

QUIETING THE GUILTY AND ACQUITTING THE INNOCENT: A CLOSE LOOK AT A NEW TWIST ON THE RIGHT TO SILENCE

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INTRODUCTION

A. *The Ascending Right to Silence*

The right to silence is on the upswing on both sides of the Atlantic. Throughout Europe, there is near-universal recognition of a right to silence and a privilege against self-incrimination that applies to both the pretrial and trial stages of a criminal case.¹ Those aspects of the right to silence that require advice of the right and prohibit adverse inferences from silence also are generally accepted. Most civil law countries of continental Europe have adopted rules that require suspects be informed of the right to remain silent prior to questioning as well as rules that prohibit courts from considering defendant's silence as evidence of guilt,² although in practice such guarantees often are not as strong as

1. The European Court of Human Rights has repeatedly stated that, although the European Convention on Human Rights contains no explicit guarantee of a right to silence, "there [could] be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6 [which guarantees the right to a fair and public hearing]." *Murray v. United Kingdom*, 22 Eur. Ct. H.R. 29, ¶ 45 (1996); *see also* *Saunders v. United Kingdom*, 23 Eur. Ct. H.R. 313 (1997); *Funke v. France*, 16 Eur. Ct. H.R. 297 (1993). The court's language in *Funke*, connecting the right to silence with police interrogation, and its later reliance on the privilege in *Saunders*, when dealing with official compulsion under oath, suggests the court perceives different roles for the silence right and the privilege. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

There is, however, an explicit privilege against self-incrimination in the United Nations International Covenant on Civil and Political Rights (ICCPR). Article 14(3) states that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees . . . (g) Not to be compelled to testify against himself or to confess guilt." International Covenant on Civil and Political Rights, Dec. 19, 1966, Article 14, 999 U.N.T.S. 171, 177.

2. *See* Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure*

in America³ due to differences in legal and social cultures and between adversary and inquiry procedures.⁴ Only in England, Israel, and a few other countries are factfinders legally permitted to draw inferences of guilt from silence during police questioning and at trial.⁵

In America, the right to silence is also on firm ground. *Miranda* rules, once thought to be in jeopardy, have been extended by the U.S. Supreme Court in some respects⁶ and recently were reaffirmed and strengthened in *Dickerson v. United States*.⁷ Furthermore, the Supreme Court recently renewed its

Rule, 14 MICH. J. INT'L L. 171, 219-20 (1993); Stephen C. Thaman, *Miranda in Comparative Law*, 45 ST. LOUIS U. L.J. 581 (2001); Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799, 809, 821-23, 832 (1998).

3. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

4. Unlike *Miranda* rules, for example, in most European countries a defendant's assertion of the right to silence generally does not operate to shut down interrogation and the police may continue to ask questions. See Van Kessel, *supra* note 2, at 810, 821-23, 832. Furthermore, in criminal trials in continental Europe it is a rare event for the defendant not to speak and respond to questions. *Id.* at 833. In some countries, particularly in France, the right to silence has more theoretical than practical significance. A French lawyer recently told me that I am wasting my time on the right to silence which is regarded in France as a foreign, English-style concept. For a fascinating example of this point in the context of a French murder trial, see Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d'Assises*, 2001 U. ILL. L. REV. 791, 812 (pointing out that the spotlight of the French trial is "squarely on the defendant" and describing how the presiding judge closely examines the accused to serve the central purpose of the French trial—finding out what happened and why).

5. See Van Kessel, *supra* note 2, at 821-23, 832. The European Court of Human Rights has found that with certain protections such use of silence does not violate the right to a fair trial under the Convention. See also *Condron v. United Kingdom*, 31 Eur. Ct. H.R. 1 (2000) (holding that permitting the factfinder to consider defendant's silence is not of itself incompatible with the right to a fair hearing provided silence is not the sole or main basis for the conviction); *Murray v. United Kingdom*, 22 Eur. Ct. H.R. 29, ¶ 47 (1996) (holding that adverse inferences may be drawn from silence "in situations which clearly call for an explanation" from the defendant if the assistance of a lawyer is provided when defendant must decide whether to speak).

6. The Supreme Court has held that when a defendant asserts his right to counsel, he may not be subjected to further police questioning until counsel has been made available to him unless defendant independently initiates further conversations with the police. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981). The *Edwards* prohibition on future questioning was later extended to offenses wholly unrelated to the crime as to which the suspect has requested counsel. *Arizona v. Roberson*, 486 U.S. 675 (1988). Professor Yale Kamisar described *Edwards* as "in effect [establishing] a new 'prophylactic rule' that built on and reinforced *Miranda's* 'prophylactic rules,'" and regarded *Roberson* as reaffirming and reinvigorating *Edwards*. Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 474, 499 (1999).

7. See *Dickerson v. United States*, 530 U.S. 428, 432 (2000) (holding that because *Miranda* is a "constitutional decision" it may not be overruled by Congress and that "*Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts"). Affirming *Miranda's* constitutional foundations substantially

commitment to the rule against adverse inferences from silence at the guilt phase of the criminal trial that was established by the Warren Court in *Griffin v. California*⁸ and even applied the rule to the sentencing stage.⁹ Only Justice Thomas urged the Court to reexamine *Griffin*.¹⁰ With the Supreme Court reaffirming *Miranda* and extending *Griffin*, at least for the present, the basic right to silence, with its warning requirements and its rule against adverse inferences, is secure throughout the criminal process from custodial interrogation through sentencing. Yet, however safe may be its core principles, the right to silence constantly is being attacked and defended, and many of its individual aspects are highly controversial. Rationales supporting the right to silence therefore remain critically important when courts and legislatures decide whether to expand or contract the right's particular guarantees that go beyond the simple right to silence warnings and the rule against adverse inferences.

strengthened its practical effect by increasing the prospect of civil penalties against those who disregard its mandates. Prior to *Dickerson*, interrogating officers often would continue questioning despite a suspect's invocation of *Miranda* rights. See Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 112 (1998) (presenting evidence "that police officers in some jurisdictions are systematically trained to violate *Miranda*"). California courts had condemned the practice of questioning "outside *Miranda*" but had permitted it in practice. See *People v. Peevy*, 953 P.2d 1212, 1225 (Cal. 1998) (finding admissible for impeachment a statement obtained in deliberate violation of *Miranda*, while noting that "it is indeed police misconduct to interrogate a suspect in custody who has invoked the right to counsel"); *People v. Bradford*, 929 P.2d 544 (Cal. 1997) (strongly disapproving continued questioning following defendant's request for counsel, but affirming his conviction).

However, with the prospect of civil rights suits for violation of *Miranda*'s standards, California law enforcement agencies have altered their practices and police no longer engage in questioning a suspect once he states that he wishes to remain silent or to consult with counsel. See *Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999) (establishing a clear rule that continued questioning after defendant's invocation of the right to counsel constitutes a violation of the Fifth Amendment and bars any claim of qualified immunity); *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (rejecting a claim of qualified immunity in a § 1983 action brought on behalf of a suspect who was interrogated after he had requested counsel, but who was never tried, finding police conduct to be coercive and a violation of the defendant's constitutional rights).

8. 380 U.S. 609 (1965).

9. See *Mitchell v. United States*, 526 U.S. 314 (1999) (holding that in federal court a guilty plea does not waive the privilege at the sentencing phase and reaffirming and extending the rule of *Griffin* such that the sentencing judge may not draw an adverse inference from defendant's silence in determining the facts about the crime which bear upon the severity of the sentence). While the dissenters in *Mitchell* disagreed with the majority's description of the no-adverse-inference rule as "an essential feature of our legal tradition," they acknowledged that it "may be true" that the rule has found "wide acceptance in our legal culture" which they found an "adequate reason not to overrule" it. *Id.* at 331-32 (Scalia, J., dissenting).

10. *Id.* at 341 (Thomas, J., dissenting).

B. Conventional Foundations of the Right to Silence

Defenders of the right to silence generally rely on conventional rationales articulated by the U.S. Supreme Court that involve a complex set of values such as upholding fairness, personal dignity, free will, and avoiding torture, inhumane treatment, and the cruel trilemma of self-accusation, perjury or contempt.¹¹ Of late, the Court has emphasized the deterrence of government coercion¹² and the maintenance of our adversary system of justice which prohibits the government from making a defendant the unwilling “instrument of his or her own condemnation.”¹³ The traditional view recognizes that the right to silence may help the guilty avoid conviction but concludes that it is the price which must be paid for the right’s many benefits.¹⁴ Suggestions that the right to silence also helps the innocent are more controversial. Scholar Jeremy Bentham advocated that only the guilty exercise the right while benefit from it¹⁵ and others contend that on occasion even the innocent may be helped by the opportunity to seek refuge in silence.¹⁶ The Supreme Court has remained somewhat ambivalent as

11. See *Miller v. Fenton*, 474 U.S. 104, 116 (1985) (referring to the voluntariness inquiry as having a “hybrid quality” and a “complex of values”); *Murphy v. Waterfront Com’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (referring to the privilege against self-incrimination as reflecting “our respect for the inviolability of the human personality” and “our fear that self-incriminating statements will be elicited by inhumane treatment and abuses,” and “our sense of fair play which dictates ‘a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him’”). The concern for privacy interests was mentioned in *Murphy* but has since been downplayed by the Supreme Court. See *United States v. Doe*, 465 U.S. 605 (1984) (explaining that the Fifth Amendment does not create a zone of privacy that protects an individual from the compelled production by the government of personal records); *Fisher v. United States*, 425 U.S. 391 (1976) (rejecting the contention that the Fifth Amendment somehow independently protects privacy).

12. See *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (describing the purpose of the voluntariness rule as deterring future constitutional violations and preventing fundamental unfairness in the use of evidence, rather than excluding “presumptively false evidence”). The Court also held that a waiver of *Miranda* rights cannot be involuntary absent official compulsion or coercion and stated that the “sole concern” of the Fifth Amendment privilege is government coercion. *Id.* at 170.

13. *Mitchell*, 526 U.S. at 325 (citing *Rogers v. Richmond*, 365 U.S. 534, 541 (1961)).

14. See *Ullmann v. United States*, 350 U.S. 422, 428 (1956) (noting that while the “privilege may, on occasion, save a guilty man from his just deserts, . . . [i]t was aimed at a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality”).

15. See JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 241 (M. Dumont ed., Fred B. Rothman & Co. 1981) (1825).

16. Scholars recently have sought to justify the privilege on the ground that it protects the innocent by offering them a refuge from speaking in a way that might lead to unreliable verdicts. See Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1250 (1996) (arguing that the privilege protects three types of factually innocent defendants—those who fear taking the stand because they will be impeached by their prior convictions, those whose nervousness, appearance,

to whether the privilege helps the innocent avoid conviction or otherwise leads to more reliable verdicts.¹⁷

C. *A New Twist on the Right to Silence*

Recently, other voices have offered a new twist on the right to silence which proposes an unconventional way in which the right benefits the innocent. Professors Daniel Seidmann and Alex Stein have proposed a behavioral or “game-theoretic model”¹⁸ as a foundation for an innocent-benefit theory that they contend has been largely ignored or underestimated by academics but which offers a better justification for the right than conventional rationales.¹⁹

According to Seidmann and Stein, the right to silence is justified primarily on the ground that it benefits the innocent, not because they may use it themselves, but because of its use by the guilty. Through encouraging the guilty to remain silent, the right assists factfinders in identifying those who are unjustly suspected or accused of criminal conduct. By remaining silent, the guilty separate themselves from the innocent, rather than lie and “pool” their false

or lack of mental agility might enable a prosecutor to make them appear guilty through artful cross-examination, and those whose truthful direct testimony would incriminate, despite their factual innocence); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 329-31 (1991) (noting that in light of the “realities of trial practice and risks to the innocent that all lawyers understand,” trial lawyers can think of numerous reasons why they would advise an innocent client not to take the stand). See also Craig M. Bradley, *Griffin v. California: Still Viable After All These Years*, 79 MICH L. REV. 1290, 1293-94 (1981) (making similar arguments).

17. *Compare* *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (stating that the privilege reflects “our distrust of self-deprecatory statements and our realization that the privilege, while sometimes ‘a shelter to the guilty,’ is often ‘a protection to the innocent.’”), with *Connelly*, 479 U.S. at 170 (stating that the sole concern of both the Due Process Clause and the Fifth Amendment is to deter government coercion, rather than to assure that statements of suspects are either reliable or the product of the suspect’s free will) and *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976) (stating that the privilege “has little to do with a fair trial and derogates rather than improves the chances for accurate decisions”). In *Withrow v. Williams*, 507 U.S. 680, 682-83 (1993), the Court shifted back to trustworthiness as a basis for the privilege when it refused to extend the restrictions of *Stone v. Powell*, 428 U.S. 465 (1976), on federal habeas corpus review of state convictions regarding Fourth Amendment violations to *Miranda* violations, partly on the ground that *Miranda* is related to the correct ascertainment of guilt and braces against the admission of unreliable statements.

18. 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, 438 (2000).

19. In their support for the right to silence, Seidmann and Stein seek to drive another nail in Bentham’s coffin and to bury even deeper the suggestion of eliminating the rule against adverse inferences from silence. *Id.* at 433. They view the “conventional wisdom” that the right to silence helps only the guilty as a “facially compelling” but ultimately a flawed argument often voiced by “law and order” conservatives. *Id.* at 435, 451-55.

stories with true accounts offered by innocent suspects during pretrial interrogation and innocent defendants at trial.²⁰ Inducing this “anti-pooling effect” enhances the credibility of innocent suspects²¹ and increases the likelihood of their acquittal.²² In this way, the “good” that guilty suspects consume by remaining silent does not remain private, but is shared by innocent suspects who are not subjected to the “negative externalities” flowing from perjured accounts by the guilty.²³ To accomplish this goal, silence must be seen by the guilty as an attractive alternative to fabrication.²⁴ Thus, calls to abandon the right to silence and to permit adverse inferences from its exercise should be rejected. The innocent as well as the guilty have an interest in maintaining the right as a refuge during pretrial questioning and as a viable alternative to perjury at trial.²⁵

Seidmann and Stein believe that their “anti-pooling” rationale offers a better explanation for the present ramifications of the right to silence than conventional justifications which have been accepted and relied on by decisions of the Supreme Court.²⁶ They contend that the “anti-pooling” rationale forms the primary basis for retaining the right to silence principles that prohibit use of silence as evidence of guilt through disallowing adverse inferences from exercise of the right both during custodial interrogation and at trial.²⁷ This rationale explains why the right is limited to testimonial evidence, to the single sovereign context, to criminal cases and to the custodial interrogation and trial contexts.²⁸ Indeed, their “anti-pooling” rationale suggests that the right to silence in America might be expanded and made even more attractive to guilty suspects. On the other hand, Seidmann and Stein appear to believe that when the “anti-pooling” rationale does not apply, there is no valid reason to recognize right to silence protections against adverse inferences from its exercise.²⁹

20. *Id.* at 433, 459-60.

21. *Id.* at 433.

22. *Id.* at 451.

23. *Id.* at 457-58.

24. *Id.* at 433, 438.

25. *Id.* at 453-54 n.79.

26. *Id.* at 474-75, 489. Indeed, Seidmann and Stein agree with many of Bentham’s criticisms of the accepted justifications for the privilege such as “individualistic notion[s] of fairness” and avoidance of the cruel “trilemma” of self-accusation, contempt, or perjury. *Id.* at 452-53.

27. For example, Seidmann and Stein criticize the fairness and reliance foundations of *Doyle v. Ohio*, 426 U.S. 610 (1976), but they accept its rule that silence following *Miranda* warnings should not be the subject of adverse comment or inferences. Seidmann & Stein, *supra* note 18, at 453-54 nn.79, 491.

