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CAN WE AFFORD LIBERTY? *

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There is a crisis in American law, a crisis reflecting the uncertainty and division of American society today. We have just witnessed an election campaign in which a central issue was crime. The growing concern with the rising rate of crime has led to a search for solutions that has yielded only frustration. And frustration has led to drastic measures; among them have been various proposals to amend the Constitution or legislatively overrule recent Supreme Court interpretations of it in the hope that law and order may thereby be "restored." Some of the proposals, converted into convenient slogans such as "Take the handcuffs off the police!" have captured the imagination of the public. Even more sophisticated suggestions are based on the idea of "liberating" officials from constitutional restraints.

The critics do not propose merely new and much-needed devices for the prevention of crime, such as better training and higher pay for the police, sufficient manpower for effective patrol, or improved techniques and equipment; the critics propose to alter the fundamental balance—established in the Bill of Rights—between the power of government and the autonomy of the individual. The Bill of Rights, we are told, should be "adjusted" to meet our concern with crime. In particular, the fifth amendment has been attacked as a luxury we cannot afford in the current crisis.¹ Once again it becomes necessary to examine the reasons for the constitutional protection to forestall the sacrifice of basic liberty for what may turn out to be illusory advantage.

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¹ See, e.g., Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

A Bill of Rights reflects wisdom. With the knowledge that a government may take hasty action that it will later come to regret, a wise nation provides itself with parchment counsel intended to prevent those actions that history teaches us are most often regretted. A Bill of Rights also expresses the essential optimism of a people, for it is based upon a belief that there will come a future worth aiming the nation toward.

It is one of the nation's glories that it has maintained a Bill of Rights for almost two centuries. This is not an easy thing, for it is an implicit assumption of constitutional limitations that they will frequently be unpopular in their specific application. If the government and people could be relied upon always to act according to the principles of the Bill of Rights, there would be no need for the document.² But the people of this new nation would not accept a constitution without a Bill of Rights, for they recognized that there would be temporary passions, passing emergencies, and apparent changes of circumstances, any of which might appear to justify the abridgment of individual liberty. It seems intrinsic to human nature that the closer we are to an event, the less reliable is our judgment. The Bill of Rights provides that detached wisdom we require when basic freedoms seem to block the path of necessity.

The value of constitutional restraints is illustrated by the first amendment's guarantee of freedom of speech. This freedom has been constantly under attack from the days of the discredited Alien and Sedition Laws. Comstockian censors have railed against the amendment when it protected some of the world's great literature which attempted enlightenment beyond the range of their narrow vision. The first amendment always has rough going when it protects war dissenters, at least until the war is over. And it has done extraordinary service in protecting the rights of peaceful demonstrators for civil rights. In fact, whenever there are two sides to an issue—and every issue has a second side—the minority depends on the first amendment for the right to express its views. We all have at least one opinion that someone, somewhere, thinks we should not express. Knowing this, we value the amendment that protects those with whom we disagree.

We easily see how the first amendment protects us all. But the rights of a suspected criminal seem less personal. His rights are often characterized as self-imposed restraints that the law-abiding members

² Such beliefs are older than the Constitution itself. At the Federal Convention of 1787, Gouverneur Morris argued: "To say that the legis[lature] shall not pass an ex post facto law is the same as to declare they shall not do a thing contrary to common sense—." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 379 (M. Farrand ed. 1911) (McHenry's notes).

of society have adopted only out of an exaggerated sense of fair play. And when a confession or illegally seized evidence is excluded from a criminal trial, we hear that we cannot afford to give such an advantage to the adversary. But the fourth, fifth, and sixth amendments do not just protect "someone else." The fifth amendment, in particular, protects us all. For to trim the privilege against self-incrimination is to trim the autonomy of every individual, which is the essence of the Bill of Rights.³

