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**THE RIGHT TO SILENCE HELPS THE  
INNOCENT: A RESPONSE TO CRITICS**

Alex Stein



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## THE RIGHT TO SILENCE HELPS THE INNOCENT: A RESPONSE TO CRITICS

*Alex Stein\**

### ABSTRACT

*This contribution to the Cardozo Law Review symposium on the future of the Fifth Amendment responds to the numerous critics of Daniel J. Seidmann & Alex Stein, The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege, 114 HARV. L. REV. 430 (2000), <http://ssrn.com/abstract=271429>.*

*Under Seidmann and Stein's theory, the right to silence protects innocents who find themselves unable to corroborate their self-exonerating accounts by verifiable evidence. Absent the right, guilty criminals would pool with innocents by making false self-exonerating statements. Factfinders would consequently discount the probative value of all uncorroborated exculpatory statements, at the expense of those innocents who cannot corroborate their true accounts. The right to silence minimizes this pooling effect, thereby reducing the incidence of wrongful convictions, by providing guilty criminals an attractive alternative to lying. Under Seidmann and Stein's theory, innocents tell the truth, whereas criminals—fearful of being implicated by their lies and unwilling to confess—exercise the right to silence. This separation reduces the distortion that factfinders would otherwise commit by discounting the probability of true self-exonerating accounts. The Article defends this theory against its critics on empirical and methodological grounds, as well as by demonstrating that the anti-pooling rationale stands out as the only coherent and comprehensive explanation of the Fifth Amendment jurisprudence.*

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## INTRODUCTION

This Article revisits Seidmann and Stein's rationalization of the right to silence<sup>1</sup> and responds to its critics.<sup>2</sup> Under Seidmann and Stein's model (*SSM*), the right to silence protects innocents who find themselves unable to corroborate their self-exonerating accounts by verifiable evidence. Absent the right, guilty criminals would pool with innocents by making false exculpatory statements (to the extent they believe that their lies are unlikely to be exposed). Aware of this incentive, factfinders would rationally discount the probative value of all uncorroborated exculpatory statements, at the expense of the unfortunate innocents who cannot corroborate their true exculpatory stories. The right to silence minimizes this pooling effect, thereby reducing the incidence of wrongful convictions, by providing guilty criminals a strong incentive to separate from the pool. Specifically, it provides guilty suspects and defendants an attractive alternative to lying. Under *SSM*, innocents tell the truth, whereas criminals—fearful of being implicated by their lies and unwilling to confess—exercise the right to silence. This separation reduces the downscaling distortion that factfinders would otherwise commit in evaluating the probability of self-exonerating testimonies, which—unbeknownst to them—happen to

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<sup>1</sup>Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430 (2000).

<sup>2</sup>See LOUIS MICHAEL SEIDMAN, SILENCE AND FREEDOM 68-69 (2007); Samuel W. Buell, *Criminal Procedure within the Firm*, 59 STAN. L. REV. 1613, 1639 (2007); Mike Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 21 OXFORD J. LEG. STUD. 209, 220-21 (2007); LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 130 (2006); Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 1020-21 (2006); T.H. Waters III, *Between a Rock and a Hard Place: An Examination of a "Costly" Right to Silence for Corporate Employees in Criminal Investigations*, 25 REV. LITIG. 603, 611-31 (2006); PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE 422-25 (2004); Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 265 n. 104 (2004); Stephanos Bibas, *The Right to Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421 (2003); Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925 (2002). Seidmann and Stein's rationalization of the right to silence also has supporters. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 715-16 (6th ed., 2003) (describing Seidmann and Stein's theory as the most persuasive economic rationalization of the right to silence); ANDREW ASHWORTH, HUMAN RIGHTS, SERIOUS CRIME AND CRIMINAL PROCEDURE 21 (2002) ("The anti-pooling rationale differs from the others in that it is not grounded in deep principle but rather in empirically testable assumptions about behaviour, related to one of the primary purposes of criminal justice system (to convict the guilty and acquit the innocent). It should therefore take its place alongside other instrumental rationales.").

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be true. The fix, admittedly, is incomplete, but is substantial enough to justify the right to silence. The right to silence is as justified as any other rule of criminal procedure and evidence that reduces the rate of erroneous convictions by increasing the rate of erroneous acquittals.<sup>3</sup>

*SSM* is a crucial, but not the only, component of Seidmann and Stein's theory. This theory has two additional components: doctrinal fit<sup>4</sup> and empirical support.<sup>5</sup> Seidmann and Stein's rationalization of the right to silence provides a unified and coherent explanation to every aspect of the Fifth Amendment jurisprudence.<sup>6</sup> Their theory thus has four methodological virtues: parsimony, testability, coherence and comprehensiveness. This theory is parsimonious in that it rests on a very small number of assumptions about people's rationality; it is testable as all of its predictions can be verified empirically; it is internally coherent and unified; and, finally, it is comprehensive in its explication of the relevant legal phenomena. No other rationale for the right to silence exhibits a similar set of methodological virtues. Moreover, *SSM* aligns with empirical studies carried out in England after the abolition of the privilege against adverse inferences from the defendant's silence, which took place in 1994.<sup>7</sup> Those studies confirm the model's predictions concerning the effects of right's abolition. Abolition of the right to silence would induce many criminals to lie instead of confessing (unless society is willing to compromise its sentencing goals by giving confessors substantial punishment discounts).

Arguments raised by *SSM*'s critics take two directions. Some of those arguments challenge the model's economic rationality. They claim that *SSM* fails to establish that the right to silence is or can be welfare-enhancing.<sup>8</sup> Other arguments question *SSM*'s foundational

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<sup>3</sup>See Seidmann & Stein, *supra* note 1, at 433-34. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 618 n.2 (6th ed. 2003) (observing that "trading off Type I and Type II errors is a pervasive feature of evidence law"); ALEX STEIN, *FOUNDATIONS OF EVIDENCE LAW* 172-78 (2005) ("The legal system can . . . reduce the incidence of wrongful acquittals ('false negatives') by increasing the number of wrongful convictions ('false positives'), and vice versa.").

<sup>4</sup>See Seidmann & Stein, *supra* note 1, at 474-98.

<sup>5</sup>*Id.* at 498-502.

<sup>6</sup>*Id.* at 474-98.

<sup>7</sup>The most important of those studies is TOM BUCKE, ROBERT STREET & DAVID BROWN, *THE RIGHT OF SILENCE: THE IMPACT OF THE CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994* (2000).

<sup>8</sup>The relationship between the right to silence and social welfare is very complex. *SSM* establishes that the right can be welfare-enhancing in a society that considers an erroneous conviction and punishment of an innocent person more harmful than an erroneous exoneration of a guilty criminal. This preference is not written on stone, see LAUDAN, *supra* note 2, at 130, but is consensual. See STEIN, *supra* note 3, at 172-78. *SSM* assumes that jurors adopt this societal preference. For variations, see Daniel J. Seidmann, *The Effects of a Right to Silence*, 72 *REV. ECON. STUD.* 593 (2005).

assumption of rationality. Under *SSM*, the relevant actors always act rationally (in a rudimentary sense). The model's critics call this postulation into question. From their perspective, criminal suspects and defendants are boundedly rational at best; and even if they were entirely rational, their situation at interrogation and trial—a combination of fear, pressures and anxiety—does not allow them to act rationally. The critics' opposition to rationalism also influences their understanding of factfinding. According to this understanding, factfinders follow their intuitions rather than general rationality and legal rules. They ignore the Fifth Amendment's command by drawing adverse inferences against non-testifying defendants. Drawing such natural inferences—say the critics—is a hard-wired instinct of human beings that the law cannot undo.<sup>9</sup>

The “realist” lines of critique against *SSM* have a common feature: the critics' allusion to the “real facts” that are not in possession of Seidmann and Stein. The critics claim that *they* know what's really going on at interrogations and trials and how the system of criminal justice really works. The critics juxtapose their realities against Seidmann and Stein's theoretical model, which they portray as an unreal post-hoc rationalization of the “law from the book” by abstract economic principles.