28. Seidmann & Stein, *supra* note 18, at 474-75.

29. Seidmann and Stein believe that if the guilty “cannot fabricate evidence in a way that harms the innocent, then they should not be exempted from potential self-incrimination,” and that “[o]nly the existence of a meaningful fabrication alternative should therefore activate the privilege.” *Id.* at 480. Nor do they believe that the innocent are in need of the right to silence protections

D. Significance of the "Anti-Pooling" Theory

Seidmann and Stein's "anti-pooling" theory represents a unique and ambitious effort to justify the right to silence on a ground that even the most ardent conservatives accept as paramount—acquittal of the innocent through accurate factfinding. But the new theory has profound implications for the right to silence. If valid, it suggests that the right should not only be maintained, but expanded to encourage even more guilty defendants to claim it.³⁰ A favorable attitude of courts and legislatures toward the right to silence may well lead to even broader protections in the context of police interrogation. For example, relying on the notion that *Miranda* established a prophylactic rule rather than a constitutional right, the Supreme Court has declined to apply the fruit of the poisonous tree doctrine to *Miranda* violations involving failure to give the required warnings³¹ and has permitted the use of statements not permitted in the prosecutor's case because of *Miranda* defects to impeach a testifying defendant.³² However, the Court's affirmation of *Miranda* as constitutionally based has cast doubt on the continued validity of these rules.³³ Furthermore, states may expand their own versions of the right to silence. Minnesota, for example, requires that confessions be recorded and imposes individual criminal and civil liability on law enforcement officers for violation of the right to consult with counsel by failing to honor a request to speak with a lawyer by any person in their custody.³⁴ Finally, the number of erroneous convictions being brought to light by newly-found DNA evidence has resulted in calls to reform interrogation practices that

which prohibit adverse inferences from failing to testify on the ground that many innocent defendants may remain silent for fear of prior conviction impeachment. *Id.* at 494.

30. Seidmann and Stein seem to favor strengthening all rules which induce an "anti-pooling" effect through making silence an "attractive alternative" to fabrications. *Id.* at 433. Currently, only a minority of suspects assert their *Miranda* rights during custodial interrogation. See *infra* note 92 and accompanying text.

31. *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985) (stating that since *Miranda* sweeps more broadly than the Fifth Amendment privilege against self-incrimination and may be triggered even in the absence of a violation of the privilege, its "preventive medicine" provides a remedy even to one who has suffered no constitutional harm).

32. *Oregon v. Hass*, 420 U.S. 714 (1975) (permitting impeachment of a defendant where warnings were given, but interrogation continued after defendant asked for counsel); *Harris v. New York*, 401 U.S. 222, 226 (1971) (holding that statements inadmissible in the prosecution's case-in-chief because obtained in violation of *Miranda* may, if not coerced or involuntary, be used to attack the credibility of the defendant if he takes the stand).

33. See *infra* notes 90, 217.

34. See Peter Erlinder, *Getting Serious About Miranda in Minnesota: Criminal and Civil Sanctions for Failure to Respond to Requests for Counsel*, 27 WM. MITCHELL L. REV. 941, 970 (2000) (noting that this responsibility can be "vindicated" by either a private consultation in the place of confinement or by telephone access to counsel in a reasonably confidential setting, but that when a person in custody requests access to counsel, the law requires consultation with counsel to be provided before questioning can continue).

are claimed to lead to false confessions.³⁵ Seidmann and Stein's theory that the right to silence helps the innocent is likely to bolster efforts to strengthen and expand the right in context of custodial interrogation.

Conversely, in attacking the conventional foundations of the right to silence and urging the acceptance of a heretofore largely unrecognized rationale as its primary basis, Seidmann and Stein are placing the right to silence in a precarious position. If the newly proposed foundation is shown to be infirm, the authors have undermined the traditional and currently accepted rationales for the right without offering any solid alternative support.³⁶

The right to silence is constantly being challenged, particularly aspects of the

35. See Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DENV. U. L. REV. 1135, 1137-39 (1997) (arguing that "there is compelling and abundant evidence that false confessions occur regularly" and that those that are noticed are only the tip of the false confession iceberg); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 983 (1997) [hereinafter Ofshe & Leo, *Decision to Confess*] (contending that while the third degree has "virtually disappeared," police-induced false confessions still occur regularly and are a serious problem for the American criminal justice system). Ofshe and Leo blame deceptive interrogation techniques, such as leading the suspect to believe that the evidence against him is overwhelming and his fate is certain and that there are advantages in confessing. *Id.* at 985-86. But Professor Paul Cassell has vigorously disputed the notion that false confessions occur frequently and has criticized Leo and Ofshe for failing to consider the costs of lost convictions that might follow from restrictions on police questioning. See Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo and Alschuler*, 74 DENV. U. L. REV. 1123 (1997) [hereinafter Cassell, *Balanced Approaches*]. The debate has continued focusing on a study of what Ofshe and Leo describe as sixty cases of "police-induced false confessions in the post-Miranda era." Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 433 (1998) [hereinafter Leo & Ofshe, *Consequences of False Confessions*]. See also Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998) [hereinafter Cassell, *Protecting the Innocent*]. See also Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999) [hereinafter Cassell, *Wrongful Conviction*]; Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat Miranda: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998) [hereinafter Leo & Ofshe, *Scapegoat*]. Occasionally, there are calls to do away with interrogation entirely. See Thaman, *supra* note 2, at 620-24 (calling for eliminating interrogation of suspects as a means of investigation).

36. Seidmann and Stein deal only with the evidentiary aspect of the right to silence which prohibits adverse inferences; they accept the validity of that aspect of the right to silence which exempts a person from contempt for refusal to incriminate oneself, noting that even the most ardent critics of the right to silence do not call for removal of the contempt exemption. Seidmann & Stein, *supra* note 18, at 440 n.36.

right during custodial interrogation.³⁷ Even the rule against adverse inferences has been questioned by judges and scholars who have proposed forms of pretrial judicial examination of the accused conducted by magistrates at which defendants would be afforded counsel, but warned that silence could lead to adverse inferences at trial.³⁸ Recently, Professor Alschuler looked to Scottish procedure and suggested a judicially supervised, deposition-style examination at which the accused would remain unsworn but subject to adverse inferences for silence.³⁹ Professor Akhil Amar would even require the accused to testify under

37. For example, a request for counsel during custodial interrogation currently has a more powerful bite than a refusal to speak or answer questions. There is no per se rule against later questioning by the police following an indication of a desire to remain silent by a suspect provided officials initially cease questioning. *Michigan v. Mosley*, 423 U.S. 96 (1975). However, once a suspect requests a lawyer, there can be no further questioning until counsel has been made available to him unless he first initiates further conversations with the police. *Edwards v. Arizona*, 451 U.S. 477 (1981). This stronger medicine applies even to questioning concerning offenses wholly unrelated to the crime as to which the suspect had requested counsel. *Arizona v. Roberson*, 486 U.S. 675 (1988). While protections against further questioning after a request for counsel have been incorporated into the Sixth Amendment, they are "offense specific" in the Sixth Amendment context such that a request for counsel does not prohibit continued questioning concerning uncharged crimes. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). Justice Kennedy, however, has urged the Court to bring Fifth Amendment rules into line with Sixth Amendment standards such that prohibitions on further questioning under *Miranda* are also offense-specific in the sense of not applying to crimes unrelated to those as to which the suspect had requested counsel. *Id.* at 183 (Kennedy, J., concurring). Justice Kennedy also urges the overruling of *Arizona v. Roberson*. See *id.* Furthermore, Justice Kennedy, joined by Justices Scalia and Thomas, views as "questionable" importation of the broad rule prohibiting further questioning after a request for counsel into the Sixth Amendment context where it is triggered by a request for counsel at arraignment or other judicial proceeding although defendant has agreed to be questioned without a lawyer. They find "difficult to understand" a rule that operates "to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless." *Texas v. Cobb*, 532 U.S. 162, 174-75 (2001) (Kennedy, J., concurring).

38. Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932); Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. & CRIMINOLOGY 1014 (1934); John H. Wigmore, *Nemo Tenetur Seipsum Proedre*, 5 HARV. L. REV. 71, 85-88 (1892). See also MARVIN E. FRANKEL, PARTISAN JUSTICE 98-99 (1980); WALTER V. SCHAEFER, THE SUSPECT AND SOCIETY 71, 77-81 (1967); LLOYD WEINREB, DENIAL OF JUSTICE 163-64 (1977); Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1053 (1975); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 685, 700-01, 713-16 (1968); R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 51-65 (1981); Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15 (1974).

39. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2670-71 (1996). See also WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE

oath by threat of contempt but with limited testimonial immunity which would not extend to fruits of such compelled testimony.⁴⁰ Consequently, however secure may be the core protections of the right to silence, the rationales supporting the right remain critically important to the future development of its many aspects. The “anti-pooling” theory therefore deserves a close inspection.

E. Analyzing Games, Markets, and “Anti-Pooling Theories

First, this Article outlines the assumptions on which Seidmann and Stein base their “Anti-Pooling” theory and describes how they use game and market models to apply and test the assumptions and draw conclusions regarding the effect of the right to silence. A troubling aspect of the “anti-pooling” theory that the authors do not discuss will also be addressed—specifically that the theory’s reliance on the rule against adverse inferences from silence, when carried to its logical conclusion, contains the seeds of its own destruction. Since the theory rests on the proposition that the no-adverse-inference rule leads to more guilty people remaining silent and factfinders believing more innocent suspects who speak, ultimately, the theory will lead to factfinders becoming more skeptical of those who refuse to speak and this will tend to undermine the very right to silence principles on which the theory rests.

Second, assuming that “anti-pooling” is a desirable goal and might be furthered by inducing the guilty to refrain from lying by remaining silent, this Article points out that, in contrast to European countries, the United States already has considerable “anti-pooling” incentives apart from the right to silence. Particularly in the trial context, the costs of speaking in America are very high. By penalizing those who speak, we induce the guilty to remain silent by using the penalty for speaking as a stick and the safety of silence as a carrot. With strong “anti-pooling” measures in the form of potent impediments to speaking already in place in American criminal trials, we may not need a powerful right to silence in order to achieve the “anti-pooling” that Seidmann and Stein believe is so important to the credibility of innocent suspects.

Next, this Article inquires into the validity of the market analogies and assumptions on which the “anti-pooling” theory rests. First, I will contend that the market analogy has little practical relevance in the real world of the American criminal trial which normally is a concentrated, one-shot process where factfinders do not accumulate market-savvy by continuous exposure to the marketplace of exonerating statements. Second, even if factfinders might gain some market experience, they have no way of testing the products they chose or reject—the exonerating statements of criminal defendants. They have no way of knowing whether the shrinking pool of suspects and defendants claiming

AND WHAT WE NEED TO DO TO REBUILD IT 68 (1999) (urging the adoption of a system involving “some formal pressure” on suspects to cooperate with the police).

40. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 56-57 (1997). For a critical analysis of Professor Amar’s proposals, see Stuart Taylor, Jr., *Rethinking the Fifth Amendment (Again)*, *LEGAL TIMES*, July 17, 1995, at 27.

innocence is due to more guilty suspects remaining silent (thus increasing the proportions of innocents in the pool of those making exonerating statements) or to other factors such as more guilty suspects confessing, more plea bargaining, or fewer innocent suspects arrested or prosecuted. Third, this Article points out that in today's real world of police interrogation the pool of exonerating statements by guilty and innocent suspects is rather large, and any incremental increase in the pool of exonerating statements that might be caused by elimination of the right to silence would not be likely to decrease the factfinder's perception of the credibility of claims of innocence.

Assuming that "anti-pooling" can affect the factfinder's evaluation of claims of innocence, the Article takes a close look at the validity of some of the assumptions of the "anti-pooling" theory in terms of the degree the innocent might be helped through the exercise of the right to silence by those who otherwise would lie. This will entail looking at both the number of innocent suspects who are in a position to be helped by "anti-pooling" and the number of guilty people who, without the right to silence, would speak in a way that would harm innocents.

First, only those innocent suspects in a position to benefit from "anti-pooling" are those who are faced with evidence of moderate strength and whose stories are unconvincing. Second, according to the "anti-pooling" theory, only the guilty who, absent the right to silence, would tell convincing stories would be in a position to spread the benefits of silence to the innocent. This category is quite limited. Only a very small proportion of guilty suspects and defendants who now claim the right to silence would tell convincing stories and confuse factfinders if the right were eliminated. In short, few guilty fabricators help the innocent by exercising their right to silence. Seidmann and Stein assume that the right to silence causes the guilty to switch from telling lies to remaining silent, but not from telling the truth to silence. They further assume that without a right to silence, suspects and defendants who would have remained silent would have no choice but to tell lies that would "pool" with the true claims of innocent suspects thereby increasing the likelihood of their conviction. However, it is likely that even with the prospect of adverse inferences from silence, many suspects would continue to remain silent, particularly career criminals and defendants in weak cases where, without a confession, the prosecution may not be able to satisfy its burden of proof. It is even less likely that the threat of adverse inferences from silence at trial would convince all defendants to take the stand because of the perils of testifying, including the prospect of aggressive cross-examination which may expose prior convictions and other highly damaging evidence. Furthermore, even if the threat of adverse inferences would convince more to speak, many would either confess or fabricate ineffectively, particularly in the context of pretrial interrogation where the guilty are less likely to be able to convincingly shape their denials as they would at trial.

To support their claim that the right to silence causes the guilty to switch from lying to remaining silent, but not from confessing to remaining silent, Seidmann and Stein dismiss evidence of a reduction in confessions following implementation of *Miranda*. Instead, they look to British studies finding that the

1994 Criminal Justice and Public Order Act (CJPOA),⁴¹ which permitted adverse inferences from silence during pretrial interrogation and at trial, caused more suspects and defendants to speak, but it did not increase the confession rate. However, it is dangerous to draw conclusions concerning alterations in particular aspects of the right to silence from foreign legal systems with very different procedural rules and professional cultures. The rule against adverse inferences cannot meaningfully be analyzed in isolation but must be considered in relation to other aspects of the silence right, as well as the procedural context in which they operate. The many differences between British and American rights and procedures suggest that limiting the right to silence in America may well have different consequences than it will across the ocean. In sum, in light of the small number of innocent suspects who are in a position to be helped by “anti-pooling” and the limited number of guilty people who, without the right to silence, would speak in ways that would harm the innocent, any benefit to the innocent from the “anti-pooling” effect of the guilty choosing to speak rather than to remain silent most likely is marginal at best.

Next, I will inquire into the costs of the right to silence stemming from the fewer guilty suspects that speak to the police or to juries. Seidmann and Stein acknowledge that the right to silence reduces the conviction rate and results in the acquittal of some guilty defendants.⁴² However, they claim that drawing meaningful conclusions from a cost-benefit analysis is difficult when it is not known how many innocent suspects may be jailed without the silence right or how many guilty are now freed on account of it. They conclude that the “requisite cost-benefit calculation” is beyond the scope of their study.⁴³ Nevertheless, they suggest that the social benefits from fewer wrongful convictions strongly outweigh the social costs do more wrongful acquittals.⁴⁴ While the authors recognize that “anti-pooling” also might be brought about by increasing incentives to tell the truth and confess,⁴⁵ they assert that a “much cheaper” and more preferable way to “purge the lemons” is to pay potential producers of false statements to remain silent by giving them the right to do so “without sustaining punishment or adverse inference.”⁴⁶ However, a meaningful

41. Criminal Justice and Public Order Act, 1994, c. 33, §§ 34-39 (Eng.) [hereinafter CJPOA].

42. See Seidmann & Stein, *supra* note 18, at 499-500. Seidmann and Stein state that “the right to silence reduces convictions of both innocent and guilty defendants.” *Id.* at 473.

43. *Id.*

44. *Id.* 473-74. Seidmann and Stein contend that the prevention of wrongful convictions is an “immensely greater value to society than prevention of wrongful acquittals,” hence retention of the silence right would be “the socially optimal choice.” *Id.* at 494.

45. Seidmann and Stein recognize that “the desired separation” also could be achieved by inducing more guilty suspects to confess rather than lie through such measures as more prosecutions for perjury and paying for true statements by plea bargaining, but they dismiss such prospects on the ground that they “generally incur greater social costs than do incentives for silence.” *Id.* at 434, 460-61.

46. *Id.* at 461.

analysis of the practical consequences of the right to silence requires some attempt to assess its costs both in the form of lost convictions of the guilty and diminished help for the innocent who benefit from guilty suspects either confessing or making false but refutable (and ultimately incriminating) statements.⁴⁷ Since the amount of assistance that silence by the guilty provides to the innocent through “anti-pooling” is marginal at best, the right to silence may overprotect in a way that helps many guilty, but very few innocents, avoid conviction.