Individual rights cannot exist in the absence of individual privacy. Privacy does not exist as an absolute concept, but as a relationship to other entities. One may maintain physical privacy against "the world" with a wall, even though the mailman, milkman, and salesman regularly come through the gate. Passersby may peer through the chinks, and children may scale the wall in search of errant balls. Still there is privacy in the sense that one can be reasonably sure that he is not in fact being observed. Freedom from governmental observation is similarly incomplete, sometimes erratic. But it must be complete enough to allow one the feeling that he is unnoticed, at least some of the time. The government naturally requires various types of information, but that does not require invasion of other areas of secrecy. There will be occasions when one may be required to give a virtually complete account of one's life. But to preserve the feeling of autonomy, those occasions must be few, like the breaches in a solid wall. The individual must know that in the usual case, his life is his own, not his government's.

Privacy has already suffered a major invasion through the sections of the Omnibus Crime Control and Safe Streets Act of 1968 that authorize wiretapping and electronic surveillance.⁴ The Attorney General—or any local chief prosecutor—may seek an order allowing

³ Some critics have argued that the fifth amendment has little to do with personal privacy. See, e.g., Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 687-90, 696-97, 720 (1968). But as long ago as 1886, the Supreme Court said:

It is not the breaking of [a man's] doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment [in *Entick v. Carrington*]. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. *In this regard the Fourth and Fifth Amendments run almost into each other.*

Boyd v. United States, 116 U.S. 616, 630 (1886) (emphasis added). *Boyd*—termed by Mr. Justice Brandeis "a case that will be remembered as long as civil liberty lives in the United States," *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (dissenting opinion)—has been repeatedly upheld by the Court since the day it was decided.

⁴ 18 U.S.C.A. §§ 2516-19 (Supp. 1969).

the interception of any conversation of an individual suspected of any one of a long list of crimes, some of them quite minor. Under this law the police can tap one's phone or eavesdrop electronically even if they only suspect that one "is about to" commit a crime. There is no requirement that the person spied upon be informed of the surveillance until long after the event. Thus we may be overheard in the supposed privacy of our homes without being given any real opportunity to protest.

The Attorney General has said he will use the wiretapping authority to "protect" us not only from threats to national security but also from "organized" crime. But even the Attorney General's "restraint" does not bind inquisitive local prosecutors. They may listen to anyone suspected of committing a crime "dangerous to life, limb, or property" and carrying a penalty of over one year's imprisonment.⁵ This means that whenever someone is suspected of larceny, the police can spy on his bedroom, since the bill allows interception of oral, as well as telephonic, communications. I do not recommend that the law be flouted, but I do not believe that electronic surveillance of family life is the proper means of enforcing it. Of course, no district attorney is likely to sanction the use of so awesome a weapon for a minor transgression. But small crimes may be used as a pretext for surveillance of those suspected of larger ones. Those who have traced judicial efforts to limit exploratory searches are all too familiar with such "fishing expeditions." Where the technique is as convenient as electronic listening, the temptation to engage in exploratory eavesdrops will be great indeed, and the possibility of control even more limited than in the case of a physical search.⁶

The problem here is that one never knows who will use modern electronic gadgetry—such as that advertised in national magazines as "The Snooper"—or for what reasons. Even if you act in accord with community mores today, you cannot predict when a new district attorney will attempt to make his reputation out of your supposed transgressions. Can we afford to maintain our privacy against such a variety of intrusions by the inquisitive state? My answer is that we

⁵ 18 U.S.C.A. § 2516(2) (Supp. 1969).

⁶ Usually, the subject of an illegal physical search knows he has been searched and can make complaint immediately. But the citizen whose conversations have been overheard may never know. 18 U.S.C.A. § 2518(8)(d) merely requires that notice be given to "the persons named in the order [authorizing the eavesdropping] and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice." The notice need not be given for 90 days after the surveillance has ceased, and even that period may be postponed indefinitely by an *ex parte* proceeding. *Id.* As there is obviously little supervision of failures to disclose, it is hardly surprising that even these minimal provisions seem to be as honored in their breach as in their observance. See N.Y. Times, Feb. 16, 1969, at 50, cols. 4-8.

must. It is the principal distinction between a free society and the sullen tyranny of Big Brother.

