(ed. The following article is adapted from a speech prepared for delivery at the Law School this spring. The author is Arthur J. Goldberg, former Justice of the US Supreme Court, Secretary of Labor in the Kennedy and Johnson administrations, and US Representative to the United Nations. Justice Goldberg set aside these prepared remarks in favor of a mock Supreme Court conference session with nine student-justices.)

CAN WE AFFORD LIBERTY

The Honorable Arthur J. Goldberg

In a recent and highly controversial address to the American Bar Association, the Chief Justice of the United States, Warren E. Burger, decried the prevalence of crime in America and directed his criticism both at the permissive state of America and opinions of the Supreme Court.

I have great respect for the office of Chief Justice of the United States. I would like to venture the suggestion, however, that the real gravamen of Chief Justice Burger's address has been overlooked. In a very real sense, the Chief Justice is raising the question of whether, in light of the serious nature of crime in America, we can afford liberty and decisions of the Supreme Court, largely during the Warren era, which enforced the Bill of Rights in the case of those charged with crime.

There is a crisis in American law, a crisis reflecting the uncertainty and division of American society today. We are understandably concerned about the prevalence of crime in our society. This growing concern with the rising rate of crime has led to a search for solutions, some of which are based on the idea of "liberating" officials from constitutional restraints.

The Bill of Rights, we are told, should be "adjusted" to meet our concern with crime. In particular, the first, fourth, fifth, sixth and eighth amendments have been attacked as a luxury we cannot afford in the current crisis. Once again it becomes necessary to examine the reasons for these constitutional protections to forestall the sacrifice of basic liberty for what may turn out to be illusory advantage.

Our Bill of Rights reflects profound wisdom, as well as the safeguard of our liberty. With the knowledge that a government may take hasty action that it will later come to regret, a wise nation provides itself with constitutional protection intended to prevent those actions that history teaches us are most often regretted. A Bill of Rights also expresses the essential optimism of people, for it is based upon a belief that liberty is enshrined in the minds and hearts of the American people.

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 always be relied upon to act according to the principles of the Bill of Rights, there would be no need for the document. But the people of our nation at its inception 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 abridgement 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 Bill of Rights does not just protect "someone else." It protects us all. For to trim the privileges the Bill of Rights accords is to trim the autonomy of every individual, which is the essence of the Bill of Rights.

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 our 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, such as income tax time or in the census gathering. 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.

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

Perhaps the best way to appreciate what the privilege against self-incrimination and the right really means is to imagine a system without it. There are, of course, countries that have neither the fourth, fifth or sixth amendments. They have developed intolerable restraints in dealings between state and citizen. From proven record of coercion in totalitarian countries, even with these privileges, it is apparent that we have developed no substitute for these amendments. And repeal in the present context would hardly provoke a search for substitutes. If we "liberate" our officialdom from the strictures of the Bill of Rights, 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 they impose. Politically, repeal would represent positive encouragement to do what formerly the amendments prohibited.

Four hundred years ago Montaigne wrote, "No man is so exquisitely honest or upright in living, but brings all his actions and thoughts within compasse and danger of the laws, and that ten times in his life might not lawfully be hanged." 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 Bill of Rights 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 more insidious possibility for law enforcement in the post fourth, fifth and sixth amendments 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 obstructing justice. 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 seems most important, but according to what group is most hated or feared by those in power. Crime can be investigated by the spurious means of keeping an alert eye on ethnic or political minorities. Membership in one of these groups can become an invitation in inquisition. Political leaders, in fact, are inclined to define law enforcement priorities in terms of the anxieties of their elector constituencies.

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 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 Bill of Rights which protects us against arbitrary intrusions by the state is something different from recent judicial interpretations, as Chief Justice Burger recently asserted in an address to the American Bar Association. 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* 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 specificity of *Mapp v. Ohio, Miranda v. Arizona* and *Escobedo* has been necessary to assure equal treatment when the states refuse to enforce the exclusionary rule, to provide counsel and to ensure that one is not a witness against himself or herself.

The test of the constitutionality of a confession has long been voluntariness. A confession could not constitutionally be beaten out of a suspect. It could not be extracted through more subtle psychological pressures playing upon the fears of the suspect. What the Court did in *Miranda* and *Escobedo* 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? The suspect in this position frequently has no real choice in 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 unnamed informers encourages the arrest of 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* and *Escobedo* 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.

We cannot afford to abandon equality. We have already seen some of the costs of 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 and the *Escobedo* ruling had not significantly affected his conviction rate. 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 and fails to provide jobs or eliminate discrimination. In virtually all of our cities an appalling proportion of certain crimes is committed by the poor and deprived and by drug addicts. These are sources of criminal conduct about which we can do something constructive. We can do better in dealing with unemployment and eliminating discrimination. The cause of crime by addicts is simply the need for money to support a habit. Simply prescribing mainte-

nance 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 disturbed person or family quarrel into a murder. Easy access to guns paves the way for assassins, terrorists and armed robbers. This is again a problem about which we have the power to do something, 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 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 this crisis? We are in the midst of serious and widespread crime 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 times, can make bad law. It would be bad law and bad policy to weaken the Bill of Rights or Supreme Court decisions enforcing this palladium of our liberties. For it is even truer today than it was some two hundred years ago, that we can afford liberty.

FACULTY/ALUMNI NOTES

Karen I. Ward ('73) has been appointed associate solicitor for special appellate and Supreme Court litigation by the US Solicitor of Labor. Ward previously was a law clerk for Judge Albert Engle on the US District Court for the Western District of Michigan and on the US Court of Appeals, Sixth Circuit. She then served as an assistant US Attorney for the District of Columbia as as an associate with a Washington, DC law firm.

Andrew F. Giffin ('70) has joined the management consulting firm of Towers, Perrin, Foster & Crosby. With 10 years of insurance regulatory experience, Giffin will work in the firm's life insurance consulting unit.

Dennis Ward ('73) has joined the Chicago based engineering firm of Sargent & Lundy as head of their Environmental Division. He is both an attorney and a registered professional engineer.

Lenora Walker ('81) has earned the status of Diplomat of the Court Practice Institute after a recent seminar. The program was intensive and designed to improve trial skills.

Texas Business magazine has named T. A. Sneed ('75) as one of its "Rising Stars of Texas." Sneed is the Vice President for Industrial Relations with Trailways, Inc.

Jack H. Blaine ('61) has been elected to a term on the Council of Tort and Insurance Practice Section of the American Bar Association. This section is one of the oldest in the ABA and currently has over 19,000 members.

Prof. James E. Jones, Jr. ('56) has been named Bascom Professor by the Board of Regents. These professorships honor outstanding teaching and provide annual allocations from gift funds for books, assistants, travel and other enhancements of teaching and scholarly activities. Initial appointments are for five years.

Prof. Walter Dickey ('71) has been appointed by Gov. Earl to head the Wisconsin Division of Corrections. Prof. Dickey will take a leave of absence from his duties, which included teaching criminal law and supervising the Legal Assistance to Inmates clinical program.