Finally, I will look at implications of the “anti-pooling” theory that suggest that the right to silence is such a good thing for the innocent that it should be enlarged to better protect them. I will argue that expanding the right to silence by adoption of rules that induce more suspects to request counsel at interrogation, limit deception, or require disclosure of prosecution evidence prior to questioning, would deter some criminals from confessing and assist others in fabricating effectively. By doing so, it would undermine the goal of truth discovery, particularly in marginal cases where police may have strong suspicions but not enough evidence to persuade a jury beyond a reasonable doubt, that is, in the very cases in which confessions are most needed to convict the guilty.⁴⁸ Consequently, Seidmann and Stein’s analysis suggests good reasons to be skeptical of proposals that would expand the right to silence in the pretrial context, particularly those that would formalize the interrogation process by means of lawyers armed with knowledge of police evidence and sworn to use all legal means to prevent the prosecution from proving its case beyond a reasonable doubt.

However, Seidmann and Stein’s “anti-pooling” analysis is helpful in focusing attention on the harm caused by convincing lies, which can frustrate accurate factfinding in more important ways than their general “pooling” effect in the marketplace of exonerating statements. False statements claiming innocence, which are plausible and not subject to effective contradiction, may not only lead to the release of the guilty, but may also contribute to the arrest and conviction of the innocent by “specific pooling” (the creation of case-specific factual conflicts). This is more directly detrimental to accuracy than the diminished credence given to statements of the innocent from the mere fact that a few more guilty people lie. Furthermore the “anti-pooling” theory is helpful in emphasizing the importance of unrehearsed statements, particularly the defendant’s story prior to an opportunity to contrive a response to prosecution evidence. Yet liberal admissibility of such statements should be a two-way street in which defendants’ early claims of innocence can be offered by the defense, as well as by the prosecution.

In sum, Seidmann and Stein’s “anti-pooling” analysis shows that lies come

47. False statements help the innocent in that the police will likely investigate these statements, learn of their falsity, and allow the prosecutor to use them as impeachment during trial.

48. Seidmann & Stein, *supra* note 18, at 461. Furthermore, according to Seidmann and Stein’s “anti-pooling” theory, in weak or marginal cases the exercise of the right to silence does not benefit the innocent but merely helps the guilty avoid conviction.

in various forms and that the need to distinguish between them is important. Convincing falsehoods can be highly beneficial for the guilty but highly harmful to the innocent, and rebuttable and ultimately incriminating falsehoods can be as important to accurate factfinding as confessions. Thus, leaving in place the rules against adverse inferences and *Miranda*'s basic right to silence warning, we should shape the right to silence and associated guarantees applicable to police interrogation with a focus on permitting procedures that tend to induce guilty suspects to tell the truth, and avoiding procedures that give them the opportunities and tools that would further the creation of uncontradictable fabrications. Such reforms would offer fewer benefits to the guilty than would an expanded right to silence, while protecting the innocent in more significant ways than merely reducing the number of lies in the marketplace of exonerating statements.

I. ASSUMPTIONS AND IMPLICATIONS OF THE "ANTI-POOLING" THEORY

A. Assumptions of the "Anti-Pooling" Theory and Use of Market Models

Seidmann and Stein's "anti-pooling" model is based on a number of assumptions. First, innocent suspects almost invariably will speak and assert their innocence both during pretrial interrogation and at trial.⁴⁹ Second, the fate of innocent suspects often depends on the credibility of their true stories. Next, in their efforts to appear innocent, guilty suspects "pool" their false stories with true accounts offered by innocent suspects and harm the innocent by diminishing the credibility of their stories.⁵⁰ In this way, when guilty suspects perjure themselves, they "impose negative externalities" on innocent suspects.⁵¹ However, virtually all suspects seek to be released and exonerated and generally

49. *Id.* at 433. While Seidmann and Stein recognize that the innocent may exercise the right to silence in exceptional cases, *id.* at 464, they accept Bentham's claim that innocent suspects rarely exercise the right to silence. *Id.* at 436, 455 n.82 (putting aside exceptional cases and noting that "[t]he existence of silent innocents does not enter into our model"). The innocent suspect's choice to speak is rational since "an innocent suspect is . . . at least as well off telling the truth as exercising the right to silence." *Id.* at 466. Contrast the Supreme Court's observations in *Mitchell v. United States*, 526 U.S. 314, 329 (1999) that the rule against adverse inferences from silence "is of proven utility." The Court in *Ullmann v. United States*, 350 U.S. 422, 426 (1956), noted that people "too readily assume that those who invoke [the privilege] are either guilty of crime or commit perjury in claiming the privilege." Later the Court quoted Wigmore's observation that "the layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." *Lakeside v. Oregon*, 435 U.S. 333, 340 n.10 (1978). But times have changed: "It is far from clear that citizens, and jurors, remain today so skeptical of the principle or are often willing to ignore the prohibition against adverse inferences from silence." *Mitchell*, 526 U.S. at 330.

50. Seidmann & Stein, *supra* note 18, at 433, 457-58.

51. *Id.* at 442-43, 458.

will act rationally in pursuit of this objective.⁵² Additionally, although the guilty “typically” will choose to speak rather than to exercise the right to remain silent, and despite that “silence is usually the better choice,”⁵³ in their rational pursuit of exoneration, the guilty will refrain from “pooling” by exercising the right to silence if it appears in their interest to remain silent rather than to lie.⁵⁴ When silence is not penalized by adverse inferences of guilt, it appears as an attractive alternative to fabrication, and guilty suspects will perceive (correctly in most cases) that they are better off remaining silent than speaking.⁵⁵ Further, when the guilty “rationally exercise” the right to silence to reduce the risk of their own conviction, they also reduce the risk that innocent suspects will be wrongfully convicted.⁵⁶ Thus, by refraining from “perjurious pooling with innocents,” the guilty “minimize[s] the risk” of wrongful conviction of the innocent.⁵⁷ Finally, in light of the considerable benefits flowing to the innocent from the exercise of the right to silence by the guilty, retaining the silence right is a cheap price to pay the guilty for withholding their fabrications and increasing the prospect that innocent defendants will be acquitted.⁵⁸

In essence, Seidmann and Stein view the right to silence and its embodiment in the privilege against self-incrimination as a means of helping the innocent in their struggle to make themselves believed. Their “anti-pooling” theory posits that the right to silence induces the guilty to choose silence over fabrication, which results in fewer false statements compared with true ones, which causes factfinders to be more accepting of the statements of innocent suspects and leads to a greater likelihood of their acquittal.

Seidmann and Stein apply and test the foregoing assumptions in theoretical laboratories of markets and games. In these “game-theoretic” models, participants in the justice system exercise rational choices based on their own welfare and on their perception of the choices others in the system would make given the particular rules of the game or marketplace.⁵⁹ The process of criminal

52. See *id.* at 442, 448. However, Seidmann and Stein acknowledge that the guilty often do not act rationally since they generally speak when it would be in their best interest to remain silent. Under “stressful interrogation” and with “asymmetric information,” “guilty suspects often choose the worst possible move, which brings about the worst possible outcome.” *Id.* at 464.

53. *Id.* at 448. Seidmann and Stein nonetheless concede that silence does have its price. At the pretrial stage, silence is “tantamount to admitting guilt and challenging the police to obtain evidence that will convict,” and at trial the damage from silence is even more serious. *Id.* at 446-47.

54. *Id.* at 448. However, the fact that most guilty suspects speak to police while total silence usually is their best choice seems inconsistent with the assumption of the game-theoretic model that “each player’s strategy is that player’s best move in light of the strategies actually chosen by the other players.” *Id.* at 465-66.

55. *Id.* at 465 (noting that experienced suspects and those receiving legal advice are more likely to exercise their silence right).

56. *Id.* at 499.

57. *Id.* at 457-58.

58. *Id.* at 473, 494.

59. *Id.* at 433-34. Seidmann and Stein describe their game-theoretic method, otherwise

investigation and trial is seen as a market for self-exonerating stories in which suspects and defendants seek to sell their accounts to factfinders—police and prosecutors at the pretrial stage and the jury at trial.⁶⁰ Since the innocent must compete with the guilty in this enterprise, measures should be adopted that “drive false statements out of the market.”⁶¹

According to Seidmann and Stein’s used car market analogy,⁶² with lemon-sellers (guilty fabricators) and apple-sellers⁶³ providing the same stories about their cars, buyers (factfinders) are confused and may disbelieve apple-sellers, thereby convicting innocent defendants. But if lemon-sellers do not make claims of good quality, their false statements will not be pooled with the true claims of apple-sellers. Buyers then will give greater credence to valid claims of good quality thereby increasing the chance that they will buy them (acquit apple-sellers).⁶⁴

B. The Adverse Inference Problem: The “Anti-Pooling” Model as Both Resting on and Undermining the Right to Silence

Seidmann and Stein concede that the right to silence in the form of a prohibition on adverse inferences from silence, along with aiding the innocent in avoiding unjust convictions, to some extent helps the guilty to escape conviction. But in order to help the innocent in the manner suggested by the theory, must the right to silence necessarily also hurt the guilty in a way that undermines the very basis of the right?

Consider a society in which all innocent suspects asserted their claims of innocence and all guilty remained silent. If factfinders became aware of this phenomenon, they would believe all exonerating statements. According to Seidmann and Stein’s model, as a society moves in this direction and as fewer

known as the Bayesian Nash Equilibrium Tool, as focusing on a person’s rational choice in a strategic situation in which that person’s welfare or best choice depends on his or her perception about the choices that others in the game will make, and explores the effects of altering the rules of the situation (the game) on all participants. *Id.* at 441, 465. The theory assumes that the belief of all players, including the suspect and the factfinder, as to how others will respond are correct such that “each player’s strategy is that player’s best move in light of the strategies actually chosen by the other players.” *Id.* at 465-66.

60. *Id.* at 460.

61. *Id.*

62. *Id.* at 459.

63. For the purposes of this Article, apple-sellers are innocent suspects who tell the truth to factfinders. Seidmann and Stein did not use this term in their article.

64. According to Seidmann and Stein, with no anti-pooling protections, buyers of used cars will pay no more than average value and quality car owners will take their cars off the market, eventually creating a single “market for lemons.” *Id.* at 459. But innocent suspects cannot readily opt out of the market and go home. They are undergoing custodial interrogation or on trial. They must try to sell their cars, and it is unreasonable to assume that they will not convey their cars’ attributes to prospective sellers merely because owners of lemons will lie about their cars. *Id.*

guilty suspects try to lie their way out of accusations, factfinders will give greater credence to the accounts of innocent suspects. Increasing the proportion of guilty persons who refuse to speak will increase the likelihood that the factfinder will accept the accounts of the innocent (who virtually always speak and are assumed to speak the truth) and will convict them less often. In fact, the authors visualize a perfect "right-to-silence regime" in which "neither pooling nor the ensuing wrongful convictions materialize" for the reason that "innocents still tell the truth, whereas guilty suspects separate themselves by rationally exercising the right."⁶⁵ In this ideal world, where measures have been adopted which "drive false statements out of the market,"⁶⁶ the guilty will separate themselves from the innocent by remaining silent, and the jury will draw "a favorable inference from any exculpatory statement, and innocent suspects (who alone make such statements) are thus acquitted."⁶⁷

But does this model also depend on factfinders being more skeptical of those who assert their right to silence and refuse to speak, with police and prosecutors less inclined to release them during the pretrial stage and juries more inclined to convict them at trial?⁶⁸ If so, the model depends on factfinders being more inclined to employ adverse inferences from silence at the same time that it relies on a broad right to silence unencumbered by adverse inferences as a safe harbor for the guilty who otherwise would lie and confuse things.

It might be argued that with guilty suspects remaining silent more frequently, factfinders would give more weight to innocent accounts while not changing their attitude toward those who claim the right to silence, thus avoiding any adverse inferences. But the used car analogy and notions of human behavior point in the opposite direction. With fewer lemon-sellers falsely touting their cars and buyers placing greater credence in the true claims of apple-sellers, buyers naturally would be more skeptical of car sellers who remained silent and refused to provide any information regarding the history or condition of their cars. In a society in which only innocent suspects claimed innocence and all guilty suspects remained silent, factfinders would believe all exonerating statements, and convict all silent defendants. As a justice system moves in this direction and as fewer guilty suspects claim innocence, the model posits that factfinders will tend to believe more innocent accounts, or as Seidmann and Stein put it, will be more hesitant to "rationally discount the probative value of uncorroborated exculpatory statements."⁶⁹ But if so, factfinders naturally would be more skeptical of those who failed to speak and assert their innocence and more readily assume guilt from silence.

In short, the authors' model suggests that the more often guilty suspects exercise their right to silence, the more it hurts them by weakening the rule

65. *Id.* at 503.

66. *Id.* at 460.

67. *Id.* at 469.

68. *Id.* Seidmann and Stein suggest that remaining silent during pretrial questioning will cause the authorities to concentrate their efforts on guilty suspects. *Id.* at 447.

69. *Id.* at 503.

against adverse inferences from silence.⁷⁰ The model, which is founded on a robust right to silence in the form of a prohibition on adverse inferences from its exercise, naturally creates its own counter pressures which bring about a greater likelihood of adverse inferences from silence, thus undercutting its own foundations. The more efficiently the model operates and the more guilty people choose silence over fabrication, the more precarious the right to silence becomes. Furthermore, once the guilty become aware of the increased credibility given to claims of innocence, they would tend to prefer lying over silence. This “free-rider” tendency would then undercut the central assumption of the “anti-pooling” theory—that if fewer guilty speak, the remaining speakers will be seen as more credible.⁷¹ With the “anti-pooling” model containing the seeds of its own destruction and eventually collapsing of its own weight, things would tend to even out in the end.⁷²

C. “Anti-Pooling” by Using the Stick Rather than the Carrot

Assuming that “anti-pooling” is a desirable goal and that it might be furthered by inducing the guilty to refrain from lying by remaining silent, similar results might be achieved by making the defendant an offer he cannot refuse. Instead of inducing the guilty to remain silent by utilizing the right to silence carrot, which involves maintaining an attractive safe harbor in silence, one might

70. Of course, a trend toward more guilty suspects choosing silence over fabrications that has the practical effect of weakening the prohibitions on using silence to infer guilt may result in more accurate factfinding. *Id.* The authors agree that in the real world, silence in the face of criminal accusations is highly probative evidence of guilt since innocent suspects virtually always proclaim their innocence. Certainly, silence has much more than some “tendency to make the existence of any fact that is of consequence . . . more probable . . . than . . . without the evidence.” FED. R. EVID. 401. Provided factfinders are aware of the fact of silence and its significance, the practical effect of rules prohibiting adverse inferences may be weakened such that the cost of the right to silence in terms of more acquittals of guilty suspects might be significantly reduced. However, if “anti-pooling” increases the significance of silence in the eyes of the jury, making them more skeptical of those who choose it, one might contend that, without a change in present rules of evidence, the shift would result in the danger of convicting more innocent defendants who choose to remain silent to avoid impeachment with prior convictions or the chance of appearing unconvincing under vigorous cross-examination in the formal trial context.

71. I owe this “free-rider” insight to my colleague Professor Rory Little.

72. Much would depend on such factors as the extent to which the guilty exercise the right, whether factfinders are aware that claims of innocence are becoming more credible from the fact that fewer guilty people make such claims, and whether factfinders nevertheless are following judicial instructions against inferring guilt from refusals to speak or to testify. In light of these considerations, it seems that the weakening of the no-adverse-inference rule is more likely to occur with respect to trial silence as opposed to pretrial silence, since generally the ultimate factfinder—the jury—is unaware of whether the defendant during custodial interrogation proclaimed his innocence or remained silent, whereas his refusal to testify at trial is an evident fact of which the jury is always aware, although legally forbidden to consider.

seek to increase the possible harm from speaking as a stick to persuade the guilty to keep their lies to themselves. Instead of making silence safer, speaking could be made more dangerous. In fact, we are now taking both approaches with an emphasis on punishing those who choose to speak. While we view the opportunity to speak and to testify in court as a fundamental right of the accused, our present system penalizes speaking both pretrial and at trial—and the perils of talking are increasing.