The Article proceeds in the following order. Part I restates Seidmann and Stein's rationalization of the right to silence. Part II defends *SSM*'s economic logic against the rationality-based critique. Part III responds to the critics' “realism”—a combination of rule-skepticism and the critics' self-professed understandings of the self-incrimination doctrine. Part IV outlines *SSM*'s rationalization of every important component of the Fifth Amendment jurisprudence—a feature that the model's critics uniformly failed to acknowledge. This doctrinal fit establishes *SSM*'s superiority over other attempts at explaining the self-incrimination doctrine. A short conclusion follows.

## I. *SSM*

The right to silence plays no significant role in cases in which the evidence inculcating the defendant is overwhelming. In such cases, both guilty and innocent defendants face a serious prospect of conviction, which the right to silence can neither attenuate nor increase. For a

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<sup>9</sup>See Van Kessel, *supra* note 2, at 942-43. Compare Redmayne, *supra* note 2, at 220, who estimates that factfinders can consider any evidence and adequately determine the probability of the defendant's guilt even when the pooling is present. He observes that “the French would be rather bemused by [Seidmann and Stein's] argument that they could improve their fact-finding by hearing less from defendants.” *Id.*

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defendant who faces an overwhelming evidence of guilt, entering into a guilty plea, bargained or unilateral, would normally be the best strategy.

The right to silence also plays no significant role in cases in which the evidence inculcating the defendant is weak. Defendants facing weak inculpatory evidence—both guilty and innocent—will likely be exonerated. Testifying and telling the truth will be an innocent defendant's best strategy irrespective of whether the legal system recognizes the right to remain silent. The prosecution's weak evidence would fail to rebut this testimony and the factfinders would have to acquit the defendant. For a guilty defendant, lying would be risky because, once revealed, his lies would virtually guarantee a guilty verdict. A guilty defendant, however, can remain silent even in the absence of a privilege against adverse inferences. Weak inculpatory evidence and the silent defendant's amorphous signal of "guilty conscience" normally would not amount to a proof beyond all reasonable doubt.<sup>10</sup>

For these reasons, *SSM* does not purport to model criminal defendants with exceedingly high payoffs for lying or for confessing. For those defendants, the right to silence is essentially irrelevant. *SSM* rationalizes the right to silence as a right that can affect the outcome of a criminal case, and only to the extent that it can actually do so. A prominent critic of *SSM*, Professor Stephanos Bibas, therefore has misidentified his target in describing the model as divorced from the reality of guilty pleas.<sup>11</sup> The universe of guilty pleas is surely an important one. There, a typical defendant faces overwhelming inculpatory evidence that prompts him to confess and plead guilty.<sup>12</sup> But there is another universe, smaller, but still important: the universe of not-guilty pleas and denials of accusations. This universe accommodates two categories of cases, featuring, respectively, weak and intermediately-strong inculpatory evidence. Weak-evidence cases are trivial. Cases in which the prosecution's evidence cuts both ways and that predominantly go to trial are not trivial.

The right to silence plays a significant role in these non-trivial cases. These cases exhibit the most acute problem of asymmetrical information. Factfinders know that some defendants are guilty and some innocent, but cannot tell who is who. Virtually every defendant knows whether he committed the crime that the prosecution accuses him of. This private knowledge, however, does not turn into public information

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<sup>10</sup>Factfinders also may interpret the defendant's silence as a conclusive indication of guilt. Under this scenario, Bentham's estimation that the right helps only the guilty would be correct. See Seidmann & Stein, *supra* note 1, at 469-70.

<sup>11</sup>See Bibas, *supra* note 2, at 431-32.

<sup>12</sup>But see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464-65 (2004) (arguing that real-world plea bargains do not track the expected outcome of the trial).

that factfinders can verify and trust. In the absence of strong incentives to plead guilty (an attractive plea-bargain offer could provide those only by sacrificing society's interest in the adequate punishment of criminals), a guilty defendant will plead not guilty. Under the regime that allows factfinders to draw adverse inferences from the defendant's silence, he will also falsely testify about his innocence. An innocent defendant will do the same, but, of course, without lying. Factfinders consequently will proceed on the assumption that some self-exonerating accounts are true and some false.

This assumption necessarily reduces the probability of *all* self-exonerating accounts. As a result, an innocent defendant who cannot corroborate his exculpatory testimony by credible evidence suffers an undeserved credibility reduction. This reduction increases the probability of the prosecution's case—an increase that helps the prosecution establish the defendant's guilt "beyond a reasonable doubt." When that happens, factfinders convict an innocent defendant, which means that, by lying, a guilty defendant imposes a harmful externality on innocent defendants (and society at large). Bentham's utilitarian analysis of the right to silence failed to notice the presence of this externality.<sup>13</sup> Bentham's followers—the present-day abolitionists, who claim that the right has pernicious effects on the criminal justice system and therefore must go—have also missed the presence of this harmful externality.<sup>14</sup> Their utilitarian analyses of the right therefore are as flawed as Bentham's.

The right to silence gives guilty criminals an attractive alternative to lying. Because a lie can be discovered and because its discovery may lead to the liar's conviction, for at least some criminals silence would be a better option. Those criminals would consequently prefer silence to lying. The externality that they otherwise would impose upon innocents (the pernicious pooling effect) would thus be eliminated. As a result, less innocents would be convicted than under a regime in which the right to silence does not exist. This externality-reduction is *SSM's* major insight. Based on this insight, the model develops a *utilitarian* response to Bentham's followers, who want to abolish the right to silence on utilitarian grounds.

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<sup>13</sup>See Seidmann & Stein, *supra* note 1, at 457-61.

<sup>14</sup>*Id.* at 455-56.

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The table below summarizes the effects of the right to silence uncovered by Seidmann and Stein:

INCRIMINATING EVIDENCE	EFFECT OF THE RIGHT TO SILENCE
Weak	No effect: both guilty and innocents are acquitted. Some guilty defendants able to secure their acquittal without taking the risk of lying.
Strong	No effect: both guilty and innocents are convicted.
Intermediately Strong	Some guilty defendants remain silent instead of pooling with innocents. As a result, more innocent defendants are exonerated.

Other supporters of the right to silence have conceded that the right cannot be justified in consequentialist terms.<sup>15</sup> Because they nonetheless support the right and do not want it to be abolished, they took a deontological route. Specifically, they offered an impressive catalogue of moral and political values that include “physical privacy,”<sup>16</sup> “mental privacy,”<sup>17</sup> “inviolability of cognitive processes,”<sup>18</sup> “an individual’s freedom to resist the government,”<sup>19</sup> “sanctity of confession and remorse,”<sup>20</sup> an “excuse” from the general duty to testify,<sup>21</sup> and, finally, the authoritatively affirmed right “not to experience a cruel trilemma of self-incrimination, perjury or contempt.”<sup>22</sup> According to the right’s supporters, these values trump society’s interest in the self-incriminating information that could help it to convict more criminals than it presently does.<sup>23</sup>

<sup>15</sup>See *id.* at 454. But see Shmuel Leshem, *The Effects of the Right to Silence on the Innocent’s Decision to Remain Silent* (2008), available at <http://law.bepress.com/alea/18th/art61> (importantly expanding SSM by modeling cases with false inculpatory evidence that rationally induces innocent defendants to remain silent in order to increase the probability of their acquittals).

<sup>16</sup>See Vincent Martin Bonventre, *An Alternative to the Constitutional Privilege Against Self-Incrimination*, 49 BROOK. L. REV. 31, 56-59 (1982) (treating the privacy rationale as a plausible justification for the right to silence); Robert S. Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343, 349-50 (1979) (same); Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87 (1970) (same); Erwin N. Griswold, *The Right to be Let Alone*, 55 NW. U. L. REV. 216 (1961)



This defense of the right is flawed. Many people would love to have their goals and values listed in society's deontological catalogue. A prospective victim of crime, for example, may argue that her right to be protected against crime as efficaciously as possible also deserves a deontological status. To the extent that this claim is plausible, it allows its holder to demand the abolition of the right to silence. The right's supporters can surely respond to this claim, but any of their responses will have a critical vice: it will try to position itself as privileged in society's moral discourse. To occupy this position, one needs to have more than just a theory. One needs to have a theory that beats all other theories.<sup>24</sup>

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(same); Redmayne, *supra* note 2, at 225-28 (defending the right as a realization of a defendant's political entitlement to disassociate himself from the prosecution). *But see* Akhil R. Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 890-91 (1995) (arguing that, if the privacy rationale were sound, the privilege would require equal application in civil proceedings); Ian Dennis, *Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege Against Self-Incrimination*, 54 CAMBRIDGE L.J. 342 (1995) (questioning the validity of the privacy rationale); David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1107-37 (1986) (rejecting the privacy rationale); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 317, 319-20 (1991) (casting doubts on the privacy rationale); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1234 (1988) ("If the privilege were sensibly designed to protect privacy . . . , its application would turn on the nature of the disclosure the government wished to require, and yet settled fifth amendment law focuses on the criminal consequences of disclosure.").