The dwindling of personal privacy has been as frequently remarked as the rise of crime. In the modern world we have only belatedly realized that privacy is an increasingly scarce social resource which must be protected against the claims of efficient social ordering. We have so far prevented the establishment of a national computer bank in order to protect some of that privacy which remains. The projected uses of the computer seem perfectly legitimate: some well-meaning men want an efficient means of arranging all the information which the government already has in order that it may be better used for the good of all. The trouble is that we all have something to hide, some matter known to a few that we would rather were not known by all. The fact that you once registered as a Democrat, or made an improvident investment, or engaged in a youthful escapade not even criminal, or bought an Edsel are facts that the state may know, but that you do not want it to remember too well. It is not only criminals who want zones of privacy.

If we are to live under the threat of the electronic eye and ear, we must be even more fearful of ceding the means we still have of protecting privacy. If everything one says is public information, then one at least needs the opportunity to write in secret, a privilege that would be barred forever under one constitutional proposal. And if everything that is voluntarily expressed escapes the veil of privacy, one needs at least the assurance that the thoughts he chooses not to release will remain his own. These are fundamental considerations, based on the judgment that a complete life cannot go on in the full glare of publicity. The occasion may arise when privacy must be invaded, but every suspected crime cannot be the justification. If it were, the invasion would not be occasional. It would be constant.

The fifth amendment is one of the more effective and visible means of restricting governmental intrusion into the privacy of the individual. Yet the most vocal attacks on crime take shape as attacks on this amendment. A rising crime rate is associated with Supreme Court rulings enforcing the privilege against self-incrimination. Critics, in the name of "law and order," seem to believe that if the privilege were eliminated or weakened there would be more confessions, and that if there were more confessions there would be fewer crimes and we would all be better off. But they offer no evidence that limiting the fifth amendment would substantially reduce crime. They really propose that we speculate with the liberty we enjoy in order to receive a benefit which may not exist.

The privilege not to "be compelled in any criminal case to be a witness against" oneself derives from an earlier, more cruel age than ours.⁷ People then did not wonder at the necessity of a privilege to remain silent in the face of criminal accusation. They were too familiar with torture and long imprisonment as means of acquiring information. They erected the privilege to bar such medieval practices. But the middle ages are past. Why do we still have the fifth amendment?⁸ One reason is the fear that without the privilege the brutality of the extorted confession would continue to plague us. Forty years ago was not the middle ages, yet the Wickersham Commission discovered that government officers still used torture to gain admissions of guilt. Today is not the middle ages, yet the crew of the *Pueblo* found that the need for the fifth amendment has not disappeared. One might say we are forty years and 7000 miles from such incidents, and for the most part we are. But that is testimony to the effectiveness of the privilege, not to its superfluity.

Even with the fifth amendment, much coercive interrogation has taken place in the past decade. The United States Commission on Civil Rights found that violence was regularly employed to obtain confessions from Negroes.⁹ A study in New Jersey found coercion to be a common questioning technique, used against both white and black suspects.¹⁰

⁷ For an exhaustive history of the origins of the privilege, see L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* (1968).

⁸ I have answered this question before. Speaking for the Court in *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1963), I said:

The privilege against self-incrimination "registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.'" *Ullman v. United States*, 350 U.S. 422, 426. [The quotation is from Griswold, *The Fifth Amendment Today* (1955), 7.] It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 *Wigmore, Evidence* (McNaughton Rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States v. Grunewald*, 233 F.2d 556, 581-82 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn v. United States*, 349 U.S. 155, 162.

⁹ See, 5 UNITED STATES COMMISSION ON CIVIL RIGHTS, *JUSTICE* 17 (1961).