In the pretrial context, speaking to the police or to prosecutors clearly is very dangerous. While there are some small benefits in confessing at an early stage of an investigation,⁷³ these benefits are greatly overshadowed in most cases by the damage such statements cause during plea bargaining and at trial. Even exonerating statements usually work against most defendants who eventually must choose to either accept a plea bargain or go to trial since evidence rules permit the prosecutor to use them freely, but generally prohibit their use by the defendant to bolster his claim of innocence. Ordinarily, such statements are inadmissible hearsay when offered by an accused.⁷⁴ In contrast to lawyers in

73. In federal cases, a defendant may receive a three-level reduction in sentence for acceptance of responsibility in a timely manner. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) (2001) [hereinafter U.S.S.G.]; *United States v. Corona-Garcia*, 210 F.3d 973, 980-81 (9th Cir. 2000).

74. Only in unusual cases are defendants able to introduce their exonerating stories at trial. For example, prior statements of an accused generally are not admissible as consistent statements under FED. R. EVID. 801(d)(1)(B). See *United States v. Nelson*, 735 F.2d 1070 (8th Cir. 1984) (defendant's prior exculpatory statement was not admissible as a consistent statement under rule 801(d)(1)(B)). Such statement may be admissible to rehabilitate a defendant only if defendant testifies and is impeached by an allegation of an improper motive and the statement was made before the improper influence or motive was alleged to have arisen. See *Tome v. United States*, 513 U.S. 150 (1995). Nor are post-arrest statements by a defendant asserting innocence admissible under the state of mind exception. See *United States v. Carter*, 910 F.2d 1524 (7th Cir. 1990) (defendant's prior exculpatory statement was not admissible under the state of mind exception of 803(3) since it referred to a past, rather than to a then-existing, state of mind); *United States v. Rodriguez-Pando*, 841 F.2d 1014 (10th Cir. 1988) (tape recording of defendant's statement to police the day following his arrest in which defendant claimed that he had been coerced to act as he did was inadmissible on the ground it was a statement of memory of past events and beliefs).

A limited avenue of admissibility is available if a defendant raises a mental defense, calls an expert witness, and seeks to elicit the statement as one of the bases for the expert's opinion. FED. R. EVID. 703 provides that if the facts or data upon which an expert bases an opinion or inference are of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. However, the rule was amended, effective December 2000, to limit the admission of facts which form the basis for expert opinion when offered by the party calling the expert. Under the new rule, facts that are otherwise inadmissible "shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." FED. R. EVID. 703.

European countries who often will advise suspects to be cooperative and truthful, American defense lawyers virtually always advise suspects not to talk to police.⁷⁵ For example, when O.J. Simpson appeared with his lawyer at a bail hearing and attempted to explain why he had fled in the Bronco, his lawyer advised him to remain silent. However, he kept talking. Finally his lawyer warned Simpson, "I will not allow you to speak and I will resign as your lawyer if you continue to do so."⁷⁶ Virtually all criminal defense attorneys would view such advice as sound, indeed vital, under the circumstances.

Of course, another reason why pretrial silence is attractive in America is that it provides a safe harbor for the guilty. The right to silence caution has some effect, but the real bite comes from associated rules and practices, such as the strict cut-off rules which require terminating interrogation whenever a suspect declines to speak or requests a lawyer. While *Miranda* and its progeny do not require the presence of stationhouse lawyers⁷⁷ or even give defendants the right on request to see a lawyer unless interrogated,⁷⁸ the *Miranda-Edwards* rules require terminating interrogation whenever a suspect declines to speak or requests a lawyer.⁷⁹ Such rules contrast sharply with the continental and English

75. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part). Justice Jackson's well known observation over forty years ago still states the accepted wisdom of criminal defense lawyers in this country: "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Id.*

76. Before represented by counsel, Simpson had gone to police headquarters voluntarily, submitted to questioning for thirty-two minutes, gave a blood sample and returned home. Arenella, *supra* note 16, at 1237. Arenella characterized the police questioning as "polite" and asks why the detectives did not engage in more prolonged and tougher interrogation since he had waived his right to silence and to counsel. While regarding this as "one of the mysteries of the case," Arenella asks whether detectives would have adopted the same polite and deferential style of questioning if they were dealing "with a more typical suspect." *Id.* at 1237 n.8.

77. See *Davis v. United States*, 512 U.S. 452, 460 (1994) (citing *Miranda v. Arizona*, 384 U.S. 436, 474 (1966) (noting that *Miranda* rejected the notion "that each police station must have a 'station house lawyer' present at all times to advise prisoners")).

78. See *Duckworth v. Eagan*, 492 U.S. 195 (1989) (holding that *Miranda* does not require that lawyers be producible on call, but only that a suspect be informed that he has the right to counsel before and during questioning and that counsel would be appointed for him if he could not afford one). Thus, "[i]f police cannot provide appointed counsel, *Miranda* requires only that police not question a suspect . . ." *Id.* at 204. See also *Moran v. Burbine*, 475 U.S. 412 (1986) (finding that *Miranda* had been waived despite fact that defendant had not been informed that counsel purporting to represent him had called police and requested that no questioning take place and that police had assured counsel that defendant would not be questioned).

79. *Miranda*, 384 U.S. at 436. See also *Minnick v. Mississippi*, 498 U.S. 146 (1990) (holding that *Edwards'* protection does not cease once suspect has consulted with his attorney, such that once defendant has requested an attorney, interrogation must cease and police may not re-initiate questioning without an attorney present even though defendant has consulted with his attorney); *Arizona v. Roberson*, 486 U.S. 675 (1988) (holding that once a suspect cuts off custodial interrogation by invoking his right to counsel, he may not, as long as he remains in custody, be

approaches which allow continued questioning in the face of a suspect's refusal to speak.⁸⁰

In the trial context, the dangers from testifying are considerable and they are on the rise. America's super-adversary trial procedure shields a defendant from inquiry by focusing the trial on the lawyers rather than on the accused who often appears set apart from the trial process.⁸¹ But a defendant who dares take the witness stand will face cross-examination by an aggressive prosecutor as well as the possibility of performing poorly before the body that will determine his fate. Most important, our rules of evidence operate to strongly discourage the defendant from taking the stand by saying to him,

If you testify, the jury will become aware of your felonious history, you may be prosecuted for perjury or your sentence enhanced if you lie, and you will be cross-examined by an aggressive prosecutor,⁸² but if you

questioned by the original interrogators or others about an offense wholly unrelated to the crime as to which he has already requested counsel, unless counsel has been provided him or the suspect himself initiates further communications with officials); *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (quoting *Fare v. Michael C.*, 442 U.S. 707, 719 (1979)) (characterizing *Edwards* as a "ridged prophylactic rule" which embodies two distinct inquiries: whether defendant actually invoked his right to counsel and if he did, the court may admit responses to further questioning only if defendant both initiated further discussions with the police and knowingly and intelligently waived the right he had invoked); *Edwards v. Arizona*, 451 U.S. 477 (1981) (announcing a stricter rule when defendant requests a lawyer: That once a suspect has asserted his right to counsel under *Miranda*, there can be no further interrogation until counsel has been made available to him unless defendant himself initiates further conversations with the police); *Michigan v. Mosley*, 423 U.S. 96, 103 (1975) (describing a person's "right to cut off questioning" as a "critical safeguard" and stating that *Miranda* requires a "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored").

Although voluntary statements obtained in violation of these rules can be used to impeach, courts are beginning to permit civil actions against police for "going beyond *Miranda*" and continuing to ask questions after a suspect has asked for a lawyer. *See Cooper v. Dupnick*, 963 F.2d 1220 (9th Cir. 1992); *see also Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999) (establishing clear rule that continued interrogation after defendant's invocation of the right to counsel constituted a clear violation of the Fifth Amendment giving rise to civil liability in which qualified immunity is unavailable).

80. *See Van Kessel, supra* note 2, at 819-21.

81. Compared to European trials, for example, courtroom arrangement and choreography greatly limit exposure of the accused. American defense lawyers generally sit beside the accused, often between him and the jury, whereas in continental trials, lawyers usually sit in back of the accused and are restricted in prompting his responses. In England, the accused (who is placed in a dock at the center-rear of the courtroom) is even more separated from his barrister who sits in the front benches some distance away. For a description of the numerous incentives to speak at a French criminal trial which starkly contrasts with American practices, *see Lerner, supra* note 4.

82. The threat of felony conviction impeachment can be a powerful deterrent to taking the witness stand. A study of American jury trials found that a defendant was almost three times more

remain silent, neither your past nor your present silence will be mentioned by the judge or prosecutor, and if you wish, the jury will be cautioned against drawing adverse inferences.⁸³

Furthermore, once the accused takes the witness stand, he is open to impeachment by many types of evidence previously found to be illegally obtained and inadmissible, such as fruits of illegal searches or seizures and statements obtained in violation of *Miranda*.⁸⁴ The threat of admissibility of evidence and prior bad acts also can keep a defendant from the witness stand. In the recent highly-publicized "road rage" case in which a driver was charged with reaching into the car of another driver and throwing her fluffy, white dog into oncoming traffic, the judge ruled that if the defendant testified that the dog had bitten him first, the prosecutor could call a witness to testify that he had seen the defendant beat a disabled dog to death. The defendant did not take the stand and

likely to refuse to testify if he had a criminal record than if not. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 146 (1966).

83. The legal prohibition on adverse inferences precludes any reference to defendant's failure to testify. See *Carter v. Kentucky*, 450 U.S. 288 (1981) (holding that on defendant's request, the jury was to be instructed that silence must be disregarded); *Griffin v. California*, 380 U.S. 609, 614 (1965) (prohibiting both judicial instructions and prosecutorial comment which suggested that defendant's silence at trial could be used as evidence of guilt); *United States v. Buege*, 578 F.2d 187, 188 (7th Cir. 1978) (disallowing prosecutorial argument that certain evidence was "uncontradicted" when contradiction would have required defendant to take the stand and would draw attention to his failure to do so).

There appears to be a trend toward greater acceptance of the right to silence by both the courts and the American public, which suggests that juries may be taking it more seriously. Until recently, the common perception has been that the right to silence at trial is rather anemic and generally of little consequence. Jurors, and even judges, have ordinarily expected the defendant to give evidence and have held it against the defendant if he does not take the stand. However, due to recent extensive media coverage of high profile trials, the public is being exposed to situations in which the defendant does not make pre-trial statements or testify at trial. When neither the judge nor the lawyers ask why the accused fails to talk, the public slowly becomes accustomed to a system in which the accused is a silent and passive observer of the courtroom action. In recent years, both the legal profession and the public have become more accustomed to criminal trials in which the defendant remains silent while his lawyers attack the prosecution's case, and they have become more comfortable with the notion that the accused is not expected to personally provide his version of the events. This changing perception was recognized recently by the Supreme Court. See *supra* note 49.

84. See *Michigan v. Harvey*, 494 U.S. 344 (1990); *United States v. Havens*, 446 U.S. 620 (1980); *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971). Furthermore, defendant's silence, whether before or after arrest, can be used to impeach his testimony as long as it was not in response to *Miranda* warnings. *Fletcher v. Weir*, 455 U.S. 603 (1982); *Jenkins v. Anderson*, 447 U.S. 231 (1980). However, the prosecutor cannot use illegally obtained evidence to impeach the credibility of defense witnesses other than the defendant. *James v. Illinois*, 493 U.S. 307 (1990).

the witness never testified.⁸⁵

The impediments to testifying are increasing. In some jurisdictions, the danger of impeachment by prior convictions has become more serious,⁸⁶ and the Supreme Court recently limited the ability of defendants to lessen the impact of such impeachment.⁸⁷ The Court upheld a rule penalizing a testifying defendant who attempts to "remove the sting" of prior conviction impeachment by bringing out the fact of the conviction on direct examination.⁸⁸ By doing so, defendant waived the right to appeal the judge's adverse *in limine* ruling allowing such impeachment.⁸⁹ Finally, the Court recently permitted the prosecutor to comment to the jury regarding defendant's presence at trial that allowed him to tailor his testimony to fit the evidence which had been presented.⁹⁰

D. *The Consequences of Sticks and Carrots*

What are the results of the present system which penalizes speaking and provides a safe harbor for silence both pretrial and at trial? To support their claim that the right to silence "cannot be responsible for many erroneous acquittals," Seidmann and Stein assert that "suspects do not exercise the right to silence very often either at interrogation or at trial."⁹¹ But this does not appear to reflect the current situation in America where a substantial number of suspects assert their *Miranda* rights by refusing to answer police inquiries and an even

85. Evelyn Nieves, *Driver Who Tossed Dog is Convicted of Cruelty*, N.Y. TIMES, June 20, 2001, at A12. The case was tried in San Jose, California, and the defendant was convicted. *Id.*

86. In California, for example, prior to 1982 the courts had restricted the prosecutor's impeachment of a defendant with previous convictions. However, an initiative entitled the "Victim's Bill of Rights" added Section 28(f) to Article I of the California Constitution and provided that "[a]ny prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment . . . in any criminal proceeding." *People v. Collins*, 722 P.2d 173, 175 n.1 (Cal. 1986) (quoting CAL. CONST. art. 1, § 2816); *People v. Castro*, 696 P.2d 111 (Cal. 1985). Another provision of the 1982 initiative permitting admission of all relevant evidence (with some exceptions) now permits impeachment with prior conduct which did not result in a conviction. *See People v. Wheeler*, 841 P.2d 938, 943 (Cal. 1992) (holding that the new rule gives trial courts broad discretion to admit or exclude all acts of dishonesty or moral turpitude relevant to impeachment).

87. *Ohler v. United States*, 529 U.S. 753, 760 (2000).

88. *Id.* at 758.

89. *Id.* (holding that if, following a judge's *in limine* ruling permitting impeachment use of defendant's prior convictions, defendant preemptively testifies to those convictions on direct examination, defendant thereby waives the right to challenge the judge's ruling on appeal).

90. *See Portuondo v. Agard*, 529 U.S. 61, 65-76 (2000) (holding that the prosecutor's comments in her summation calling the jury's attention to the fact that defendant had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly did not violate defendant's Sixth Amendment right to be present at trial, his Sixth Amendment right to confront witnesses, or his Fifth and Sixth Amendment right to testify in his own behalf).

91. Seidmann & Stein, *supra* note 18, at 448.

larger proportion of defendants refuse to testify at trial.

While most suspects waive their *Miranda* rights and make statements, a substantial number do not. The proportion of American suspects who assert their right to silence and refuse to answer questions varies considerably but averages around twenty percent.⁹² The frequency of damaging statements also varies, but most studies have found that confession rates declined following *Miranda* and that in the post-*Miranda* era, confessions are found in less than one-half of the cases.⁹³ A study of thirty-seven capital jury trials in California from 1988 to

92. In my 1986 review of American studies, I found that the proportion of suspects who remained silent varied from five percent to sixty percent. See Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 116-19 (1986). Professor Cassell's more extensive review of American studies found that the percentages of those invoking *Miranda* vary widely (from seventy-seven percent to four percent) averaging about twenty percent. Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 495 (1996). Other recent studies have come to similar conclusions. In a study of police interrogation practices at three police departments in Northern California during 1992 and 1993, Professor Richard Leo found that twenty-one percent of the suspects (thirty-eight out of 182) invoked their *Miranda* rights. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 268, 275-76 (1996). Cassell's 1994 Salt Lake County study found that 16.3% of suspects given *Miranda* invoked their rights initially. Cassell, *supra*, at 496.

93. In my 1986 review of English and American confession rates, I noted that American studies conducted after *Miranda* became common knowledge detected an increase in refusals to answer questions and "some decline in confession rates." Van Kessel, *supra* note 92, at 128. Professor Paul Cassell's later, more extensive reviews of American studies and his 1994 Salt Lake County study also found declining confession rates following *Miranda*. Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084, 1091-92 (1996) (concluding that studies before *Miranda* found that defendants made damaging statements in well over fifty percent of the cases, while after *Miranda* the rates dropped considerably such that the rates now vary from twenty percent to fifty percent); Cassell, *supra* note 92, at 483 (finding a sixteen percent nationwide drop in confession rates following *Miranda* when confessions were necessary for conviction in twenty-four percent of the cases, resulting in a 3.8% loss of convictions in serious cases (.16 x .24)); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 842 (1996) (summarizing their Salt Lake County study and finding a confession rate of thirty-three percent suggesting that "*Miranda* has reduced the confession rate"). But see Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 545 (1996) (disputing Cassell's calculations and concluding that with the "necessary adjustments" the confession rate change drops from sixteen percent to 4.1% and the harm to law enforcement due to lost cases declines to "at most 0.78%"). Cassell responded to Schulhofer, contending that studies before *Miranda* found that defendants made damaging statements in well over fifty percent of the cases, while after *Miranda* the rates dropped considerably such that the rates now vary from twenty percent to fifty percent. Cassell, *supra*, at 1091-92. But see George C. Thomas, III, *Law's Social Consequences*, 51 RUTGERS L. REV. 845, 852 n.36 (1999) (reading Cassell's studies as showing a more than fifty percent chance that interrogation will lead to incriminating statements).