<sup>17</sup>See Andrew E. Taslitz, *Confessing in the Human Voice: A Defense of the Privilege Against Self-Incrimination*, 6 CARDOZO J. PUB. L., POL'Y, & ETHICS (forthcoming, 2008)

<sup>18</sup>See Allen & Mace, *supra* note 2, at 266-89.

<sup>19</sup>See Michael S. Green, *The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, 65 BROOK. L. REV. 627 (1999) (justifying the right to silence as an individual's entitlement to rebel against the state); Michael S. Green, *The Paradox of Auxiliary Rights: The Privilege Against Self-Incrimination and the Right to Keep and Bear Arms*, 52 DUKE L.J. 113 (2002).

<sup>20</sup>See generally Gerstein, *supra* note 16 (arguing that the privilege against self-incrimination protects individual dignity). This idea has roots in the Judeo-Christian tradition in the form of *nemo tenetur prodere seipsum* (the principle understood by canonist writers to prohibit forcing a person to accuse himself publicly). See Stefan A. Riesenfeld, *Law Making and Legislative Precedent in American Legal History*, 33 MINN. L. REV. 103, 118 (1949); AARON KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW 50 (1970); see also LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 433-41 (1968) (explaining the Judeo-Christian origins of the privilege).

<sup>21</sup>See Stuntz, *supra* note 16.

<sup>22</sup>See *Murphy v. Waterfront Comm. of N.Y. Harbor*, 378 U.S. 52 (1964); see also *Schmerber v. California*, 384 U.S. 757 (1966) (entrenching the "trilemma rationale" for the privilege against self-incrimination).

<sup>23</sup>Instead of taking this deontological route, the right's supporters could consequentialize their positions. They could posit that the values protected by the right to silence must be given a lexical priority in the ranking of outcomes that the criminal justice system achieves. See generally Douglas W. Portmore, *Consequentializing Moral Theories*, 88 PAC. PHIL. QUART. 39 (2007). This line of argumentation, however, would still suffer from *petitio principii*.

<sup>24</sup>See Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors*

## II. RATIONALISM

Under *SSM*, innocent defendants have only one rational course of action: revealing their true self-exonerating accounts. Guilty defendants, in contrast, choose between lying, confessing, and remaining silent. This choice depends on the extent to which each course of action reduces the expected punishment. When inculpatory evidence is overwhelmingly strong, all defendants will be convicted (regardless of factual guilt). Confession therefore might be the optimal course of action for both guilty and innocent defendants. When the inculpatory evidence is weak, innocents should tell the truth, while guilty defendants can choose between silence, self-exonerating perjury and the risks of conviction arising therefrom.<sup>25</sup> Most defendants, if not all of them, will be acquitted (regardless of factual innocence). The right to silence makes no difference in both scenarios (except for slightly increasing a guilty defendant's chances of acquittal in cases featuring weak inculpatory evidence)<sup>26</sup>.

When the prosecution's evidence is of intermediate strength, an innocent defendant should still tell the truth, while a guilty defendant's choice is more complicated. Self-exonerating perjury is a risky option because of the substantial probability of rebuttal.<sup>27</sup> When a defendant is proven to have lied in his defense, the jury would virtually certainly convict him, and he also should expect a harsh sentence from the judge.<sup>28</sup> All this decreases the defendant's payoff from lying.

Making a confession only makes sense in exchange for a substantial sentence reduction (or when the defendant's trial expenses

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*Getman and Kohler*, 92 *YALE L.J.* 1435, 1435 (1983) (“[I]t takes a theory to beat a theory.”).

<sup>25</sup>Under one of *SSM*'s simplifying assumptions, jurors infer guilt from silence automatically, which forces guilty defendants to choose between lying and confessing. Absent an attractive plea bargain, a guilty defendant therefore would always lie in his defense. He would then be convicted if the prosecution proves beyond a reasonable doubt that he lied (an unlikely scenario in weak-evidence cases). Acquittal, therefore, is—and, arguably, should be—the normal weak-case outcome for both innocent and guilty defendants. See *STEIN*, *supra* note 3, at 171-78 (calling for a justification requirement for all guilty verdicts, regardless of factual guilt).

<sup>26</sup>See *Seidmann & Stein*, *supra* note 1, at 105.

<sup>27</sup>At interrogation, a guilty defendant is never aware of *all* the evidence that the police have gathered or will gather to rebut his false exonerating story. At trial too, the defendant's right to discovery does not capture every item of the prosecution's rebuttal evidence. See *Seidmann & Stein*, *supra* note 1, at 491-92. This factor decreases the defendant's expected payoff from lying.

<sup>28</sup>See *id.* at 491-92. See also U.S. SENTENCING GUIDELINES MANUAL § 2J1.3 (2004).

are unaffordably high). When the legal system does not commit itself to a substantial sentence reduction for confessors, a rational guilty defendant will be choosing between lying and remaining silent. His expected benefit from lying will virtually always be greater than the benefit from confessing: the probability of acquittal generated by the defendant's self-exonerating lies will bring his expected punishment below the confessor's standard sentence. The defendant's payoff from silence will depend on whether factfinders interpret silence as a sign of guilt. If they do, the defendant's silence would strengthen the prosecution's evidence, which would virtually guarantee his conviction. If factfinders draw no adverse inferences from the defendant's silence, the guilty defendant would have a chance of acquittal.<sup>29</sup>

The defendant's choice between lying and remaining silent consequently depends on whether the law allows factfinders to draw adverse inferences from silence. If it does, the guilty defendant will defend himself by lying. If it does not, the defendant will remain silent. As I already explained, the choice between the two regimes depends on the legal system's benefits from motivating *guilty* defendants to prefer silence to lies. These benefits derive from the anti-pooling consequences of the guilty defendants' silence. What determines these benefits is the extent to which silence substitutes for lies and cleanses the pool of uncorroborated self-exonerating accounts. An increase in this substitution increases the credibility of the exculpatory accounts that remain in the pool.

A number of critics have contended that this theory fails to consider all rational courses of action that innocent and guilty defendants may take. Specifically, innocents may rationally prefer silence to self-exonerating testimony; rational guilty defendants, in turn, may confess for free and forfeit their chances of acquittal without securing sentencing discounts in return. For innocent defendants, so goes the argument, silence may be a better call than making a confused statement or testimony under pressure and anxiety and leaving a wrong and potentially devastating impression on the factfinders.<sup>30</sup> For guilty defendants, an early confession may spare the pressures of interrogation and trial and yield the psychic benefits of contrition and remorse.<sup>31</sup>

This criticism is misguided. Consider a pool of 200 defendants facing inculpatory evidence of intermediate strength under a regime that allows factfinders to draw adverse inferences from the defendant's

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<sup>29</sup> As an alternative, the legal system may abolish the right to silence and impose severe extra punishments on defendants who choose to lie. This measure need not be discussed here. For reasons supporting its rejection, see Seidmann & Stein, *supra* note 1, at 440, n.36.

<sup>30</sup>See Buell, *supra* note 2, at 1639; Waters, *supra* note 2, at 611-12; Van Kessel, *supra* note 2, at 944. For a special case in which silence really can help an innocent defendant, see Leshem, *supra*, note 15.

<sup>31</sup>See Bibas, *supra* note 2, at 424.