¹⁰ A. TREBACH, *THE RATIONING OF JUSTICE—CONSTITUTIONAL RIGHTS AND THE CRIMINAL PROCESS* 39, 41 (1964). Lest anyone think this represents the irreducible level of violence, the same study showed that across the Delaware, in Philadelphia, coercion was a rare phenomenon. The difference was attributed to the determination of Philadelphia authorities to respect the privilege. *Id.* 41.

Actual physical brutality is not the only means of coercion employed. Threats and promises can be equally effective in breaking the will of a suspect. For the state to close around a lone suspect and intimidate him into confessing is not only unseemly; it is dangerous as well. If a little fear makes a guilty man confess, a lot might move the innocent to admit guilt. More likely, it could make a minor criminal exaggerate his criminal activities, clearing the police files of unsolved crimes. These are too common realities, as the reported cases show, and judicial enforcement of the fifth amendment is the primary means of controlling their occurrence. Of course we could limit the privilege to protection from threats and violence and let law enforcement officers get on with their job. But the fifth amendment privilege protects against more than physical and psychological brutality. It is essential to the privacy of the individual.

Perhaps the best way to appreciate what the privilege against self-incrimination really means is to imagine a system without it. There are, of course, countries that have neither the fifth amendment nor tyranny. But they have developed other restraints in dealings between state and citizen. From the record of coercion in the United States, even with the privilege, it is apparent that we have developed no substitute for the amendment. And repeal in the present context would hardly provoke a search for substitutes. If we "liberate" our officialdom from the fifth, it will not be because the officials have so internalized its values as to render it superfluous. Rather, it will be because we have decided we can no longer afford the restraints it imposes. Politically, repeal would represent positive encouragement to do what formerly the amendment prohibited. Post-repeal America would not merely be a society without the amendment; it would be a society without the privilege.

What could happen without the amendment would seem to many a whole new order of police behavior. One can imagine an investigator calling a citizen in for a chat about the events of the last few days, weeks or years: "Come down to the station. And bring your diary with you." What crimes have been committed in the vicinity in the last month? Undoubtedly, many. One's whereabouts every minute of the time is therefore relevant to a whole list of unsolved crimes. "Do you take a morning walk? Why that route?" At this point the citizen may keep silent, which will no doubt interest a jury, or he will have to defend his innocent private habits.

How many details of one's life are perfectly legal, honorable, yet personal; what is more totalitarian than having to report on these

things at the instance of some bureaucrat who naturally views his task as more important than your privacy? Yet it is only an explicit prohibition such as the fifth amendment that prevents the state from seeking out such total knowledge. The ends are legitimate (investigating crime) and the means seem mild enough in the individual case (just a few polite questions). But if the interrogation is limited only by the number of crimes to solve, there is no limit at all. One does not need "something to hide" to object to the requirement that he give a running account of his life.

But the fifth amendment does not protect us only against embarrassment. It keeps us out of jail. Four hundred years ago Montaigne wrote, "No man is so exquisitely honest or upright in living, but brings all his actions and thoughts within compass and danger of the lawes, and that ten times in his life might not lawfully be hanged."¹¹ In the intervening centuries the number of crimes for which we may "lawfully be hanged" has been reduced. But the number for which we may be imprisoned has multiplied a hundredfold. How many tax underpayments are the result of unwitting errors by the taxpayer? How much simpler prosecution would be if the taxpayer could be interrogated alone, with neither lawyer nor records on hand. When one in fact declares too little, and refuses to talk, that refusal will most likely indicate the existence of fraudulent intent to a jury. Yet silence may be the result not of fraud, but of innocent bewilderment.

It is interesting to speculate whether the proponents of a weakened fifth amendment would want it weakened in their case. Price fixing would certainly be easier to prove if the suspect could be forced to recount how he arrived at his pricing policy. Maybe the honest man has nothing to fear and the country doesn't care. But I don't think so. The reaction to the Government's interest in the 1962 steel price increases suggests otherwise. It suggests that we cherish our freedom, that we resent midnight visits by the law too much to compromise the liberty the Bill of Rights guarantees.