1992 found that defendants made pretrial confessions in only twelve of the cases (thirty-two percent).⁹⁴ This post-*Miranda* decline is not surprising since the right to silence has become a familiar feature on the legal landscape. Moreover, those with felony conviction records, who are more likely to refuse to make statements,⁹⁵ are becoming more aware of the consequences of waiving their *Miranda* rights.

As to exercising the right to silence at trial, with increasing frequency defendants are not taking the stand at trial as they once did. In colonial America, virtually all defendants testified at trial, and this trend continued throughout the first half of this century. Studies of trials in the 1920s and the 1950s show that very few defendants refused to testify at trial and that few were helped by such refusals.⁹⁶ However, following *Griffin* and the Supreme Court's decisions of the 1960s and 1970s which strengthened the right to silence, fewer and fewer defendants are testifying at trial. Professor Schulhofer's study of Philadelphia

In a multiple regression analysis of FBI data, Cassell and Fowles found that national crime clearance rates fell precipitously in the two years immediately following *Miranda* and have remained at lower levels ever since and concluded that "*Miranda* has seriously harmed society by hampering the ability of the police to solve crimes." Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1132 (1998) [hereinafter Cassell & Fowles, *Handcuffing the Cops?*]. John J. Donohue used his own regression model with Cassell and Fowles' data and found a statistically significant post-1966 effect only for total violent crime and for the individual crime of larceny and could neither substantiate nor reject the claims of Cassell and Fowles. John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1172 (1998). In response, Cassell and Fowles then contended that Donohue's figures largely supported their conclusions that crime rates fell substantially after *Miranda* and that *Miranda* was in large part a cause of this decline. Paul G. Cassell & Richard Fowles, *Falling Clearance Rates after Miranda: Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998) [hereinafter Cassell & Fowles, *Falling Clearance Rates*].

94. Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1584-1585, tbl. 8 (1998). Only five of the twelve voluntarily turned themselves in or were arrested on unrelated charges and brought up the killing on their own. *Id.* The aim of the study was to assess the effect of remorse on a jury's decision to impose a sentence of death or life without parole. Figures were drawn from the California segment of the Capital Jury Project (CJP) which involved a study of thirty-seven capital cases which were tried to juries during the years 1988 to 1992. *Id.*

95. See Cassell, *supra* note 92, at 465.

96. Even studies of trials in the 1920s and the 1950s reveal that very few defendants refused to testify at trial and that few were helped by such refusals. See ARTHUR TRAIN, *THE PRISONER AT THE BAR* 209-12 (1923) (referring to an empirical study revealing that only twenty-three out of 300 defendants choose to remain silent at trial (twenty-one of these were convicted anyway)). In their study of the American jury, Kalven and Zeisel describe an empirical Chicago jury study of trials conducted during the middle and late 1950s showing that ninety-one percent of defendants without prior records and seventy-four percent of those with prior records, chose to testify at trial. KALVEN & ZEISEL, *supra* note 82, at 146.

felony trials in the 1980s illustrates the decline in defendant testimony.⁹⁷ Nearly one-half of felony defendants did not testify at trial and twenty-three percent of this group was acquitted,⁹⁸ while fifty-seven percent of misdemeanor defendants chose not to testify at trial and thirty-four percent were acquitted.⁹⁹ A study of thirty-seven capital jury trials in California from 1988 to 1992 revealed that "with a few notable exceptions, most defendants did not testify."¹⁰⁰ Only twenty-seven percent testified at the guilt phase and only twenty-two percent testified at the penalty trial (four defendants testified at the penalty phase only, while four testified at both). Thus, only thirty-eight percent of the defendants took the stand either at the guilt or the penalty trial. While studies on the number of defendants who testify are few, these results are consistent with my own observations and inquiries with trial lawyers and judges: while much depends on the particular charge and defense, the nature of the evidence, and the defendant's criminal record, the extent of refusals to testify varies from one-third to well over one-half in some jurisdictions. The failure of American defendants to testify has become so common that even the public rarely notices when the defendant does not take the witness stand. For example, of those who have seen the movie, *Reversal of Fortune*, how many were aware, much less thought it unusual, that Claus von Bulow failed to tell his story to the jury in either trial?¹⁰¹

European practice provides a stark contrast. In continental Europe, nearly all defendants choose to testify.¹⁰² Likewise, in England, it is the rare case in which the accused does not take the stand and give evidence.¹⁰³ The CJPOA¹⁰⁴ which permits adverse inferences from silence in Great Britain has had a "marked impact on both pre-trial and trial practices" with a notable reduction in the exercise of silence among suspects in police custody and more defendants

97. Schulhofer, *supra* note 16, at 329-30.

98. *Id.* at 329-30 (citing Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1080 (1984)). Of the 162 felony defendants tried by a judge without a jury, seventy-nine did not testify and forty-four percent of those who remained silent were acquitted on the principal charge (some convicted on lesser counts). *Id.* at 330 n.72.

99. *Id.* at 329-30. Altogether, thirty-nine percent of those who remained silent avoided conviction on the principle charge. *Id.* at 330 n.73 (citing Stephen J. Schulhofer, *No Job Too Small: Justice Without Bargaining in the Lower Criminal Courts*, 1985 AM. B. FOUND. RES. J. 519, 571).

100. Sundby, *supra* note 94, at 1561.

101. The movie portrayed the efforts of Alan Dershowitz and his Harvard law students in obtaining the reversal of the conviction of Doctor von Bulow for murdering his wife. Even the Rhode Island Supreme Court, in reversing his convictions for attempted murder, failed to mention the fact that he never took the stand at the trial. *See State v. von Bulow*, 475 A.2d 995 (R.I. 1984).

102. *See supra* note 1 and accompanying text.

103. Graham Hughes, *English Criminal Justice: Is It Better than Ours?*, 26 ARIZ. L. REV. 507, 590-91 (1984) (remarking that in England the case in which the defendant fails to testify is "exceptional" whereas "defendant's silence is becoming the common practice in trials in the United States").

104. CJPOA, 1994, c. 33, §§ 34-39 (Eng.).

testifying at trial.¹⁰⁵ With respect to pretrial questioning, before the CJPOA, ten percent of defendants refused all questions, thirteen percent refused some questions, and seventy-seven percent answered all questions. After the passage of the CJPOA, only six percent of defendants refused all questions and only ten percent refused some questions with eighty-four percent answering all questions.¹⁰⁶ There are few English studies regarding the effect of the CJPOA on the decision to testify at trial, but a study from Northern Ireland on the effect of an Order permitting adverse inferences from a defendant's silence supports the view that the effect has been considerable.¹⁰⁷ For those charged with scheduled offenses (terrorist cases), the proportion of defendants refusing to testify declined from sixty-four percent in 1987 to forty-six percent in 1991.¹⁰⁸ The percentage dropped further to twenty-five percent in 1995.¹⁰⁹ Those charged with non-scheduled offenses (non-terrorist cases), the proportion of defendants refusing to testify fell from twenty-three percent in 1987 to fifteen percent in 1991.¹¹⁰ By 1995, the number had dropped to three percent.¹¹¹ The authors of the study concluded that with respect to non-scheduled defendants, the Order has rendered the number refusing to testify "almost negligible" such that it is now "only in the exceptional case that such defendants will absent themselves from the witness box."¹¹²

There are several reasons for the American trend toward more reliance on silence, but much has to do with the high costs encountered in speaking to the police and testifying at trial. Consequently, with strong "anti-pooling" measures already in place in the form of potent impediments to speaking, it is appropriate to ask whether we need a powerful right to silence in order to achieve "anti-pooling" that Seidmann and Stein believe is so important to the credibility of innocent suspects and defendants. In fact, with both the safe harbor in silence and the penalties associated with speaking, we may be guilty of "anti-pooling" overkill which can be highly harmful to innocents when silence replaces more than convincing fabrications.¹¹³

105. Tom Bucke et al., *The Right of Silence: The Impact of the Criminal Justice and Police Order Act 1994*, Home Office Research Study 199 at 69 (2000).

106. *Id.* at 31.

107. *See generally id.*; John Jackson et al., *Legislating Against Silence: The Northern Ireland Experience*, Northern Ireland Office Research & Statistical Series: Report No. 1 (2000).

108. Jackson et al., *supra* note 107, at 130.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 131.

113. *See infra* Part III.B regarding the consequences of the guilty switching from confessions or ineffectual denials to silence.

II. VALIDITY OF MARKET ANALOGIES, GAME-THEORETIC ASSUMPTIONS, AND THE "ANTI-POOLING" THEORY

A. *Validity of Market Analogies*

1. *The One-Shot Trial and Juror Awareness.*—According to Seidmann and Stein's car market analogy, if fewer lemon-sellers make claims of good quality, buyers will tend to give greater credence to apple-sellers touting their cars and acquit more innocent defendants.¹¹⁴ However, this theory rests on the assumption that car buyers generally are aware of overall market practices—that the buyers operate in a changing market in which they are exposed to numerous statements of sellers praising their cars and that buyers will give greater weight to such statements when they come to realize that fewer lemon-sellers are touting their cars. Innocent defendants become more credible because the protective right to silence has induced more guilty suspects to choose silence over fabrication. Without the right to silence, buyers will give less credence to statements of good quality when they become aware that among car-touting sellers in general, the proportion of liars (lemon-sellers) has risen. In short, a market model hinges on buyer (factfinder) experience in a changing market.

While it is possible that in the context of the pretrial investigation, buyers (police and prosecutors) listening to the accounts of numerous suspects and defendants may be aware of a changing market, such awareness is unlikely in the jury trial context since normally jurors are not "market conditioned" by serving in numerous trials. Unlike trial jurors in Sixteenth and Seventeenth Century England who were conditioned from the experience of hearing consecutive cases,¹¹⁵ today's jurors often sit for only one or two trials and have little or no market savvy or experience. Today's jurors rarely return to the market place of exonerating statements.

2. *Tasting the Fruit and Testing the Cars.*—Even if some jurors might gain extensive trial experience, jurors differ from used car buyers in another crucial aspect. They do not buy, take home, and test the cars (i.e., the exonerating statements of criminal defendants). They convict, acquit, or "hang," and go home, usually without any confirmation of the accuracy of their decision or feedback regarding the truth or falsity of the defendant's testimony. Factfinders can never be absolutely certain of the guilt or innocence of defendants, particularly in cases where the defendant claims innocence and the evidence of guilt is not crystal clear. Thus, even if the right to silence reduces the frequency of lemon-sellers touting their cars, jurors have no way of knowing whether the shrinking pool of suspects and defendants proclaiming innocence is due to more guilty suspects remaining silent (thus increasing the proportions of innocents in the pool of those making exonerating statements) or to other factors such as more guilty

114. See *supra* note 64.

115. See John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 273 (1978) (describing how from the 1500s through the early 1700s, single juries would sit for several days hearing dozens of cases and becoming "old hands" at the process).

suspects confessing or plea bargaining or fewer innocent suspects arrested or prosecuted. We are left with the unlikely possibility that American society in general, and prospective jurors in particular, will somehow become aware of the fact that defendants at their trials are taking the stand and lying more or less frequently (depending on the availability of the silence right).

Finally, Seidmann and Stein's theory claims that the statements of innocent suspects become significant only where the incriminating evidence is of "intermediate strength" (but not in other cases) and that in such cases factfinders will draw "a favorable inference from any exculpatory statement" since innocent suspects alone will make them.¹¹⁶ Thus, the "anti-pooling" theory will operate efficiently only in the unlikely event that jurors are sophisticated enough to know the type of cases in which such inferences are appropriate and use it in those, but not other cases.

3. *The Limits of Real World "Anti-Pooling."*—In another respect Seidmann and Stein's hypothetical marketplace differs from the real world of police interrogation and trial. In the authors' ideal market world, all lemon-sellers would choose silence over lies and the claims of innocent apple-sellers would always be believed.¹¹⁷ However, even with the right to silence in place in the form of the no-adverse-inference rule and *Miranda* requirements, most suspects do not exercise the right during police questioning, but either confess or fabricate.¹¹⁸ As noted earlier, only about twenty percent of suspects assert their silence rights and refuse to make any statement to authorities,¹¹⁹ while somewhat less than fifty percent confess.¹²⁰ Thus, the remaining thirty percent are either guilty fabricators or innocent truth-tellers. At trial, the proportion of defendants remaining silent is larger, but in view of the fact that virtually no defendant takes the stand and confesses, the pool of those testifying and claiming innocence most likely is even larger. Thus, there is a limit to what carrots and sticks can do to persuade suspects and defendants to refrain from contesting guilt. With the large pool of exonerating statements by guilty and innocent suspects, any incremental increase in this pool that might be caused by limiting the right to silence most likely would not be substantial enough to decrease the factfinder's perception of the credibility of claims of innocence.

B. *Assessing Benefits to the Innocent from "Anti-Pooling"*

Assuming that "anti-pooling" can affect the factfinder's evaluation of claims

116. Seidmann & Stein, *supra* note 18, at 462, 469.

117. With the right to silence, the guilty would "separate themselves from the innocent suspects by exercising the right," rather than falsely replicating their exculpatory statements and reducing their credibility, resulting in the jury drawing "a favorable inference from any exculpatory statement, and innocent suspects (who alone make such statements) are thus acquitted." *Id.* at 462, 469.

118. *See id.* at 448.

119. *See supra* note 93 and accompanying text.

120. *See supra* note 93 and accompanying text.

of innocence, one must closely question the validity of some of the assumptions of the “anti-pooling” theory in terms of how much the innocent might be helped through the exercise of the right to silence by those who otherwise would lie and confuse factfinders. Even if “pooling” can have an adverse effect on the credibility of innocent suspects, how much, if any, does the exercise of the right to silence by the guilty “minimize[] the risk”¹²¹ of wrongful convictions brought about by rejection of their true statements?

Seidmann and Stein focus on the value of the right to silence from the perspective of what would occur if the right were eliminated. That is, how would guilty suspects react and what would be the effect of that reaction on the innocent? Taking this approach, assessing the benefits to the innocent from the “anti-pooling” effect of silence created by the guilty, requires asking what proportion of innocents who are now believed and acquitted would be disbelieved and convicted if the right to silence were eliminated and more guilty suspects spoke rather than remained silent? This analysis entails both identifying innocent suspects who are in a position to benefit from “anti-pooling” and would be harmed by its elimination as well as determining the number of guilty people who, without the right to silence, would speak in a way that would hurt the innocent. This latter inquiry requires an estimation of how many guilty suspects and defendants who now choose silence would speak if the right to silence were not available, how many of these guilty speakers would tell lies rather than confess, and how many of these fabricators would lie in a way that harms the innocent.

1. *Identifying Innocent Suspects Who Would Be Harmed by Fewer Guilty Suspects Remaining Silent.*—In our concededly imperfect criminal justice system, how many innocent people are convicted and how many more, if any, would be convicted if more guilty suspects spoke rather than remained silent because of the absence of the silence right? Of course, we have no way of knowing the precise number of innocent suspects who plead guilty or are found guilty by juries, but Seidmann and Stein believe that the number would be greater without the right to silence. However, they assume that not all innocent suspects benefit from the “anti-pooling” effect of exercise of the right to silence by guilty suspects, and they seek to identify the particular group of innocent suspects whose true accounts would be disbelieved because of the presence of more convincing fabricators. If the incriminating evidence is weak, Seidmann and Stein believe that innocent suspects have no need for and are not assisted by the “anti-pooling” effect of the right to silence,¹²² and in “such cases the guilty suspect gains by exercising the right without affecting the fate of any innocent suspect.”¹²³ When prosecution evidence is “very strong” the authors concede that “anti-pooling” will not help the innocent since the guilty will confess rather than fabricate regardless of the silence right because they would desire the benefits of

121. Seidmann & Stein, *supra* note 18, at 457-58.

122. *Id.* at 461-62.