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silence. Half of the defendants in the pool are guilty and half innocent. For good or bad reasons, half of the innocent defendants wish to remain silent; the remaining fifty defendants prefer to defend themselves by true alibis and other exonerating statements. Half of the guilty defendants seek contrition and are eager to avoid the pressures of interrogation and trial. Those defendants make early confessions and plead guilty. The remaining fifty defendants invoke false alibis and other self-exonerating statements that imitate the true statements of the innocents. Aware of this pooling, and without knowing which defendant lies and which tells the truth, the factfinders need to evaluate the credibility of uncorroborated, self-exonerating testimony of Doe, a randomly chosen defendant.

The probability of Doe's testimony being true equals  $p/2$ , with  $p$  representing the probability of truthfulness that would attach to an innocent defendant's testimony in the absence of pooling. If guilty defendants did not pool with the innocents at all—that is, if only innocent defendants were to come up with self-exonerating testimonies and their guilty counterparts were to plead guilty or stay silent—this probability would equal 1. The probability of Doe's testimony being true consequently equals 0.5. Hence, if Doe is factually guilty, his false story would undeservedly get a probability boost of 0.5. And if Doe is factually innocent, the probability of his true, but uncorroborated, story would be wrongly discounted by 0.5. The factfinders subsequently will update their assessment of Doe's testimony by considering the inculpatory evidence. The probability of guilt to which this evidence gives rise will further reduce the probability of Doe's innocence. Because the inculpatory evidence has intermediate strength, this reduction may take the probability of Doe's innocence to below a "reasonable doubt." Doe's guilt will thus be established beyond a reasonable doubt. The factfinders may consequently convict Doe—a defendant equally likely to be guilty and innocent.

The right to silence would give a choice to the fifty guilty defendants who felt compelled to testify falsely in their defense. Each of those defendants exposed his testimony to the risk of rebuttal. Rebuttal of the defendant's testimony virtually guaranteed his conviction. The right to silence removes this risk from a guilty defendant who is unwilling to confess and who otherwise would lie in an effort to obtain an acquittal. For such defendants, silence constitutes an attractive way of blocking an increase in the probability of conviction. Lying becomes less attractive than previously because a defendant can eliminate the prospect of rebuttal by remaining silent. A guilty defendant therefore would try to develop a false self-exonerating story only when it brings

about a better prospect of acquittal than silence.<sup>32</sup> To achieve this result, he must have at his disposal a false, but convincing, alibi witness or similar testimony. As in real life, the guilty defendants in my example do not normally have such persuasive exculpatory evidence. These defendants—say, 25 out of 50—“take the Fifth” and separate from the pool.

This separation reduces the pool’s size to 75 self-exonerating accounts. As previously, 50 of those accounts are true, but the number of false exculpatory stories is now 25, instead of 50. Under these conditions, the probability of Doe’s testimony being true equals  $2/3$ . This probability virtually guarantees Doe’s acquittal because the inculpatory evidence would hardly take it down to below a “reasonable doubt.” The legal system consequently would acquit each of the testifying innocents. The price paid for achieving this result would be the acquittal of the guilty criminals, who now benefit from silence, but would have implicated themselves by unsuccessful lies under the previous regime. The legal system, of course, needs to figure out whether it wants to pay this price.<sup>33</sup> *SSM* offers no normative prescriptions as to whether it should do so.<sup>34</sup> This model only advises on how to get most out of this price, given the system’s willingness to pay it.

I now turn to the remaining groups of defendants: “pressurized innocents” and “remorseful criminals.” For a truly pressurized innocent defendant, speaking out the truth is—subjectively—almost as dangerous as lying. For that reason, presumably, he prefers silence to giving a true self-exonerating testimony. A regime that allows factfinders to draw inferences against silent defendants might change this preference because silence is no longer costless. This change is socially beneficial because of the anticipated increase in the flow of the true claims of innocence that—objectively—are difficult to rebut. Relative to the current regime, the level of anxiety among testifying innocents would increase exponentially, but the rate of rightful acquittals would increase as well. This beneficial effect, however, would likely be offset by the deleterious pooling of the guilty and the innocent, as described above.

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<sup>32</sup>I ignore the possibility of risk-aversion. Accounting for it would not change the essence of my argument.

<sup>33</sup>See Seidmann & Stein, *supra* note 1, at 470-74 (explaining *SSM*’s dependency on the predetermined societal preferences between erroneous convictions and erroneous acquittals).

<sup>34</sup>Laudan, *supra* note 2, at 130, criticized *SSM* for its excessive protection of the innocent. This critique misses its target, as Seidmann and Stein only articulate society’s choices and the choices’ consequences. See Seidmann & Stein, *supra* note 1, at 473-74. They take no position as to what choices society should actually make. A proper target for Laudan’s critique could be my self-authored theory of evidence, see STEIN, *supra* note 3, at 172-83, that favors a very strong protection against wrongful conviction. My disagreement with Professor Laudan, however, is not part of this Article’s agenda.

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Hence, the plight of pressurized innocent defendants has no strong implications on whether the right to silence should stay or go. The need to protect such defendants can neither rationalize the right nor justify its abolition.<sup>35</sup>

For a remorseful criminal, the right to silence is altogether immaterial. When a criminal genuinely seeks the psychic benefits of remorse, he will go ahead and confess to the crime. Whether he can remain silent without risking adverse inferences is not a factor that can play a role in this decision. To be sure, if most guilty defendants were remorseful, their confessions would separate them from the innocents, and the pooling effect that the right to silence seeks to reduce would be insignificant.

But most criminal defendants are not remorseful and virtually never confess for free.<sup>36</sup> Ordinarily, the legal system can only purchase a confession by giving the confessor an attractive sentencing discount. A rational defendant will confess for free only after finding the inculpatory evidence incontrovertible. Avoiding trial in such circumstances will often be the defendant's best strategy even when he does not stand to receive a sentencing discount. A hopeless trial has a downside: criminal defense costs money and effort. Furthermore, finding out that the defendant wasted her time may prompt the sentencing judge to waste the defendant's time in return.

But for some guilty defendants, the prospect of going to trial is attractive. This is the case with defendants who face inculpatory evidence that is not overwhelmingly strong. For these defendants, confession is not an option. These guilty defendants consequently choose between silence and lies. Under Seidmann and Stein's taxonomy, these defendants choose between pooling with and separating from the innocents. The number of defendants facing this choice is an empirical matter that has not been completely resolved. This number determines the practical significance of the right to silence as an anti-pooling device.

Another rationalist critique of *SSM* holds that the model is doomed to unravel. After learning about the credit that self-exonerating

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<sup>35</sup>As noted in Seidmann & Stein, *supra* note 1, at 455 n.82, "[t]he existence of silent innocents does not enter into our model, in which guilty defendants separate from testifying innocents by exercising the right to silence."

<sup>36</sup>*Cf.* Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327, 329, 331, 364-67 (1998). Bibas, *supra* note 2, at 424n. 16, cites this article to support the idea that confessing criminals achieve psychic benefits, such as "forgiveness, reconciliation, and a clear conscience" as well as peace, joy, and redemption." Unfortunately, neither he nor Cochran demonstrated empirically that many criminals actually seek those benefits. My experience as a criminal attorney has been rather limited: the only such criminal I am familiar with is Rodion Raskolnikov, the fictional protagonist of FYODOR N. DOSTOYEVSKY, *CRIME AND PUNISHMENT* (1866) (Wordsworth Editions Ltd. 2000) (1866).

statements receive from factfinders following the criminals' separation from the pool, some criminals will try to get back to the pool by concocting false alibis and other self-exonerating perjuries. Factfinders will learn about the pool's renewed contamination and will start discounting the probability of all self-exonerating stories that come uncorroborated.<sup>37</sup>

This critique does not properly account for a guilty criminal's cost of lying. As already explained, any false self-exonerating statement or testimony carries the risk of being refuted. This risk increases the probability of the defendant's conviction. A rational guilty defendant determines his defense strategy by comparing the expected payoffs from confessing, lying and remaining silent. When the sentence discount for confessing defendants is substantial, the defendant may decide to confess and plead guilty. Absent such a discount, he will be choosing between the expected payoffs from silence, on the one hand, and from lies, on the other. The right to silence minimizes the defendant's negative payoff from silence without changing the negative payoff from lies. The right consequently widens the gap between the two negative payoffs, relative to a legal regime that recognizes no right to silence.