There is a more insidious possibility for law enforcement in the post-fifth amendment era. Instead of investigating specific crimes in which a suspect might have been implicated, the state can call in its citizens for general investigations. Who has not wittingly or unwittingly exceeded the speed limit, or littered the sidewalk, or walked against the red light? When asked, "Have you committed any crimes?" what does one say? To say no is to lie—if this is done in court it is perjury and, out of court, it may very well constitute the crime of obstruct-

¹¹ M. MONTAIGNE, *Of Vanitie*, in 3 ESSAYS 185, 242 (J. Florio trans. 1893).

ing justice.¹² To confess means that one will be found guilty and punished simply because some official, for reasons that will never be known, has singled one out. In effect, the state can make either a criminal or a perjurer out of almost anyone it chooses. Unfortunate man, who falls out of favor with his local district attorney!

In fact the large number of crimes necessitates some sort of selection by law enforcers, but the criteria of selection are never specified by the legislature. To say, "Use your men to fight crime" gives no guidance. Law enforcement officials focus attention upon and concentrate their investigative efforts on those crimes they determine are most serious. Some will concentrate on street crimes; others will perceive a threat in subversion and question suspects about their politics; still others may spend their time enforcing civil rights laws. But the decision may as easily be made not according to what classes of crime seem most important, but according to what group is most hated or feared by those in power. Crime can be investigated while keeping an alert eye on ethnic or political minorities. Membership in one of these groups can become an invitation to inquisition. Political leaders, in fact, are inclined to define law enforcement priorities in terms of the anxieties of their electoral constituencies.

Even those who fall on the right side of the prosecutor's discretion today ought not to be so sure that they can get along better without the fifth amendment. Only fifteen years ago the clamor of McCarthyism threatened the privilege against self-incrimination. That campaign was not directed against street crime, but against the right to hold one's own political beliefs, the right to differ with Senator McCarthy's credo without having to suffer public harassment. McCarthy is gone, and we and the fifth amendment have survived, but that is no assurance that another witch hunt will not occur. The fifth amendment, even if it sometimes pinches, is an essential part of our insurance for that day.

It is not just the fifth amendment, but our whole heritage of individual liberty that rejects inquisitorial law enforcement. It is argued that it will be more difficult to catch criminals if we cannot make them confess. Of course, there are times when no other evidence is available, although not so often as is frequently asserted. I must emphasize, however, that liberty is worth this small price. We should not rush to abandon our autonomy as individuals just because it creates inefficiencies in the apprehension of criminals. When it is said that democracy is an inefficient means for determining policy, we do not

¹² This example is hardly hypothetical. See Note, *Obscene Harpies and Foul Buzzards? The FBI's Use of Section 1001 in Criminal Investigations*, 78 YALE L.J. 156 (1968).

rush to abandon democracy. We are justifiably concerned with crime, but the power of the criminal is nothing compared to the power of the state.

But proponents of new measures argue that to "adjust" the fifth amendment is not to unleash the entire force of the state. They argue that the fifth amendment which protects us against arbitrary intrusions by the state is something different from recent judicial interpretations. It is said that the courts have enacted a new code of criminal procedure under the guise of interpreting the Constitution. It is true that the Supreme Court has prescribed rules of a specificity that is understandably not present in the Constitution. But such rules are the only way to make the Constitution a reality. When *Wolf v. Colorado*¹³ left enforcement of the fourth amendment to the states, it was too widely taken as a green light to search and seize at will. The Court has not expanded the privilege against self-incrimination—it has only created effective remedies and extended their protection to the poor and ignorant. The specificity of *Miranda v. Arizona*¹⁴ has been necessary to assure equal treatment when the states refuse to act.