123. *Id.* at 470. In these cases, the right to silence helps the guilty alone, just as Bentham claimed. *Id.* at 468.

the confession premium.¹²⁴ Thus, the authors recognize that the only innocent defendants who will be helped by exercise of the right to silence by the guilty are those facing incriminating evidence “of intermediate strength.”¹²⁵ The benefits to the innocent from exercise of the right to silence by the guilty fall only on those suspects and defendants who face incriminating evidence “of intermediate strength” but who “cannot corroborate their responses.”¹²⁶

2. *Assessing the Reaction of the Guilty to Elimination of the Right to Silence.*—The value to the innocent of the “anti-pooling” effect of the right to silence according to Seidmann and Stein’s model also largely depends on what the guilty would do if deprived of the right. Assessing the value of “anti-pooling” to the innocent requires looking at the group of guilty suspects and defendants who now choose silence over speaking, and asking how many would choose to speak if faced with the threat of adverse inference from silence. Moreover, of those guilty people who would choose to speak if the right to silence were eliminated, how many would tell lies rather than confess? Finally, one must ask what proportion of such fabricators would lie in a way that harms the innocent by confusing factfinders and causing them to render unjust convictions?

3. *The Market Analogy and Silent Lemon-Sellers.*—Seidmann and Stein assume that without a right to silence, the only option for guilty suspects would be to speak to the police and to testify in court.¹²⁷ However, in doing so, the suspects would fabricate rather than confess. As a result, their untrue statements would “pool” with those of the innocent and increase the likelihood of an innocent suspect’s conviction. Specifically, the authors assume that, absent the right to silence, guilty suspects acting rationally always would speak, whether the evidence against them is weak, moderate, or strong, although it is only in “intermediate strength” cases where the innocent will be harmed by their fabrications.¹²⁸ However, is it reasonable to assume that, without protections from adverse inferences, all suspects would talk to the police and testify at trial rather than remain silent and accept the consequences of adverse inferences?

Even in England, where adverse inferences from silence was permitted by the CJPOA, some suspects still refuse to speak to the police.¹²⁹ One would assume

124. *Id.* at 509-10. Again, I part company with Seidmann and Stein’s assumption that the guilty generally will act rationally in the context of pretrial interrogation. However, if the incriminating evidence is very strong, such as fingerprint or DNA identification, it likely would overwhelm any marginal increase in the believability of true statements which might be caused by the “anti-pooling” effect of the guilty’s exercise of the right to silence.

125. *Id.* at 461-62, 509.

126. *Id.* at 503.

127. *See id.* at 473 (stating that absent the right to silence, the felon’s “only option is to give a statement to the police and subsequently to testify in court”); *see also id.* at 492 (stating that absent the right to silence, a guilty defendant at trial “would have no choice but to imitate an innocent defendant by lying”).

128. *Id.* at 467-70.

129. *See* Bucke et al., *supra* note 105, at 31, 69 (finding that before the 1994 Act ten percent

that in America an even greater proportion of suspects would refuse to cooperate. Americans do not share with the Europeans that feeling of confidence in authority and that sense of responsibility which motivates the vast majority of European suspects and defendants to cooperate and speak to police and judges.¹³⁰ Even with the prospect of adverse inferences from silence, many American defense lawyers would continue to advise suspects to remain silent, particularly in weak cases where there is a good chance that without a confession, the prosecution could not satisfy its burden of proof. In England where lawyers are less contentious,¹³¹ solicitors nonetheless often will advise suspects to remain silent when the evidence against them is weak despite the threat of adverse inferences following the CJPOA.¹³² Furthermore, it is likely that many seasoned criminals and those arrested for serious offenses would still remain silent.¹³³ Given that approximately twenty percent of suspects now refuse to speak to police, even if one-half would speak if threatened with adverse inferences, the increased "pooling" effect would be limited to about ten percent of those interrogated.

With respect to testifying at trial, as pointed out earlier, the dangers encountered by taking the stand, such as impeachment with prior convictions and illegally obtained evidence, are such that with increasing frequency defendants are not testifying as they once did. The result is that refusals to testify are reaching over one-half in some jurisdictions. The threat of adverse inferences from silence would do little to convince a defendant to take the stand when he faces the prospect that cross-examination which exposes a criminal record or incriminating evidence will be much more damaging than mere suggestions that

refused to answer all questions and thirteen percent refused some questions, whereas after the Act, six percent refused all questions and ten percent refused some questions).

130. See Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 505-506 (1992) (discussing how the basic assumptions underlying the European non-adversary approach cut against the grain of our national character which emphasizes fear and distrust of governmental power).

131. See *id.* at 435-37 (describing American criminal trial lawyers as more aggressive and contentious than either continental or English advocates, and viewing themselves as semantic warriors in pursuit of that most important goal—winning the case).

132. The *Law Society Guidelines* for solicitors were revised in response to the 1994 Act and stated that if the solicitor is "unsure whether the police have sufficient, or sufficiently strong evidence" for the police to charge, or for the prosecution to continue with their prosecution, or for a court to convict, "the safest advise will often be that your client should remain silent." *Police Station Advice: Adverse Inferences and Waiving Privilege: Guidelines from the Criminal Law Committee of the Law Society*, July 1, 1997.

A study of the operation and effect of the Criminal Evidence (Northern Ireland) Order 1988 in the Northern Ireland Crown Court found evidence that the introduction of solicitors in police interviews led to a reduction in statements where police had evidence to hold, but not enough to convict and solicitors played it safe and advised silence. See Jackson et al., *supra* note 107, at 126.

133. In England following the 1994 Act, those arrested for serious offenses were more likely to exercise their right to silence. See Bucke et al., *supra* note 105, at 30-32.

his silence might indicate that he has something to hide.

4. *The Market Analogy and Truthful or Unbelievable Lemon-Sellers: Confessions and Refutable Fabrications.*—Assuming that, without the right to silence, marginally more guilty people would choose to speak, how many of those switching from silence would lie rather than confess and would do so in a way that harms the innocent? The “anti-pooling” theory rests on the assumption that, if the right to silence were not available, guilty suspects would fabricate in a way that would cause factfinders to distrust innocent defendants. Lemon-sellers (guilty suspects), however, may decide to be truthful and to admit their car’s defects (i.e., confess to the crime or admit the falsity of their stories) and take them off the market.¹³⁴ On the other hand, lemon-sellers might believe that they can sell their cars by making false statements touting their “outstanding” properties when in fact such statements can be investigated and rebutted before or during trial. For the absence of the right to silence to harm innocent defendants under the “anti-pooling” theory, the guilty must not only fabricate; they must do so effectively. If, without the right to silence, most guilty suspects would either confess or fabricate ineffectively, there would be no benefit to the innocent from depriving the guilty of that right.

Leaving aside the many guilty suspects who would confess either with or without the right to silence, Seidmann and Stein conclude that, given sufficiently weak evidence, the guilty will inevitably choose silence regardless of the resulting adverse inferences.¹³⁵ If the incriminating evidence is sufficiently strong, they conclude that the right to silence “becomes irrelevant to behavior,” because the guilty always will prefer “to confess and enjoy the small but positive remission of sentence.”¹³⁶ Consequently, the right to silence helps innocent suspects only when the incriminating evidence is of “intermediate strength”¹³⁷ because only then will guilty suspects “separate themselves from the innocent suspects by exercising the right to silence” rather than “falsely replicating their exculpatory statements” thereby reducing their credibility.¹³⁸ However, “intermediate” or lesser strength evidence may be made to appear overwhelming to the suspect. When interrogating officers exaggerate the strength of prosecution evidence, an “intermediate strength” case may easily fall into the strong case category, in which the right to silence becomes irrelevant. Furthermore, what might appear to all parties to be a very strong case sometimes will fall apart during the course of investigation or trial.

134. This may occur outside the context of plea bargaining such that guilty suspects do not benefit by selling their rights to silence and to jury trial at a discount.

135. See Seidmann & Stein, *supra* note 18, at 469.

136. *Id.* Seidmann and Stein claim that “when the circumstantial evidence is strong, the right to silence does not affect behavior.” *Id.* at 470. Apparently, they either ignore or discount the many “dead cases,” well known to public defenders, in which guilty defendants maintain their claims of innocence at trial rather than either confessing or accepting a plea bargain.

137. *Id.* at 461-62.

138. *Id.* In such cases the jury “draws a favorable inference from any exculpatory statement, and innocent suspects (who alone make such statements) are thus acquitted.” *Id.* at 469.

Contending that the right to silence is used only by those who otherwise would fabricate, Seidmann and Stein argue that those who would confess or make damaging statements would do so whether or not there is a right to silence. Defendants in cases of moderate or intermediate strength generally would choose to lie rather than to confess if the right were unavailable.¹³⁹ Additionally, suspects who would confess absent the right to silence “would not switch to silence were [it] to become privileged.”¹⁴⁰ In short, the right to silence causes the guilty to switch from lies to silence, but not from truth to silence. This assumption is central to the validity of the “anti-pooling” thesis.

Yet is it reasonable to assume that, of those guilty suspects who now exercise the right to silence but who would speak if the right were not available, few would confess, fabricate unconvincingly, or make statements that could be refuted? First, guilty suspects are not all equally able or predisposed to lie. For some, lying is a way of life and doing it effectively comes naturally. Others may either lack convincing stories or consider themselves bad liars and, realizing, as do Seidmann and Stein, that it is not easy to give convincing, irrefutable fabrications,¹⁴¹ will either clam up or confess. In fact, it seems reasonable to assume that many, if not most, guilty suspects choose to remain silent because they have no convincing stories to tell and the alternatives—confessions or ineffective lies—are unappealing.

Thus, even if most guilty suspects would switch from silence to lies if the right to silence were not available, many would not do it very well. In fact, with the present right to silence, most guilty suspects who choose to speak to the police do not do so very effectively, as Seidmann and Stein recognize. Police interrogation, they reason, places the guilty between a rock and a hard place and, though it has costs, remaining silent will generally be the lesser of two evils for suspects. In the context of pretrial interrogation, a guilty suspect has two choices, both of which “[worsen] his position” because he must “move first” without full knowledge of the available evidence against him.¹⁴² Seidmann and Stein, however, believe that pretrial silence is less damaging than fabrication, because there is a good chance that refuting evidence is or will become available to discredit the false story.¹⁴³ For guilty suspects, “silence is usually the better choice.”¹⁴⁴ Yet the guilty usually fail to choose silence. Most often, they make

139. *See id.* at 499.

140. *Id.* at 470.

141. Seidmann and Stein concede that in the context of pretrial police questioning, there is a good chance that refuting evidence will be available. *Id.* at 447. They note that the guilty usually make “the worst possible move” by either confessing or fabricating an account susceptible of refutation. *Id.* at 464.

142. *See id.* at 447.

143. *See id.*

144. *See id.* at 448. Seidmann and Stein describe the cost of pretrial silence to the guilty suspect as the confirmation of the authorities’ belief that the suspect is guilty which induces them to concentrate on proving it. *Id.* at 446. This cost, however, generally is minimal compared with the cost of either confessing or fabricating an easily refuted statement.

“the worst possible move” by either confessing or fabricating an account susceptible of refutation.¹⁴⁵ If most guilty suspects who now choose to speak to the police do so ineffectively, why should we assume that, if more choose speaking over silence, they would fabricate convincingly?

Finally, we might listen to experienced criminal lawyers, who generally agree that successful fabrication during police questioning is the exception rather than the rule. Prosecutors and police prefer for suspects to make pretrial statements, even if they are fabrications,¹⁴⁶ and defense lawyers clearly do not want their clients speaking to the authorities. Like Seidmann and Stein, the police and prosecutors recognize that under “stressful interrogation” and with “asymmetric information” the guilty most often make “the worst possible move” by either confessing or fabricating an account susceptible of refutation.¹⁴⁷ Even convincing denials of guilt, which are consistent with a defendant’s eventual contentions, usually do not help the defendant at trial because they are generally inadmissible hearsay when offered by the accused.¹⁴⁸

C. *Distinguishing Between Pretrial and Trial Silence*

Assuming that there are benefits in separating false from true claims of innocence, one might consider the degree of “pooling” dangers present in different contexts. By this measurement, the “anti-pooling” theory works less well in the pretrial context than it does at trial.¹⁴⁹ Consequently, the “anti-pooling” analysis suggests that there is good reason to be skeptical of an expansive right to silence in the context of pretrial interrogation.

First, the guilty are less likely during pretrial questioning than at trial to be able to lie in ways that “pool” with the accounts of the innocent. According to the “anti-pooling” theory, “[o]nly the existence of a meaningful fabrication alternative should . . . activate the privilege” so if the guilty “cannot fabricate evidence in a way that harms the innocent,” they should not enjoy the privilege

145. *See id.* at 464.

146. Prosecutors and police detectives believe that interrogations are essential. *See* Cassell, *Protecting the Innocent*, *supra* note 35, at 498. Professor Cassell observed that “virtually every detective to whom I spoke insisted that more crimes are solved by police interviews and interrogations than by any other investigative method.” *Id.* (quoting Richard A. Leo, *Police Interrogation in America: A Study of Violence, Civility and Social Change* (1994) (unpublished Ph.D. dissertation, Univ. of Cal. at Berkeley)). Cassell and Hayman’s poll of prosecutors found that sixty-one percent believed that incriminating statements were either essential or important in obtaining a favorable outcome. *See* Cassell & Hayman, *supra* note 93, at 906.

147. *See* Seidmann & Stein, *supra* note 18, at 464.

148. *See supra* note 74.

149. Seidmann and Stein discuss the argument that the right to silence might be less potent at trial than during pretrial interrogation in persuading the guilty to refrain from fabricating, and suggest that there are good arguments on both sides of the question. *See* Seidmann & Stein, *supra* note 18, at 491-92.

to remain silent without consequence.¹⁵⁰ Thus, the opportunity to “shape [the] content” of evidence justifies applying the privilege to testimonial evidence, but not to physical evidence.¹⁵¹ Taking this approach, the greater the opportunity that a guilty person has to “shape [the] content” of a statement, such that the fabricated evidence harms the innocent through the “pooling-through-lying alternative,”¹⁵² the stronger the argument for the right to silence as an attractive alternative. The less a particular context provides such a “shape [the] content” alternative, the less justification there is for the right. During the pressure-packed process of custodial interrogation, it is often very difficult to fabricate effectively because the suspect generally will be confronting the authorities without counsel and without knowledge of the evidence possessed by his interrogators.

On the other hand, at trial the defendant usually has been provided by counsel with knowledge of the prosecution’s case and has had the opportunity to wait until all prosecution and defense witnesses have testified before making the decision whether to take the stand.¹⁵³ American criminal defense attorneys carefully calculate whether it is in their clients’ best interest to take the stand and will not hesitate either to “prepare” them to testify or advise silence if the dangers in testifying appear to outweigh the potential benefits.¹⁵⁴ Occasionally, defense attorneys may devise methods to convince their “unconvincing” clients that they would be better off to remain silent. For example, O.J. Simpson may well have desired to testify (as do most defendants who think they can persuade the jury of their innocence), but the defense team engaged talented defense lawyers to act as prosecutor and aggressively cross-examine him. Evidently convinced to take the safer course, he did not testify.¹⁵⁵

Second, even if a defendant is able to lie effectively during pretrial questioning, and his lies may pool with the true accounts of innocent suspects who speak to police, those lies generally are inadmissible on his behalf and thus will not have a pooling effect at the trial stage. While the prosecution may almost always use defendant’s pretrial statements against him, only in limited

150. *Id.* at 480.

151. *Id.* at 475-76.

152. *Id.* at 476.

153. *See Brooks v. Tennessee*, 406 U.S. 605 (1972) (holding that the state’s attempt to counter defense tailoring of its evidence by requiring the defendant to testify at the outset of the defense or not at all was an unconstitutional burden on defendant’s right to testify).

154. Professor Pizzi accurately describes our system as “at the extreme in openly encouraging the presentation of evidence at trial that has the palm prints and fingerprints of the lawyers all over it as the evidence is shaped, reshaped, and sometimes distorted a bit for adversarial advantage.” *See PIZZI, supra* note 39, at 126.