For those guilty defendants who choose to lie when the right to silence is at their disposal, the expected payoff from lying must be greater than the payoff from silence. Both payoffs are determined by the defendant's probability of being acquitted. If the extra-credit for self-exonerating testimony is set high, guilty defendants would often prefer lies over silence. But this extra credit need not be set high. To secure the exoneration of innocent defendants, it need not be greater than a reasonable doubt. The "back to the pool" strategy therefore would be attractive only to those guilty criminals whose gain from lying—the probability of acquittal generated by a false self-exonerating testimony—is sufficiently high. The "back to the pool" strategy thus would be used predominantly by criminals with iron-clad alibis (or other convincing exculpatory accounts). Criminals with weaker stories would not assume the risk of being uncovered as liars. Defendants willing to take this risk therefore are predominantly those who would pool with innocents under any regime.

Another line of critique against *SSM* holds that the prohibition of adverse inferences from silence requires factfinders to "treat testifiers and nontestifiers alike."<sup>38</sup> To satisfy this requirement, factfinders must ascribe the same a priori probability of innocence to silent and testifying defendants.<sup>39</sup> Testimonies of potentially innocent defendants consequently will not receive the extra credit that they need to receive

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<sup>37</sup>See SEIDMAN, *supra* note 2, at 68.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

under *SSM*. And when testifying innocent defendants receive no signaling advantage, the model unravels.<sup>40</sup>

This argument proceeds from a false doctrinal premise. The right to silence does not require factfinders to treat testifiers and nontestifiers alike. It requires that factfinders draw no inferences of guilt from a defendant's silence. The right does not enjoin factfinders from upping the probability of innocence of a testifying defendant. This credit brings about no inferences of guilt for defendants who chose to exercise their Fifth Amendment right. Those defendants, of course, would not be as well-positioned as testifiers, but there is nothing in the Fifth Amendment that dictates an alignment between the two groups of defendants.

### III. REALISM

#### A. *Are Criminal Defendants Rational?*

Does it all happen in the real world? I claim that it does, but can only offer inconclusive evidence in support of this empirical claim. Empirical evidence demonstrates that criminal suspects and defendants tend to respond rationally to the presence or absence of the right to silence at interrogation and trial. The factfinders' authorization to draw adverse inferences from silence, introduced by the English law in 1994, has reduced the percentage of silent suspects and defendants without increasing the rate of confessions. After finding silence no longer attractive, guilty suspects and defendants chose to lie instead of confessing. This evidence, however, is incomplete. More generally, empirical evidence demonstrates—once again, inconclusively—that suspects and defendants tend to act rationally in making important choices that the legal system allows them to make.<sup>41</sup>

My primary evidentiary source is an empirical study of Tom Bucke, Robert Street and David Brown that was commissioned by the British government following the removal of the bar against adverse inferences from silence.<sup>42</sup> This study examined interrogations of 1,227 suspects and reported that 6% of the suspects did not answer any questions, as compared to 10% before the abolition of the right to silence in 1994; and that an additional 10% of the suspects did not answer some questions, as compared to 13% under the right to silence. These findings establish that the abolition of the right to silence reduced

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<sup>40</sup>*Id.*

<sup>41</sup>This evidence is surveyed in Seidmann & Stein, *supra* note 1, at 498-502.

<sup>42</sup>See BUCKE ET AL., *supra* note 7, at 30-35.



the percentage of silent suspects and defendants. Another important finding is a roughly similar confession rate under both regimes, which the study explains as follows:

[W]hile suspects may be talking more to officers during police questioning, it would appear that they are no more likely to make admissions than in the past. Some officers described this development as an increase in 'the flannel factor.'<sup>43</sup>

These findings suggest that the abolition of the right to silence in England and Wales induced many guilty suspects to switch from silence to self-exonerating lies. As predicted by *SSM*, abolition of the right did not increase the rate of confessions. Instead, it intensified the pooling of the guilty and the innocent.

The Bucke-Street-Brown study relies on bivariate correlations, which means that the increase in exculpatory statements may have been induced by factors unrelated to the right's abolition. This hypothesis, however, can be ruled out as implausible because in the early nineties, prior to the right's abolition in 1994, the proportion of silent suspects had steadily increased, presumably because many criminal attorneys advised clients to remain silent.<sup>44</sup> This baseline factor suggests that the right's abolition prompted attorneys to tell clients that silence is no longer attractive. As a result, many guilty defendants opted for lies as the only viable alternative to confessing. Hence, criminal defendants rationally chose between lies, silence and confessions.

Two extensive studies of interrogations of suspects in the United States also support the "rational defendant" hypothesis. These studies report that the rate of suspects opting for silence at interrogation range between 10% and 20%.<sup>45</sup> Those suspects received the *Miranda* warnings and were given access to attorneys. If those attorneys or the suspects themselves estimated that factfinders in their future trials could somehow infer guilt from silence, the rate of silent suspects would have been much lower than twenty or even ten percent.<sup>46</sup>

The "rational defendant" hypothesis is substantiated by studies covering other areas of the criminal process. These studies establish that

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<sup>43</sup>*Id.* at 34-35.

<sup>44</sup>*Id.* at 24-25; see also DAVID BROWN, *PACE TEN YEARS ON: A REVIEW OF THE RESEARCH* 172-75 (1997).

<sup>45</sup>See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 *UCLA L. REV.* 839, 869 tbl.4 (1996) (reporting that 9.5% of Mirandized suspects invoked their right to remain silent during police interrogations); Richard A. Leo, *Inside the Interrogation Room*, 86 *J. CRIM. L. & CRIMINOLOGY* 266, 275 tbl.2 (1996) (finding that 20.88% of questioned suspects invoked the right to silence, with 19.78% invoking the right at the outset of their interrogation).

<sup>46</sup>Note that the 10% average is actually a high figure because numerous suspects are caught red-handed or apprehended on the basis of overwhelming inculpatory evidence. For those hopeless suspects, confession is the best call. See Seidmann & Stein, *supra* note 1, at 461-62. Those suspects are not part of the pool that *SSM* separates.

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semi-indigent defendants rationally prefer to retain an expensive private attorney over having a defense counsel appointed at the government's expense<sup>47</sup> and that many indigent defendants choose to represent themselves with adequate rates of success, instead of being represented by public defenders.<sup>48</sup> Furthermore, defendants by and large rationally prefer a jury trial over a trial by a judge, and vice versa.<sup>49</sup>

*SSM*'s realist critics do not seem to be impressed by this evidence. They claim that suspects and defendants do not typically make rational choices at their interrogations or even at trials.<sup>50</sup> This claim, however, was tendered as a general observation that rested on the critics' intuition and, perhaps, individual experience as practitioners. None of the critics has relied on empirical evidence that could substantiate his "irrational defendant" hypothesis.

My response to those critics is straightforward. Economic logic substantiated by *some* empirical proof is methodologically superior to personal intuitions with no external empirical support whatsoever. For me, "methodologically superior" means "more persuasive," but this sameness derives from a set of methodological commitments<sup>51</sup> that *SSM*'s critics need not endorse. The critics, however, need to have *some* methodological commitments to make their claims meaningful. Alas, they uniformly failed to indicate what those commitments are.

### B. *Are Factfinders Rational?*

Professor Gordon Van Kessel argued that when factfinders give an extra credit to a defendant's uncorroborated self-exonerating testimony, they become more inclined to draw adverse inferences against silent defendants despite the Fifth Amendment's proscription of such inferences.<sup>52</sup> If so, a potentially silent criminal would be induced to pool with innocents by concocting a false self-exonerating account. This renewed pooling would motivate factfinders to discount the credibility

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<sup>47</sup>See Morris B. Hoffman, Paul H. Rubin & Joanna M. Shepherd, *An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent"*, 3 OHIO ST. J. CRIM. L. 223 (2005).

<sup>48</sup>See Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007); Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423 (2007).

