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JUDGE FRIENDLY
Love is dying.

JUDGES

Falling Out With the Fifth

Back in the era of Senator Joe McCarthy, says Judge Henry Friendly of the U.S. Court of Appeals, the Fifth Amendment served as a shield for people whose only crime was leftist political associations. Indeed, says Friendly, the amendment's main purpose was to give the protective privilege of silence to those persecuted for heresy, nonconformity and political crimes. "This is the privilege we love," says Friendly.

Love is now dying between the judge and the amendment. During the 1960s, he argues, it has served to protect murderers, rapists and bagmen. It has worked to prevent police from getting the information they need to protect life and property. He indicts both legal scholars and the U.S. Supreme Court for turning the Fifth into "an ultimate article of faith in respect to which compromise is impossible."

Friendly, who is often mentioned as one of Richard Nixon's leading candidates for Chief Justice of the Supreme Court, would like to see a constructive debate over the amendment, "free from the compulsion of precedent and the cacophony of clichés." In a recent series of lectures at the University of Cincinnati Law School, Friendly tried to start the debate by proposing that the U.S. amend the amendment—or at least the self-incrimination provision that states that no one "shall be compelled in any criminal case to be a witness against himself."

Hemophilic Heart. Among other things, says Friendly, the Fifth was designed to prevent a defendant from "being dragged, kicking and screaming, to the witness stand." But Friendly does not see how the Supreme Court can interpret it as meaning the state cannot compel a person to produce documents and records relevant to his case. "It takes a heart more hemophilic than mine," says he, "to find cruelty" in a subpoena to require racketeers to produce their books. Yet the Supreme Court has barred just such an act under the self-incrimination clause.

Friendly also worries because only a slim majority on the Supreme Court now holds that it is legal for police to require a suspect to cooperate in certain scientific tests. Nothing in the amendment, he says, should be construed as protecting an accused man from a "reasonable examination of his body" or from having to submit to voice and handwriting tests or furnish blood and urine samples. To prevent the court from outlawing such techniques, he suggests that they be specifically excluded from Fifth Amendment privileges.

When it comes to the interrogation of criminal suspects, Friendly argues for a more narrow interpretation of the Fifth than the court gave in *Miranda v. Arizona* (TIME, June 24, 1966). At the very least, Friendly believes, a policeman investigating a crime should be able to question a suspect on the street before taking him into custody. Yet he fears that the court may eventually bar even this. Nor is it asking too much, says Friendly, to require a man brought to the station house to identify himself. Agreeing with the goal of *Miranda*—to make certain that the rights of the poor and ignorant are protected—Friendly would give an added safeguard against the third degree. He suggests that all questioning at the police station take place before a magistrate. If the man refuses to answer, Friendly's amendment would permit the prosecution to comment on that fact at the trial.

Friendly concedes if he had to choose between repealing all recent Supreme Court rules for criminal investigations or keeping all, "I would unhesitatingly choose the latter." But neither extreme appeals to the conservative judge. Friendly prefers to be selective rather than discard all the court has accomplished in the past several years.