155. *See People v. Simpson*, No. B.A. 097211 (Cal. Super. Ct., Oct. 3, 1995). He did, however, request the opportunity to personally address the jury prior to the defense opening statements. The request was denied. In the later civil case, in which he had no privilege against self-incrimination, his unconvincing testimony was a factor leading the jury to find liability and impose substantial damages. *See Rufo v. Simpson*, 103 Cal. Rptr. 2d 492 (Ct. App. 2001).

situations will the defendant be permitted to introduce his own exonerating story to police.¹⁵⁶ In short, convincing fabrications during police interrogation pose fewer pooling dangers than do convincing fabrications at trial.¹⁵⁷

Finally, the right to silence is a greater help to the innocent at trial than it is during pretrial interrogation. At trial, innocent defendants may legitimately fear impeachment with their prior criminal record, cross-examination by an aggressive prosecutor, or exploitation of personal traits which might damage their credibility. The Supreme Court has recognized that even a truthful defendant may decide not to take the stand out of fear of not being a credible witness. "Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him."¹⁵⁸ Because of these trial-specific considerations, trial silence often is less probative of guilt than pretrial silence. Because the exercise of the right to silence by the innocent is more likely at trial than in the pretrial context, the right seems more justified at this later stage.¹⁵⁹ Assuming that there are benefits from avoiding the "pooling" of false and true claims of innocence, these practical considerations regarding the use of the right to silence suggest that we should be particularly hesitant to expand the right in the context of pretrial questioning.

D. Empirical Evidence Testing the "Anti-Pooling" Theory

Testing the "anti-pooling" theory's assumptions regarding the reaction of the guilty to the reduction or elimination of the right to silence is extremely difficult in light of the absence of a domestic laboratory in which the right is present and then taken away. We can, however, look at the opposite situation from the mid-1960s, when the *Miranda* decision abruptly expanded the right to silence. Numerous studies have found that *Miranda*'s expansion of the pretrial right to silence reduced confession rates, although the extent of the reduction has been

156. See discussion *supra* note 74.

157. Furthermore, the number of innocent suspects who are interrogated by police is much larger than the number of innocent defendants who face trial.

158. *Wilson v. United States*, 149 U.S. 60, 66 (1893). See Mark Berger, *Reforming Confession Law British Style: A Decade of Experience with Adverse Inferences from Silence*, 31 COLUM. HUM. RTS. L. REV. 243 (2000) (contending that, because drawing adverse inferences from the accused's failure to take the witness stand may be more problematic than doing so following the accused's failure to speak to the police, if adverse inferences for failure to testify are permitted, "its scope could be limited to the impeachment of any defense which the accused offers through other evidence"). *Id.* at 261.

159. On the other hand, some fairness considerations seem to point in the opposite direction. One may argue that drawing adverse inferences from failure to testify at trial is less objectionable than drawing adverse inferences from silence during police interrogation because, at trial, the accused usually knows the full extent of the case against him before deciding whether to testify and has had an opportunity to reflect on the situation with advice of counsel.

the subject of extended debate, with *Miranda* critics pointing to a sixteen percent reduction in confessions and *Miranda* supporters arguing that the reduction was no more than four percent.¹⁶⁰ But reduced confession rates following *Miranda* strongly suggest that some, who would previously have confessed, claimed the expanded right to silence. Nevertheless, Seidmann and Stein dismiss the evidence of reduced confession rates as “too contaminated with measurement error.”¹⁶¹ Even if most who claimed the new expanded right to silence switched from lies to silence rather than from confessions to silence, evidence of reduced crime clearance rates following *Miranda* suggests that the lies they would have told would have damaged their cases and contributed to their conviction.¹⁶² Reduced confession and crime clearance rates following *Miranda*’s expansion of the right to silence is consistent with Seidmann and Stein’s acknowledgments that “the right to silence reduces convictions of both innocent and guilty defendants,”¹⁶³ and that “one can attribute changes in the confession rate to the relevant enhancement (or weakening) of the right to silence.”¹⁶⁴

Failing to find domestic studies supporting their theory and in the face of contrary *Miranda* studies, Seidmann and Stein turn overseas and cite British studies concerning the consequences of the CJPOA,¹⁶⁵ which eliminated in certain circumstances the rule against drawing adverse inferences from either silence during pretrial interrogation or from failing to testify at trial.¹⁶⁶ The

160. See Cassell, *supra* note 92, at 447 (reviewing American studies and finding a sixteen percent nationwide drop in confession rates following *Miranda*); see also Van Kessel, *supra* note 92, at 128 (reviewing American studies conducted after *Miranda* became common knowledge and noting that they “detected some increase in refusals and some decline in confession rates”).

Stephen Schulhofer disputes Cassell’s calculations and contends that the studies show that the confession rate fell by, at most, 9.7% when compared with regimes without warnings which used only the traditional voluntariness test, and by only 6.4% when compared with regimes using some warnings. See Schulhofer, *supra* note 93, at 538-39. Schulhofer concludes that, with further “necessary adjustments,” the decline in confession rates becomes only 5.8%, when compared with regimes without warnings and 4.1% when compared with regimes using some warnings. *Id.* at 545. Cassell responded to Schulhofer contending that studies before *Miranda* found that defendants made damaging admissions in well over fifty percent of cases, while, after *Miranda*, the rates dropped considerably, varying from twenty percent to fifty percent. See Cassell, *supra* note 93, at 1091-92.

161. Seidmann & Stein, *supra* note 18, at 500 (stating that the studies are not reliable enough to support the thesis that the right to silence causes guilty defendants to switch from confessions to silence).

162. See *supra* note 93.

163. Seidmann & Stein, *supra* note 18, at 473.

164. *Id.* at 437 n.20.

165. 1994, c. 33, §§ 34-39 (Eng.).

166. See Bucke et al., *supra* note 105, at 199.

The caution given to suspects in England has been revised several times. The first caution was:

You do not have to say anything. But if you do not mention now something which you

studies were conducted before and after the passage of the CJPOA and found that, while the CJPOA had a "marked impact on both pre-trial and trial practices" including "a notable reduction in the exercise of silence among suspects in police custody" and "more defendants . . . testifying at trial,"¹⁶⁷ there was no evidence that the new provisions encouraged more confessions. Both before and after the CJPOA, about fifty-five percent of suspects confessed during police interviews.¹⁶⁸ Nor did the CJPOA affect the conviction rate.¹⁶⁹ Nevertheless, police officers preferred fabricated stories to silence, because the lies gave them something to investigate; if the accounts proved false, they strengthened the prosecution's case and were regarded as much more valuable than any adverse inferences drawn in court.¹⁷⁰

A Northern Ireland study not discussed by Seidmann and Stein also seems to support their theory. The study focused on the effect of the Criminal Evidence (Northern Ireland) Order,¹⁷¹ which was the basis for the CJPOA and which also permitted the factfinder to draw adverse inferences from silence both during police questioning and at trial.¹⁷² The study examined Belfast Crown Court cases in the years directly before the implementation of the Order through 1995.¹⁷³ Although the Order resulted in fewer defendants remaining silent and may have assisted the police investigating crime and prosecutors in proving their particular cases,¹⁷⁴ the study found that the Order had no effect on solving crime, guilty pleas, or conviction rates.¹⁷⁵

later use in your defence, the court may decide that your failure to mention it now strengthens the case against you. A record will be made of anything you say and it may be given in evidence if you are brought to trial.

Police and Criminal Evidence Act, 1984 c. 60 (Eng.) [hereinafter PACE]; Codes of Practice, Draft Revisions for Consultation 45 § 10.4 (1994) (Eng.).

The caution has been shortened to: "You do not have to say anything, but I must caution you that if you do not mention when questioned something which you later rely on in court, it may harm your defence. If you do not say anything it may be given in evidence." ENGLISH AND NORTHERN IRELAND CODES OF PRACTICE § 10.5.

167. Bucke et al., *supra* note 105, at 69.

168. *Id.* at 34.

169. *See id.* at 74.

170. *See id.* at 35.

171. Criminal Evidence (Northern Ireland) Order 1988.

172. *See* Jackson et al., *supra* note 107.

173. *Id.* at 40-44.

174. *Id.* at 151. In fact, with regard to non-terrorist cases, the Order appeared to have had a contrary effect from what was expected—a marked decline in conviction rates in contested cases. *Id.* at 144.

175. *Id.* at vi. In fact, the rate at which non-terrorist defendants pled guilty declined in the years following the Order. By 1997, however, the rate had increased to near its pre-Order level. *Id.* at 139-40.

E. The Limited Value of Comparative Studies

Seidmann and Stein's comparative analysis illustrates the dangers of drawing general conclusions from the impact of specific alterations to particular aspects of the right to remain silent in foreign legal systems with very different procedural rules and professional legal culture from the United States. The rule against adverse inferences cannot be analyzed meaningfully in isolation, but must be considered in relation to both other aspects of the right and the procedural context in which it operates.

First, unlike *Miranda* and related interrogation rules, the codes of England and Northern Ireland provide both a meaningful right to consult with a lawyer prior to a police interview and the right to have a lawyer present during the interview. These rights are given effect through a system of stationhouse legal advisors, which results in approximately forty percent of suspects receiving legal advice prior to police station interrogations.¹⁷⁶ *Miranda* rules do not guarantee a right to consult with a lawyer, but only the right not to be questioned after a lawyer is requested.¹⁷⁷ The result is that American interrogations rarely take place in the presence of defense counsel. Furthermore, the new English silence

176. Jackson et al., *supra* note 107, at 116. The Police and Criminal Evidence Act, 1984 required that the police generally must interview suspects at the police station and provided a statutory right "to consult a solicitor privately at any time." *Id.* §§ 56, 58. The Code of Practice, however, states that, with certain exceptions, "a person who asks for legal advice may not be interviewed or continue to be interviewed until he has received it" and provides that the person must be allowed to have the solicitor present whenever he is interviewed if a solicitor is available. CODE OF PRACTICE FOR THE DETENTION, TREATMENT AND QUESTIONING OF PERSONS BY POLICE OFFICERS (1985) [hereinafter CODE OF PRACTICE] § 6.3-6.5. In *Condron v. United Kingdom*, 31 Eur. Ct. H.R. 1 (2000), the European Court of Human Rights held that, provided appropriate safeguards are in place, "it is obvious that the right cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution," *id.* at ¶ 56, but that access to legal advice and the physical presence of a solicitor during a police interview is a "particularly important" safeguard for dispelling any compulsion to speak which may seem inherent in the terms of the caution. *Id.* ¶¶ 60-61. Britain responded with the Youth and Justice Criminal Evidence Act 1999 (Eng.) [hereinafter YJCEA] and the Criminal Evidence (Northern Ireland) Order 1999, which prevent a court or jury from drawing adverse inferences until access to legal advice has been offered to suspects who are being interviewed in a police station or other "authorized place of detention." YJCEA § 58; Order Art. 36. Consequently, more suspects in both England and Northern Ireland are requesting and receiving legal advice. In Northern Ireland, from 1992 to 1997, 34.5% of non-terrorist suspects and ninety-three percent of terrorist suspects requested legal advice. See John D. Jackson, *Silence and Proof: Extending the Boundaries of Criminal Proceedings in the U.K.*, INT. J. OF EVID. AND PROOF 145, 169 n.111 (2001).

177. See *Duckworth v. Eagan*, 492 U.S. 195 (1989) (holding that *Miranda* does not require that attorneys be producible on call and that it is sufficient for police to tell a suspect that there is no way of furnishing him with a lawyer during questioning but that one will be appointed for him if and when he goes to court).

rules led to more disclosure of police evidence prior to police interviews.¹⁷⁸ Earlier and fuller discovery of the prosecution's case arms a suspect with important knowledge and allows him to tailor his statement accordingly.¹⁷⁹ This is particularly true when the suspect is assisted by a lawyer who advises the suspect to answer questions only after discovery is provided.¹⁸⁰ If the evidence appears strong, the suspect is able to conform his statement to facts not reasonably subject to dispute. When incriminating evidence is weak and the prosecution's need for statements is the greatest, solicitors often will advise silence.¹⁸¹ The Northern Ireland study found that the presence of solicitors at police interviews has led to fewer statements by suspects where police have enough evidence to hold an individual, but not enough evidence to convict.¹⁸² The report's authors speculated that in such cases, solicitors might play it safe and advise silence whereas prior to the Police and Criminal Evidence Act of 1984,¹⁸³ defendants without advice might well have spoken.¹⁸⁴ Although the new rules led to solicitors advising silence and suspects claiming it less often, solicitors still confidently advised silence in cases where they believed the police were conducting "fishing expeditions" or where "there was no real evidence against the client."¹⁸⁵ Finally, new defense tactics have been devised to cope

178. While authorities have no legal duty to provide pre-interview disclosure of their case, lack of disclosure may provide good reason for a suspect to remain silent, which would preclude the drawing of adverse inferences. Although courts have not required full disclosure in every case, the consensus was that the police in both England and Northern Ireland were providing more information to legal advisors than before the new right to silence rules. See Jackson, *supra* note 176, at 158-61. Furthermore, most solicitors in Northern Ireland were satisfied with the information they received in non-terrorist cases and considered it sufficient for the purpose of advising their clients. See *id.* at 159.

179. Seidmann and Stein recognize that a suspect's initial responses to police questioning when "the police may play without showing their hand" disadvantages the guilty suspect in a way often "crucial to the case." Seidmann & Stein, *supra* note 18, at 443.

180. Following the CJPOA, solicitors were more likely to request disclosure of prosecution evidence and police were more likely to comply with such requests. See Bucke et al., *supra* note 105, at 23-25. The Northern Ireland study found that solicitors were much more likely to recommend answering questions in PACE cases when they received full details about the nature of the case against the suspect and full access to police interviews. In the absence of a clear view of the case against the suspect, solicitors were more inclined to advise clients not to cooperate. See Jackson, *supra* note 176, at vi, 124 nn.71-73.

181. In *R. v. Robel*, Crim. L. R. 449 (1997), the court stated that, if the interviewing officer has disclosed little or nothing, it would be good legal advice for the defendant to stay silent.

182. See Jackson, *supra* note 176, at 126.

183. Police and Criminal Evidence Act, 1984 c. 60 (Eng.).

184. See Jackson, *supra* note 176, at 126.

185. *Id.* at 160. Jackson quotes solicitors' standard advice as: "I will explain that . . . if there's a defence, it will have to be put forward. Or this is a case where it's unlikely the prosecution will proceed. So you can put forward your defence, but if you don't have a defence, then I'd advise you not to answer any questions." *Id.*

with the threat of adverse inferences, whereby suspects or their legal advisors will read out a written statement at the beginning of the interview and then refuse to expand on its content.¹⁸⁶ For these reasons, English interrogation rules seem particularly ill-suited to expose lies and encourage guilty suspects to tell the truth. In sum, if the new threat of adverse inferences in England and Northern Ireland operates to persuade suspects to abandon silence, the accompanying protections may have merely enabled suspects to fabricate more effectively.

Second, the no-adverse-inference rule with respect to pretrial silence, as it operated in England and Northern Ireland prior to the new reforms, was very different from the rule as applied in the United States.¹⁸⁷ Even before the revisions expressly allowing adverse inferences, English juries generally were made aware of a defendant's refusal to answer questions posed by police.¹⁸⁸ American juries never hear of a defendant's silence following *Miranda* warnings.¹⁸⁹ While, prior to the CJPOA, English prosecutors could not suggest to the jury that the accused's silence was suspicious, they could produce evidence of the fact of such silence and nothing prevented a jury from drawing adverse inferences.¹⁹⁰ In short, the rule against drawing adverse inferences from silence in the context of police questioning did not affect admissibility of evidence, but

In essence, the solicitor is telling the suspect, "I don't think the prosecution has enough evidence to convict you unless you confess or make damaging statements, so I advise you not to talk, particularly if you're guilty."

186. See *id.* at 158. The studies found that terrorist suspects and professional criminals often utilized tactics such as the written statement to get around the new rules.