<sup>49</sup>See Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1550 (2006).

<sup>50</sup>See Bibas, *supra* note 2, at 421-22; Van Kessel, *supra* note 2, at 935-36; ROBERTS & ZUCKERMAN, *supra* note 2, at 422-25.

<sup>51</sup>These commitments are specified in Seidmann & Stein, *supra* note 1, at 436-38.

<sup>52</sup>See Van Kessel, *supra* note 2, at 942-43. I focus here on the main points of Professor Van Kessel's critique of *SSM*. His independent insights and points of agreement with Seidmann and Stein are not discussed in this Article.

of all self-exonerating accounts that have no corroboration. Consequently, *SSM* would unravel.<sup>53</sup> This point derives in large part from Van Kessel's general skepticism about jurors' ability to reason economically and emulate market behavior.<sup>54</sup>

Relatedly, Professor Louis Michael Seidman criticizes *SSM* by reference to the model's unrealistic operational demands. He describes Seidman and Stein's theory as "republican";<sup>55</sup> comments that the theory's "very brilliance . . . strongly cuts against it" because Seidman and Stein "require seventy-nine pages of the *Harvard Law Review* to set out their complex and tightly reasoned theory"; and asks rhetorically "How likely it is that ordinary jurors, who do not regularly read the *Harvard Law Review*, will think up or understand the theory."<sup>56</sup>

I respond to Louis Seidman's argument first. This argument implies that jurors need to know the reasons underlying the rules that they are instructed to apply. These reasons include the social policies that the rules promote and the incentive-based mechanisms that they employ in promoting those policies. Without knowing those reasons, so goes the argument, jurors would not be able to apply the rules properly.

This proposition strikes me as wrong. An adequate juror need not have a law school education. Common sense and a willingness to make his or her best effort in following the judge's instructions should be enough. A juror, in other words, must assume that the rule that she is instructed to apply promotes social good. Awareness of the good's nature may help the juror make her decision, but the juror need not know, for example, how the incentives set by the rule play out to attain that good. A juror, in other words, must follow rules qua rules.<sup>57</sup>

For these reasons, it seems to me that Louis Seidman intended to make a different (more sophisticated) point, similar to Van Kessel's. I now restate this point in a format that captures the claims of both scholars. Arguably, jurors act upon natural epistemic instincts that form their "common sense." A rule that prohibits adverse inferences from silence and the credit that a defendant's self-exonerating testimony receives under *SSM* run against those instincts. Because jurors are essentially free to decide the case as they deem fit, the legal system cannot simply tell them "hold your instincts back and follow the rules qua rules." This sort of command is not something that jurors are likely to obey blindly. Jurors need to have good and intelligible reasons for overriding their natural instincts. Under this criterion, *SSM* admittedly

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<sup>53</sup>*Id.*

<sup>54</sup>*Id.* at 953-60; see also Buell, *supra* note 2, at 1639.

<sup>55</sup>See SEIDMAN, *supra* note 2, at 64, 69.

<sup>56</sup>*Id.* at 68.

<sup>57</sup>See generally FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION MAKING IN LAW AND IN LIFE (1991).

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does not score high. This model is too complex for an average juror to understand and agree with reflectively.

This point has some plausibility, but in the end it fails to persuade. Do jurors reflectively agree with all the rules they apply? Do they agree, for example, with the rule against perpetuities, with felony murder, or, closer to the subject of the present discussion, with the rule that requires them to acquit a seemingly guilty defendant in the face of a reasonable doubt? I am not aware of any empirical research that answers these questions. Unfortunately, nor are Professors Seidman and Van Kessel, whose descriptions of jurors' deliberations are tendered as a "word of mouth" without any empirical support.

*SSM* assumes that jurors are both able and willing to promote the objectives of the law. This assumption is far from being divorced from reality. *SSM* further assumes that, when a judge instructs jurors to follow a particular legal rule in order to promote the law's objectives, the jurors will follow the instruction. Before becoming a juror, a person is told how crucial following those instructions is; her task as a juror is also described to her as a civic duty that she must perform conscientiously in order to promote society's good. She is told, in other words, that the law's rules *are* the reasons for her decisions as a juror, and that these reasons should preempt her private convictions and intuitions. The juror is also told that following these authoritative reasons instead of hers is to society's benefit. For an ordinary person, whose daily routine does not include work as a law professor on the normative side of the law, this following of rules qua rules is a both acceptable and feasible way of performing her tasks as a juror. Seidman's and Van Kessel's hypothesis that jurors adequately apply only those rules that align with their personal intuitions is counterintuitive. Those who rely on this hypothesis in order to establish that the law does not work as it is supposed to work must prove it empirically. Bald assertions will not do.<sup>58</sup>

#### IV. POSITIVE LAW

One of *SSM*'s most attractive features is its explanatory value—a contribution to understanding positive law. The model's "lies as

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<sup>58</sup>Samuel Buell, *supra* note 2, at 1639, estimates that factfinders evaluate defendants' testimony without using the background knowledge as to how defendants, guilty and innocent, respond to accusations. Instead, factfinders evaluate each testimony on its own individual merits. But where do factfinders take those "merits" from when the testimony is not corroborated? And how can one ever start evaluating evidence without resorting to generalizations? See STEIN, *supra* note 3, at 92-100 (demonstrating that the use of generalizations in adjudicative factfinding is pervasive and inevitable).

externality” rationale explains and justifies virtually every aspect of the Fifth Amendment jurisprudence.<sup>59</sup> This rationale explains why the right to silence applies to testimonial, as opposed to physical, evidence and to criminal, as opposed to civil and other non-criminal, proceedings.<sup>60</sup> This rationale also justifies the same-sovereign limitation of the self-incrimination privilege,<sup>61</sup> the privilege’s extension to sentencing proceedings,<sup>62</sup> and the booking and emergency exceptions to *Miranda*.<sup>63</sup> No other theory has provided a coherent unifying rationale for these rules.<sup>64</sup>

Consider the testimonial/physical evidence distinction first. The Fifth Amendment privilege protects suspects and defendants only against the compelled production of testimonial evidence.<sup>65</sup> There is no rule prohibiting factfinders to draw adverse inferences from a defendant’s refusal to provide physical evidence.<sup>66</sup> This distinction and its official “trilemma” rationale are problematic. Both production and a refusal to produce physical evidence are communicative conducts functionally equivalent to testimony. As such, they call for protection by the self-incrimination privilege. However, a decision to protect all such conducts by the privilege would make the privilege too broad. At the same time, a decision to confine the privilege’s protection to verbal

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<sup>59</sup>See Seidmann & Stein, *supra* note 1, at 474-98.

<sup>60</sup>*Id.* at 475-80, 484-88.

<sup>61</sup>*Id.* at 482-84.

<sup>62</sup>*Id.* at 495-98.

<sup>63</sup> I discuss those exceptions only in this footnote. Under the emergency exception to *Miranda*, *New York v. Quarles*, 467 U.S. 649 (1984), a self-incriminating statement that the police obtain from a suspect while attending an ongoing emergency is admissible as evidence at the suspect’s criminal trial even when no *Miranda* warnings are given. This exception is best explained by the anti-pooling rationale. Statements made admissible under this exception are inculpatory. As such, they never pool with self-exonerating accounts of innocent defendants. Other rationales for the right to silence cannot explain this exception so straightforwardly. Under the booking exception, *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), a suspect’s answers to routine booking questions concerning his name, age, address and other biographical data are not protected by *Miranda* even when they might incriminate the suspect. The anti-pooling rationale justifies this exception straightforwardly: guilty suspects are unable to provide booking information that imitates non-verifiable personal data of innocent defendants. Other rationales for the right to silence once again fail to provide a straightforward explanation to this exception.

<sup>64</sup>For the most recent attempt, see Michael Pardo, *Self-Incrimination and the Epistemology of Testimony*, 30 CARDOZO L. REV. \_\_\_\_ (2008) (rationalizing the right to silence as preventing the government’s utilization of the defendant’s “epistemic authority” as a witness). This rationale fails to explain *United States v. Balsys*, 524 U.S. 666 (1998) (holding that the Fifth Amendment protection does not extend to cases in which a person is forced to reveal information incriminating him abroad), and *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (holding that the Fifth Amendment privilege against adverse inferences from silence does not apply in non-criminal cases).

