect protected by *Miranda* from police overreaching. Still, the story is incomplete and unnecessarily loses some of its appealing explanatory power when crime rates increase but the law of confessions remains reasonable or even moves toward greater restraint. A fuller appreciation for the nature of threats, however, can fill in this missing piece and add power to the Thomas/Leo thesis. The journey of interrogation law reflects the ebb and flow of threats, both internal and external, and including the threat of official overreaching itself. Like our friends and neighbors, the police are human beings, with the same strengths and weaknesses as the rest of us.

When crime rates rise, or when terrorists threaten our lives, most of us look to our government to use force to protect us from those threats. In such times, interrogation is likely to become harsher and less solicitous of the needs and interests of suspects.[62] But even (and maybe even especially) in those terrifying times, there are those who will remain most frightened of the police, whether they fall into minority groups that comprise "the usual suspects" or whether they are simply naturally inclined to fear government more than private individuals. People drawn to membership in the American Civil Liberties Union [ACLU] provide one example, on the left side of the political spectrum.[63] And occasionally it is those individuals and the people who empathize with them—people like Justices William O. Douglas and Thurgood Marshall—who help craft the legal response to police practices.[64]

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[61] *See* THE CENTRAL PARK FIVE, *supra* note 54.

[62] *See supra* note 40 and accompanying text.

[63] *See, e.g.*, the ACLU's arguments against an increase in police presence in and police resources dedicated to American communities. *The Militarization of Police in America: Towns Don't Need Tanks*, *available at* http://www.aclu.org/militarization (last visited Mar. 9, 2013).

[64] Justice Marshall joined Justice Douglas' dissent in *Laird v. Tatum*, where the Court dismissed for lack of ripeness of a plaintiff's claim that the U.S. Army was conducting unlawful surveillance of lawful activity. 408 U.S. 1 (1972). Justice Douglas argues that, "[t]he Constitution was designed to keep government off the backs of the people." *Id.* at 28 (Douglas, J., dissenting).

When crime or other such threats emerge, the law governing police interrogation is likely to be less robust than it would be in a time of relative safety and security. And this fact can help explain the holes in *Miranda* that Thomas and Leo do an excellent job of exposing. Likewise, in times of safety from threats, the people naturally inclined to fear the government can join hands with those who feel unthreatened by and therefore favorably inclined toward people suspected of criminal deviance, and together urge the provision of protection against police abuse.

In my amended version, the Thomas and Leo story of interrogation law thus becomes a somewhat more complex story, one in which the dominant group identifies with the government and usually gets its way, whether that means harsh interrogation for perceived threats or humane interrogation for the underdog during calm periods. In this story, however, there is a real-time countercurrent in those who feel most threatened by the government itself and whose analogue to a majority's desire for harsh interrogation methods is a desire for strict limits on what the police may do in the service of law and order. And sometimes, the countercurrent prevails.[65]

[65] In his dissent in *Miranda*, Justice John M. Harlan decried the new limits on police interrogation: "the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all." Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).