The test of the constitutionality of a confession has long been voluntariness. A confession could not constitutionally be beaten out of a suspect.¹⁵ It could not be extracted through more subtle psychological pressures playing upon the fears of the suspect. What the Court did in *Miranda* was to apply the same standards to the reality that confronts the poor and ignorant defendant. Organized criminals have their lawyers and know enough to call them when they confront the law. When they volunteer a confession it is the result of a bargain—they exchange their help to the police for lesser charges and lighter sentences.

But a lawyerless defendant facing the law for the first time is unaware of the possibilities for bargaining. For him, the Orwellian model of law enforcement I have described is too often the reality. Ignorant of his rights, the suspect sees no limit to what his captors can do. Indeed, interrogation manuals suggest creating this impression. And even if there are limits, who enforces them against the police?¹⁶ The suspect in this position frequently has no real choice in

¹³ 338 U.S. 25 (1949).

¹⁴ 384 U.S. 436 (1966).

¹⁵ Mere witnesses, however, are given no such protection. See, e.g., *People v. Portelli*, 15 N.Y.2d 235, 205 N.E.2d 857, 257, N.Y.S.2d 931 (1965).

¹⁶ The answer, of course, is that no one does. Although civil suits are sometimes suggested as an available remedy for police brutality, e.g., Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955), the courts are generally hostile to such actions. See, e.g., *Hoffman v. Halden*, 268 F.2d 280, 295 (9th Cir. 1959); *Lewis v. Brautigam*, 227 F.2d 124, 127 (5th Cir. 1955) (quoting

his behavior. This produces results for the inquisitor. It also provides an incentive to violate other rights. Although the fourth amendment requires probable cause for arrest, the availability of information from the uninformed prisoner encourages the arrest of large numbers of people on "suspicion" in the hopes that some of them will reveal incriminating information under the stress of custody.

Miranda is closely tailored to the coercive atmosphere in which interrogation is conducted. The police are not forbidden to ask questions; they are not required to warn informants who are not suspects; and volunteered statements are perfectly acceptable evidence. What *Miranda* does require is the warning of a suspect that what he says can be used against him, and that he has a right to remain silent and to have a lawyer, without cost if he cannot afford one himself. These are not new rights. They are all means of effectuating the long-recognized privilege against self-incrimination, based on the appreciation that rights are useless if the holder is ignorant of them. *Miranda* really stands for the proposition that the indigent first offender is as entitled as any of us that anything he says should be voluntary.

It is clear that it would be the poor, disproportionate numbers of whom are black, who would be affected if *Miranda* were overturned. Organized criminals do not talk, even in the face of illegal threats. The police are usually careful not to harass well-to-do suspects, who have lawyers anyway. So, in effect, a separate system of interrogation would be established for the poor. The counter-argument is that all that is sought is an efficient system of criminal investigation, which accidentally affects the poor somewhat differently than others. It is a fact of life that the poor suffer in many ways. A fact of life it may be, but not one we can overlook when, in the name of practical necessity, a change of rules is proposed—a change that will affect the poor more than others, and a change that will put greater pressure on this already disadvantaged group without really affecting the rights of the more affluent.

It is argued that questioning only residents of high-crime areas would uncover more street criminals than questioning only residents of low-crime areas. This may be true, but we cannot ignore the fact

unreported opinion of District Court); *Cox v. Shepard*, 199 F. Supp. 140, 143 (S.D. Cal. 1961). Even the successful plaintiff is not likely to recover a substantial amount in damages. One of the more "fortunate" appears in *Wakat v. Harlib*, 253 F.2d 59 (7th Cir. 1958). He was arrested without a warrant, released on habeas corpus and immediately rearrested. The second time, the police held him for 6 days without filing charges against him; denied him an opportunity to contact his attorney, who had no knowledge of the second arrest; beat him with a club, blackjack, and sandbags so severely as to require 11 days in the hospital; and finally forced him to sign a confession, which was used to convict him. He served 5 years of a 10-to-20-year sentence before obtaining relief. The jury awarded him \$15,000 damages.

that the discrimination occasioned by the use of these separate systems of law enforcement will not be perceived by the poor and black as either justifiable or reasonable. The poor know that whatever happens to the fifth amendment, business crime suspects are unlikely to be grilled at the station house. And this may explain why proposals to weaken the amendment come mainly from the more affluent members of society. To legitimize the inquisitorial mode of law enforcement would be to abandon a fundamental element of American law, equal justice.