<sup>65</sup>See *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990); *Doe v. United States*, 487 U.S. 201, 210 (1988).

<sup>66</sup>See *Schmerber v. California*, 384 U.S. 757, 761 (1966); *Holt v. United States*, 218 U.S. 245, 252 (1910).

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communications would make it too narrow. Under the “trilemma” rationale, the government must not force a person into choosing between self-incrimination, perjury and penalties for contempt. This trilemma, arguably, is too cruel to be tolerated. But if any such trilemma is socially intolerable, the privilege should then extend to *all* compelled communications, verbal and non-verbal alike. And if only some of such trilemmas are intolerable, while others are tolerable, what are the criteria by which to distinguish between permissible and impermissible trilemmas? What is so special about compelled verbal communications that makes them so intolerable? Why tolerate compelled non-verbal communications?

These questions unravel the “trilemma” rationale.<sup>67</sup> Unsurprisingly, the Supreme Court has gradually eroded the distinction between testimonial and physical evidence and replaced it with a complex doctrine. Under this doctrine, the Fifth Amendment’s protection against governmental compulsion extends to all verbal and *some* non-verbal communications.<sup>68</sup> For example, the “act of production” rule holds that preexisting documents do not count as “testimonial”; yet the compelled production of documents classifies as “testimonial” to the extent it entails the producer’s admission that the documents exist, that they are in his possession or control and are authentic.<sup>69</sup> The act of production consequently counts as testimonial evidence that ought to be protected from disclosure by “use immunity.”<sup>70</sup> Hence, although the government can require a person to produce an identified tax-related document that might incriminate that person,<sup>71</sup> it cannot require a person to assemble a number of unspecified documents pertaining to its investigation.<sup>72</sup> The first of those requirements was analogized by the Supreme Court to forcing a person “to surrender the key to a strongbox”—an action not meriting protection by the Fifth Amendment’s use immunity.<sup>73</sup> The second requirement, according to the Court, is similar to compelling a person to “[tell] an inquisitor the combination to a wall safe”—a compulsion that the Fifth Amendment prohibits.<sup>74</sup> *SSM* rationalizes these decisions by the presence of a pooling externality in the second category of cases and by

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<sup>67</sup>See SUSAN EASTON, *THE CASE FOR THE RIGHT TO SILENCE* 207-35 (2d ed. 1998); Pardo, *supra* note 65.

<sup>68</sup>See Seidmann & Stein, *supra* note 1, at 475.

<sup>69</sup>United States v. Doe, 465 U.S. 605, 613 n.11 (1984) (citing *In re Grand Jury Empanelled* March 19, 1980, 541 F.Supp. 1, 3 (D.N.J. 1981)).

<sup>70</sup>*Id.* at 616.

<sup>71</sup>*Fisher v. United States*, 425 U.S. 391 (1976).

<sup>72</sup>United States v. Hubbell, 530 U.S. 27 (2000).

<sup>73</sup>*Id.* at 43.

<sup>74</sup>*Id.*

its absence in the first category.<sup>75</sup> In the first category of cases, the government need not rely on the truth-telling of the person subpoenaed to produce a named document. In the second category, it does rely on that truth-telling.<sup>76</sup> This reliance allows guilty criminals to create a pooling externality by falsely imitating innocent suspects.<sup>77</sup> There is no need to restate here this argument's details.<sup>78</sup> All that needs to be noticed is that the "trilemma" rationale no longer functions as the organizing principle of the Fifth Amendment's right to silence. The right to silence is in need of a new unifying rationale.

Among the existing rationales, *SSM*'s anti-pooling rationalization is, arguably, the best. Under *SSM*, the Fifth Amendment privilege applies only when the pooling-by-lying alternative is available to a guilty suspect. When a guilty suspect is required to provide externality-laden evidence that can reduce the credibility of an innocent suspect's evidence, the privilege should apply. Any such externality-laden evidence—and this evidence alone—would classify as "testimonial" for purposes of the Fifth Amendment. Utterances and their non-verbal equivalents—for example, the signs language and a person's nodding of her head for a "yes"—obviously fall into the "testimonial" category. But evidence would also classify as "testimonial" in any case in which its producer can shape its content. This shaping ability makes the evidence externality-laden. For example, a handwriting sample that a suspect produces at the police station is "testimonial" because a guilty suspect might replicate an innocent person's handwriting.<sup>79</sup> Giving a handwriting sample is an activity always accompanied with an explicit or implicit confirmation "This is my handwriting." This confirmation is a communication that originates from the suspect's mental process. Crucially for our purposes, this confirmation can be false and externality-laden. For that reason, courts should classify it as "testimonial."<sup>80</sup> By contrast, handwriting samples that already exist classify as physical evidence because their production does not depend on the person's confirmation;<sup>81</sup> a qualified expert or a nonexpert witness personally familiar with the person's handwriting can authenticate such samples.<sup>82</sup>

In a civil case, a person may invoke the self-incrimination privilege only as an exemption from punishment for contempt. She has no

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<sup>75</sup> See Seidmann & Stein, *supra* note 1, at 477-80.

<sup>76</sup> *Id.* at 479-80.

<sup>77</sup> *Id.* at 480.

<sup>78</sup> For those details, see *id.* at 475-81.

<sup>79</sup> The Supreme Court is yet to recognize it, though. See *Gilbert v. California*, 388 U.S. 263, 266-67 (1967); Seidmann & Stein, *supra* note 1, at 477.

<sup>80</sup> See Seidmann & Stein, *supra* note 1, at 476-77.

<sup>81</sup> *Id.*

<sup>82</sup> See FED. R. EVID. 901(b)(2).

privilege against adverse inferences from silence.<sup>83</sup> As the Supreme Court held in *Baxter v. Palmigiano*, the Fifth Amendment does not forbid “adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.”<sup>84</sup> This rule has been applied widely across the United States<sup>85</sup> (although there are a few states that refuse to follow it<sup>86</sup>).

This rule is difficult to reconcile with the trilemma rationale (and other non-economic justifications of the privilege<sup>87</sup>). Even in a civil case, the factfinders’ authorization to draw adverse inferences against a party invoking the self-incrimination privilege is a form of compulsion authorized by the state. This compulsion forces the party into a choice between incriminating himself, committing perjury, or staying silent and assuming a serious risk of losing the case. There is no difference in kind between this compulsion and the “cruel trilemma.”

*SSM* justifies the right to silence as a means for preventing wrongful convictions only. As such, it provides a straightforward explanation to the *Baxter* rule. The pooling problem that the self-incrimination privilege seeks to attenuate does not exist in civil and other non-criminal proceedings because those proceedings do not involve innocents who face the possibility of wrongful conviction. The unavailability of the privilege motivates liars to pool with truth-tellers in those proceedings as well, but this pooling occurs outside the machinery of criminal justice. The legal system consequently need not sacrifice

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<sup>83</sup>425 U.S. 308 (1976).

<sup>84</sup>*Id.* at 318.

<sup>85</sup>*See, e.g.*, *LiButti v. United States*, 107 F.3d 110, 124 (2d Cir. 1997); *FDIC v. Fid. & Deposit Co. of Md.*, 45 F.3d 969, 977 (5th Cir. 1995); *Koester v. Am. Republic Invs., Inc.*, 11 F.3d 818, 823-24 (8th Cir. 1993); *Daniels v. Pipefitters’ Ass’n Local Union No. 597*, 983 F.2d 800, 802 (7th Cir. 1993); *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 274-75, 277 (3d Cir. 1986); *Brink’s Inc. v. City of New York*, 717 F.2d 700, 709 (2d Cir. 1983); *Hoover v. Knight*, 678 F.2d 578, 581-82 (5th Cir. 1982); *United States v. White*, 589 F.2d 1283, 1286-87 (5th Cir. 1979); *see also Nat’l Acceptance Co. of Am. v. Bathalter*, 705 F.2d 924, 929-32 (7th Cir. 1983) (“After *Baxter* there is no longer any doubt that at trial a civil defendant’s silence may be used against him, even if that silence is an exercise of his constitutional privilege against self-incrimination.”). For a summary of the controlling principle, *see Lasalle Bank Lake View v. Seguban*, 54 F.3d 387, 389-92 (7th Cir. 1995), which held that, although the circuit courts of appeals have widely recognized the rule allowing the factfinder to draw adverse inferences from Fifth Amendment silence in civil proceedings, even in a civil case a summary judgment imposing liability cannot rest solely on an assertion of the privilege. *Id.* at 394. *See also SEC v. Colello*, 139 F.3d 674, 677-78 (9th Cir. 1998) (affirming summary judgment against a defendant when there was some evidence in addition to an adverse inference from silence). The *Baxter* principle also applies in clemency proceedings. *See, e.g., Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 285-88 (1998).