We cannot afford to abandon equality. We have already seen some of the costs of a racially divided society—not just joblessness and riots, but the very crime wave that these proposals seek to reverse. It is true that equality is slowly achieved, and will only slowly affect the crime rate, but it is essential to peace in our cities. Any short term gains that may flow from repression are certainly not worth deepening the alienation of the repressed. A state of siege cannot be the goal of law and order.

So far we have assumed that the protection of the fifth amendment exacts its price through crime. But there has been no sufficient showing that abrogation of the amendment will significantly affect the crime rate. Interrogation is a technique for solving crimes, not preventing them. Even in solving crimes confessions are not usually essential. The District Attorney of Los Angeles County concluded that *Miranda*-type warnings had not significantly affected his conviction rate.¹⁷ There is no reason to believe that the experience should be different elsewhere.

It is not the Supreme Court that has caused the startling rise in urban crime, but rather the way our society handles the availability of addictive drugs and guns. In virtually all of our cities an appalling proportion of certain crimes is committed by drug addicts. This is a source of criminal conduct about which we can do something constructive. The principal cause of crime by addicts is simply the need for money to support a habit. Simply prescribing maintenance doses of the addictive drug, either free or at its normal cost of less than a dollar a day, would eliminate a substantial cause of crime. The English addict population has remained both small and law-abiding while receiving legal maintenance doses of drugs.

Uncontrolled ownership of guns also contributes to violence. The mere availability of a gun has turned more than one family quarrel into a murder. Easy access to guns paves the way for armed robbers. This is again a problem about which we have the power to do something,

¹⁷ YOUNGER, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 *FORDHAM L. REV.* 169, 255-62 (1966).

yet we have continually failed to enact adequate measures. It is ironic that some of the most vociferous opponents of the Supreme Court also oppose gun control legislation. If they really wish to control crime and preserve liberty, their positions should be reversed on both issues.

Experimentation with such steps and efforts to eliminate underlying causes are practical approaches to the crime problem. If this kind of proposal does not work out in practice it can be modified or abandoned. But constitutional experimentation is far more difficult and dangerous. Constitutional restrictions serve a more complex function than statutes and judicial decisions. The constitutional rule, by instructing officialdom about its primary duties to the citizenry, educates it as to the policies underlying the rule. It inculcates a basic respect for individual dignity. To alter the rules every so often devalues the social policy underlying them. The entire relationship between citizen and state is altered with results neither foreseen nor easily corrected. Perhaps for these reasons we have never fundamentally altered the Constitution. And we have never even tampered with the Bill of Rights.

Establishing the basic relationship between the citizen and the state is the most important and most difficult task of the constitution-maker. The arrangement must last far beyond what the wisest man can foresee. Whenever adjustments are required, the immediate demands of the state always seem so pressing and legitimate. In any single case it is difficult to resist the demands of necessity, as the Japanese-Americans who spent World War II in concentration camps learned. What if the Bill of Rights had been written during that crisis? We are in the midst of another crisis now, and it is an equally bad time to rewrite the Constitution. We should especially abstain from rewriting it in response to proposals that trade away liberty for an illusion of security. In the end we would be protected from neither the state nor the criminal. If we sacrifice only the least aware of our fellow citizens, we exacerbate the causes of violent conflict without eliminating any of the symptoms. There are many ways of fighting crime, but neither for rich nor for poor are there many ways to protect the privacy and integrity of the individual—rights and values which are the very essence of constitutional liberty and security.

Times of stress, even more than bad cases, can make bad law. It would be bad law and bad policy to weaken the fifth amendment. For it is even truer today than it was one hundred and seventy-eight years ago, that we can afford liberty.