<sup>86</sup>The *Baxter* principle does not apply in states that have adopted Uniform Rule of Evidence 512 (an equivalent of the proposed Federal Rule of Evidence 513, so far rejected by Congress). Uniform Rule 512 provides that no adverse inferences may be drawn from an invocation of any legally recognized privilege.

<sup>87</sup>*See Seidmann & Stein, supra* note 1, at 485.



probative evidence in order to prevent it.

In *United States v. Balsys*, the Supreme Court held that a suspect's prospect of being prosecuted for a crime in a foreign country does not activate the Fifth Amendment protection.<sup>88</sup> This holding confined the privilege against self-incrimination to same-sovereign prosecutions. As the Court previously acknowledged in *Murphy v. Waterfront Commission*, a witness in a state proceeding can invoke the privilege out of concern regarding a potential federal prosecution, and vice versa.<sup>89</sup> By the same token, a witness in a state proceeding can successfully claim the privilege by referring to a prosecution in another state.<sup>90</sup>

This same-sovereign limitation is at odds with the trilemma and all other rationales for the privilege. A defendant's prospect of being convicted and punished abroad, rather than in the United States, does not lighten the trilemma experience guarded against by the Fifth Amendment. The same "cruel trilemma" is present.

The anti-pooling rationale resolves this difficulty. The same-sovereign limitation generates no pernicious pooling inside the American criminal justice system. When a criminal tried in another country chooses to lie, his lies do not increase the risk of wrongful conviction for innocent defendants in the United States. The externality that his lies generate stays overseas and therefore need not be eliminated by the costly Fifth Amendment. The same-sovereign limitation generates probative evidence for proceedings taking place in the United States, such as Balsys's deportation case. There is no good economic reason to forego this benefit in order to protect foreign innocents. Those innocents must be taken care of by their own legal systems.<sup>91</sup>

In *Mitchell v. United States*, the Supreme Court held that, after pleading guilty, a defendant can invoke the privilege against self-incrimination in her sentencing hearing.<sup>92</sup> The Court rejected the notions that incrimination is complete once guilt was adjudicated and that a defendant waives the privilege by pleading guilty.<sup>93</sup> The Court consequently declared that a sentencing court may not draw an adverse inference from a defendant's silence when it determines sentencing

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<sup>88</sup>524 U.S. 666 (1998).

<sup>89</sup>378 U.S. 52, 79-80 (1964).

<sup>90</sup>See *Balsys*, 524 U.S. at 671-72 (indicating unequivocally that *Murphy* applies uniformly in the United States).

<sup>91</sup>As acknowledged in *Balsys*, 524 U.S. at 698-99, an applicable international norm that provided for cooperative law enforcement between the United States and the foreign country might alter this conclusion. An international norm that demanded uniform observance of the self-incrimination privilege would have a similar result. But absent such special rules, the same-sovereign limitation to the privilege should remain intact. See Seidmann & Stein, *supra* note 1, at 483.

<sup>92</sup>526 U.S. 314 (1999).

<sup>93</sup>*Id.* at 325-26.

facts that relate to the circumstances of the crime.<sup>94</sup>

The trilemma rationale cannot easily justify this decision. After pleading guilty, a defendant cannot seriously complain about being forced by the government into the cruel trilemma of self-incrimination, perjury or contempt. The anti-pooling rationale, by contrast, easily justifies *Mitchell*. Failure to apply the right to silence in sentencing hearings would induce some defendants, if not many, to plead not guilty instead of guilty. These defendants would then either remain silent and enjoy the pre-conviction protection against adverse inferences or falsely testify to their innocence and adversely affect innocent defendants by impugning the credibility of their truthful testimony. Society, consequently, can gain nothing and will likely lose from not extending the Fifth Amendment protection to sentencing hearings.<sup>95</sup>

These doctrinal rationalizations are not the only ones that *SSM* generates. As indicated above, *SSM* explains every important aspect of the Fifth Amendment jurisprudence.<sup>96</sup> In this explanatory capacity, *SSM* outscores all other justifications of the right to silence.<sup>97</sup>

This explanatory advantage of the model has escaped the attention of its critics. What could possibly be the reasons underlying the critics' refusal to take Seidmann and Stein's rationalization of positive law seriously? I can only think of one such reason: as an empirical matter, the anti-pooling rationale was not among the explicit motivations of the Fifth Amendment's architects. But why should it matter? The self-incrimination privilege is a highly complex and untidy legal doctrine that has been developed over years by multiple actors, predominantly by common law judges. Many considerations have gone into the mix, and not all of them were explicit and comprehensive.

If so, why inquire empirically into the elusive historical intentions of the doctrine's multiple architects?<sup>98</sup> Why not ask a different—partly normative and partly hermeneutical—question: What contemporary reasons present the Fifth Amendment doctrine in its best light? Indeed, what is the most plausible explanation of the doctrine's retention and remarkable resilience? After all, the doctrine has survived a number of

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<sup>94</sup>*Id.* at 327-28.

<sup>95</sup>See Seidmann & Stein, *supra* note 1, at 497-98.

<sup>96</sup>I do not discuss here the rule permitting factfinders to draw adverse inferences from the defendant's pre-arrest silence. The anti-pooling rationale justifies this rule as well: see *id.* at 488-89..

<sup>97</sup>*Id.* at 474-75.

<sup>98</sup>See Jody S. Kraus, *Transparency and Dependency in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 349-56 (2007) (demonstrating that explanatory accounts of common law rules as producing economic efficiency need not match the reasons by which judges justify their decisions, as it is enough for those accounts to uncover contextual convergence between judges' decisions and efficiency).

abolitionist attempts,<sup>99</sup> and this survival must have a rationale of its own. The anti-pooling theory of Seidmann and Stein offers the best available rationale. Those who disagree with this claim must offer a better rationalization for the doctrine's continual survival.

#### CONCLUSION

Critics of Seidmann and Stein's theory miss an important aspect of the right to silence. This right plays virtually no role in cases in which the prosecution's evidence is overwhelmingly strong or weak. The right to silence affects only those cases in which inculpatory evidence has intermediate strength. For those nontrivial cases that often go to trial, the right is significant as an anti-pooling device that helps factfinders to separate the innocent from the guilty.

The critics argue that the anti-pooling device does not work in the real world in which irrational defendants are adjudicated by boundedly rational jurors. This argument, however, is tendered without evidence. It also ignores substantial empirical research demonstrating that criminal defendants manage their affairs rationally. Most crucially, this argument fails to explain empirical evidence gathered in Great Britain. According to this evidence, abolition of the right to silence that took place in 1994 had caused many guilty criminals to switch from silence to self-exonerating lies (as opposed to confessions).

Furthermore, the critics of Seidmann and Stein pay virtually no attention to positive law. They disengage from the Supreme Court's Fifth Amendment jurisprudence, which Seidmann and Stein's theory rationalizes. To counter this theory, its critics need to furnish an alternative explanation of the Fifth Amendment jurisprudence. But the critics do not even try to develop such an explanation. They attempt to defeat Seidmann and Stein's theory without offering a theory of their own. No wonder they fail.

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<sup>99</sup>For the most recent attempt, see *Dickerson v. United States*, 530 U.S. 428 (2000) (declaring unconstitutional 18 U.S.C. § 3501 (1994), an attempt by Congress to abolish *Miranda*).