187. The rule's operation at trial, however, was more like the current situation in this country. The 1898 Criminal Evidence Act that gave testimonial competence to the accused, also provided for a right to silence by restricting comment by the prosecutor on defendant's choice not to testify. See Carol A. Chase, *Hearing the "Sounds of Silence" in Criminal Trials: A Look at Recent British Law Reforms With an Eye Toward Reforming the American Criminal Justice System*, 44 U. KAN. L. REV. 929, 935 (1996). However, judicial comment on trial silence was not forbidden and the judge could refer to it in summarizing the evidence for the jury. *Id.* at 935. By 1994, judicial decisions had severely limited the judge's power to comment on defendant's failure to give evidence, rendering the English rule not substantially different from the rule in this country. See *R. v. Friend* [1997] 2 All ER 1011 (Eng.); SUSAN M. EASTON, *THE RIGHT TO SILENCE* 7, 10 (1991).

188. See Jackson, *supra* note 176, at 166 n.97. A study conducted before the right to silence revisions found that the jury heard of defendant's silence during police questioning in eighty percent of Crown Court trials. See M. Zander & P. Henderson, *Crown Court Study* (1993) ROYAL COMMISSION ON CRIMINAL JUSTICE RESEARCH STUDY No. 19.

189. *Miranda* itself states that the prosecution cannot use at trial the fact that a defendant exercised the right to silence. *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966). Nor may such silence be used to impeach a defendant who testifies. *Doyle v. Ohio*, 426 U.S. 610 (1976) (reasoning that, while *Miranda* requires no express assurance that silence will carry no penalty, "such assurance[s] [are] implicit to any person who receives the warnings" and therefore it would be fundamentally unfair and a deprivation of due process to allow his silence to be used to impeach an explanation offered at trial.)

190. See M. Zander, *THE POLICE AND CRIMINAL EVIDENCE ACT 1984* §§53-65, at 89 (1985).

only controlled what the judge and prosecutor could say to the jury.¹⁹¹ With this aspect of the silence right so significantly different from that in the American system, the consequences of its abolition also differ. Because the rule against adverse inferences in England was not as potent as it is here,¹⁹² not as much was lost by its abolition as would be lost if the rule were eliminated in the United States. Abolition of the more protective right in this country may well have greater consequences and may result in more guilty suspects deciding to confess their crimes or to fabricate ineffectively rather than remain silent.

Furthermore, different rules regarding the admissibility of exonerating statements give suspects more to gain by lying to police and prosecutors in England than in America. Here, generally such statements are not admissible when offered by the accused and the jury never hears of them,¹⁹³ whereas in England such statements usually come before the jury as part of the prosecution's case.¹⁹⁴ Consequently, false claims of innocence made to police can benefit the defendant more in England than in the United States. Other aspects of the right to silence also are significantly different. For example, *Miranda* rules give suspects the right to cut off questioning with a request for counsel or refusal to speak, whereas police in England and Northern Ireland may continue to question and try to convince suspects to speak.¹⁹⁵ Finally, the United State's legal culture

191. Thus, even before the new rules, it was usually considered unwise for English suspects to refuse to respond when cautioned and questioned by police. See CHRISTOPHER J. EMMINS, A PRACTICAL APPROACH TO CRIMINAL PROCEDURE 331-32 (1983); ROYAL COMMISSION REPORT, 1981, Para. 4.39, at 82. The fact of pretrial silence was known to solicitors and taken into account in their advice to suspects, increasing the pressure to make statements. The 1981 Report of the Royal Commission on Criminal Procedure recognized that it is unsafe to use such silence against a defendant for any purpose, but observed that, regardless of the rules, whatever a judge may say to a jury concerning a defendant's pre-trial silence, "does not, indeed it cannot, prevent a jury or bench of magistrates from drawing an adverse inference" and that, in relying upon the right to silence, a suspect "would be wise to have regard to how people are likely to interpret his conduct." ROYAL COMMISSION ON CRIMINAL PROCEDURE, REPORT, 1991, C.M.N.D. 8092 Para. 70, at Zanier, Para 4.39 at 82. See also R. CROSS, EVIDENCE 551 (5th ed. 1979).

192. In *Regina v. Sullivan*, 51 Crim. App. R. 102, 105 (C.A. 1966), the court found that the trial judge erred in telling the jury that, if the defendant were innocent, he would be anxious to answer questions; however, Lord Salmon observed that "[i]t seems pretty plain that all members of the jury, if they had any common sense, must have been saying to themselves precisely what the learned judge said to them." *Id.*

193. See *supra* note 74.

194. While a defendant's exculpatory statement is not admissible as substantive evidence when offered by the defendant, it usually comes before the jury as *res gestae*, because the Crown offers everything said by the defendant upon arrest and under police questioning. If not, it can be extracted from the police by the accused on cross-examination. See Glanville Williams, *The Right of Silence and the Mental Element*, CRIM. L.R. 97, 99 (1988); Archbold § 1565.

195. As long as a suspect was properly cautioned, interrogation could continue in the face of protestations and objections, subject only to the prohibition against such pressures as would render the statement involuntary. PACE did not change this principle. See Van Kessel, *supra* note 92,

is different from that in the United Kingdom. Our defense bar is much more hostile to cooperating with authorities than attorneys in England or Northern Ireland.¹⁹⁶

In sum, even accepting that, in the British context, eliminating the rule against adverse inferences caused the guilty to shift from silence to lies, rather than from silence to confessions, the result may not be the same here. In a system that does not provide suspects with lawyers during questioning who are aware of prosecution evidence and able to react accordingly, the threat of adverse inferences from silence may either convince more guilty suspects to confess or induce them to lie ineffectively, resulting in more accurate factfinding.

F. *Assessing the Costs of the Right to Silence*

Seidmann and Stein acknowledge that the right to silence has costs, in the form of reduced conviction rates and the acquittal of some guilty defendants,¹⁹⁷ thus conceding that Bentham was at least half-right: that to some extent the right to silence helps the guilty escape conviction.¹⁹⁸ Yet they find the “requisite cost-benefit analysis” beyond the scope of their study, in view of the difficulty in drawing meaningful conclusions when it is not known either how many innocents might be jailed without the silence right or how many guilty are now freed because of it.¹⁹⁹ Nevertheless, the authors suggest that the social benefit of fewer wrongful convictions strongly outweighs the social cost of more wrongful acquittals.²⁰⁰ They concede that the right to silence to some extent “reduces convictions of both innocent and guilty defendants,”²⁰¹ but claim that the goal of fewer convictions of innocents is worth the cost of fewer convictions of the guilty.²⁰²

at 49-50 nn.232-41; see also William T. Pizzi, *Punishment and Procedure: A Different View of the American Criminal Justice System*, 13 CONST. COMMENT. 55, 65-67 (1996) (explaining that English suspects have the right to refuse to answer police questions, but, at the same time, police have the right to continue to inquire, such that when a suspect refuses to answer a question, police often will proceed to the next question.)

196. Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HAST. L.J. 477, 515-16 (1998) (describing American criminal trial lawyers as more aggressive and contentious than either continental or English advocates).

197. See Seidmann & Stein, *supra* note 18, at 499-500. They state that “the right to silence reduces convictions of both innocent and guilty defendants.” *Id.* at 473.

198. Bentham may be more than half-right; Seidmann and Stein also concede that his conclusion, that *only* criminals benefit from the right to silence is correct in all cases in which the evidence against them is weak. See *id.* at 469-70.

199. See *id.* at 473.

200. See *id.* Seidmann and Stein contend that, with the prevention of wrongful convictions being of “immensely greater value to society than prevention of wrongful acquittals,” retention of the silence right would be “the socially optimal choice.” *Id.* at 494.

201. *Id.* at 473.

202. See *id.* at 461, 494.

However, meaningful analysis of the value of the right to silence requires some attempt to assess the expense of silence by the guilty. Because no justice system is perfect and there will always be some number of erroneous convictions, the loss of any relevant evidence, whether from restrictions on investigative methods or suppression at trial, inevitably will help some innocent people avoid wrongful convictions. A rule against interviewing eye witnesses or using their testimony in court would benefit many innocent people who otherwise would be misidentified, but the cost in terms of fewer convictions of the guilty would be enormous. Whenever probative evidence is forfeited, accurate factfinding is impaired to some degree and the crucial question becomes whether the benefits derived are worth the cost. Thus, I will make a rough attempt to assess the costs of the right to silence, in terms of fewer guilty suspects speaking to the police or to juries, and will ask whether the assumed "anti-pooling" benefits of the right to silence are worth those costs.

1. *Helping the Guilty to Help Themselves.*—How large of a "helping" are the guilty taking for themselves from the table of "social good" by using the right to silence to avoid conviction? As noted earlier, the right to silence to some extent leads to fewer confessions and rebuttable false statements and thus to more acquittals of the guilty.²⁰³ By offering a safe harbor in silence, some confessions are lost and some false stories are not adequately investigated and rebutted at trial. The "anti-pooling" theory relies on "making silence advantageous to guilty suspects,"²⁰⁴ thereby inducing more guilty suspects to claim it. Seidmann and Stein claim that its costs are minimal because those who choose silence would not make damaging statements were the right not available.²⁰⁵ The authors undoubtedly are correct in their contention that convincing fabrications can harm the innocent.²⁰⁶ As noted earlier, however, their argument that the right to silence alters the conduct of only those who would fabricate convincingly is itself unconvincing. The authors apparently agree with experienced criminal attorneys that suspects who now waive the right to silence often make "the worst possible move" by either confessing or fabricating an account susceptible of refutation.²⁰⁷ Because most guilty suspects who now speak to the police do not do so effectively, it is highly unlikely that, if more choose speaking over silence, they will be either less prone to confess or more effective in their fabrications. Thus, the right to silence has considerable costs in terms of fewer confessions and fewer false statements which can be investigated and rebutted at trial.²⁰⁸ This is a significant consequence given the fact that studies have estimated that

203. Seidmann and Stein recognize that clear benefits flow from confessions and that the confession rate is always a hard fact. *Id.* at 437.

204. *Id.* at 438.

205. See *id.* at 499 (arguing that defendants facing evidence of moderate or intermediate strength generally would choose to lie rather than to confess if the right were not available).

206. See *infra* notes 210-11 and accompanying text.

207. See Seidmann & Stein, *supra* note 18, at 464.

208. See *id.* at 444 (noting that either silence or false responses in the face of criminal accusation usually signals guilt).

confessions are necessary to convict in approximately twenty percent of criminal cases.²⁰⁹

2. *Helping the Innocent by Choosing to Speak.*—In a number of ways innocent people benefit directly by guilty suspects either confessing or lying ineffectively. The “anti-pooling” theory focuses on benefits only in the sense of innocent suspects avoiding unjust convictions, but the innocent may enjoy other benefits through fewer criminals escaping conviction. Confessions and damaging statements induce the guilty to plea bargain, which avoids the need for witnesses and victims to endure the trauma of a lengthy trial process. Also, damaging statements, which result in convictions of the guilty, may eliminate future crimes that would have been committed by guilty beneficiaries of the right to silence.

Finally, lost confessions may harm innocent people who are erroneously charged and prosecuted, but who would have been cleared by the truthful statements of the guilty.²¹⁰ In such cases, speaking can have strong “anti-pooling” effects which are highly beneficial to innocent suspects. The more the guilty remain silent, the less they separate themselves from the innocent through confessions and refutable fabrications. If more innocent suspects are released and innocent defendants acquitted as the result of guilty suspects speaking and incriminating themselves, encouraging more to do so by restricting the right to silence might result in a net benefit for the innocent in the form of avoiding incarceration for crimes they did not commit.

Thus, one might ask how the innocent view the right to silence. Seidmann and Stein propose a “non-smoker-smoke-lover” analogy to support the view that innocent suspects would prefer the guilty to exercise the right to silence even though they have no need for it. The non-smoker who likes the smell of smoke, they believe, would reject an offer of a cigarette but would not favor a ban on smoking.²¹¹ For her, the smoking of others is beneficial, while her own smoking is not. Innocent suspects, like the passive smoker, would, by analogy, oppose elimination of the right to silence, although they do not choose to exercise it.²¹² However, in light of the many ways innocent individuals benefit from guilty suspects speaking and incriminating themselves, would the innocent really object to limitations on the right to silence, when none exercise it, merely on the ground

209. Paul Cassell’s extensive review of American studies found that the percentage of confessions which are necessary to convict varied widely, but averaged 23.8% of all cases and 26.1% of confession cases. See Cassell, *supra* note 92, at 433. Stephen Schulhofer estimated the necessity rate of confessions to be around nineteen percent. See Schulhofer, *supra* note 93, at 545 & tbl.2. My own review of evaluation studies found that the percentage of cases in which a statement was regarded as necessary for conviction varied from three percent to twenty-eight percent, with most recent scholarly studies finding statements necessary in about twenty percent of the cases. See Van Kessel, *supra* note 92, at 127-28.

210. See Cassell, *Protecting the Innocent*, *supra* note 35, at 500-01 (contending that the innocent are at risk not only from false confessions, but also from lost truthful confessions which prevent police from solving crimes.)

211. See Seidmann & Stein, *supra* note 18, at 457-58.

212. *Id.* at 458.

that marginally fewer guilty people would lie? They reasonably might assume that, just as second-hand smoke can be harmful to the “innocent” non-smoker, so can second-hand silence harm the innocent defendant.

In sum, by confessing or by fabricating in an unconvincing way, the guilty help witnesses, victims (both former and prospective), and innocent defendants, but it stretches the imagination to believe that they perform an even more important social good by merely clamming up.

III. IMPLICATIONS OF THE “ANTI-Pooling” THEORY REGARDING REFORM OF THE RIGHT TO SILENCE

A. *The Many Faces of the Right to Silence*

Seidmann and Stein advocate retaining the right to silence as we have it with respect to the prohibition on drawing adverse inferences from silence during pretrial questioning, trial, and sentencing, based on the proposition that the innocent, as well as the guilty, benefit from the right both as a refuge during pretrial questioning and as a viable alternative to perjury at trial.²¹³ Referring to Bentham and other critics of the right to silence, who would abolish the rule against drawing adverse inferences from silence, the authors regard the “key question” to be whether the “abolitionist proposal is good or bad.”²¹⁴ They conclude that it would be preferable to encourage potential fabricators to remain silent by giving them the right to do so “without sustaining punishment or adverse inferences.”²¹⁵

At present, however, abolition of the rule against adverse inferences is not a realistic possibility in America, particularly at the trial and sentencing stages.²¹⁶ Nor would it be just to permit adverse inferences from silence at trial, given our present rules of evidence and procedure. To permit an inference of guilt from the failure to take the stand, when evidentiary rules strongly inhibit even innocent defendants from testifying, would not only be unfair, it would be inimical to truth discovery. In any event, the no-adverse-inference principle is so imbedded in our

213. See *id.* at 453-54 n.79, 473, 494; see also *id.* at 440 (discussing two branches of the right to silence—the evidentiary rule against adverse inferences from its exercise and the “contempt exemption,” which gives one a privilege to refuse to testify if answers might contribute to criminal conviction, and stating that Seidmann and Stein would focus only on the former).

214. *Id.* at 433.

215. *Id.* at 461.

216. See *supra* notes 6-9 and accompanying text, noting that *Griffin* was strongly reaffirmed in *Mitchell* and that *Miranda* was reaffirmed in *Dickerson*. The possibility remains of modifying *Miranda* warnings to eliminate any implicit promise of a safe harbor in silence, but the Supreme Court has given no indication that it would be willing to treat pretrial silence differently from trial silence. The Court recently stated that “there might be reason to reconsider *Doyle*,” but acknowledged that “[i]t is possible to believe that [the caution] contained an implicit promise that [the defendant’s] choice of the option of silence would *not* be used against him.” *Portuondo v. Agard*, 529 U.S. 61, 74-75 (2000).

culture and jurisprudence that following the English approach is not a realistic option.²¹⁷

By concentrating on discrediting Bentham's proposal to permit adverse inferences, Seidmann and Stein neglect other significant aspects of the right.²¹⁸ Particularly in the pretrial interrogation context, the protection against adverse inferences arguably is not the most important protection. In the real world of criminal investigation, the right to silence may be regarded as encompassing all legal rules which significantly encourage suspects to remain silent. These include advice of the right to counsel and the prohibition on further questioning once a suspect expresses the desire to speak with a lawyer. Elimination of these protections might be more significant than the abolition of the no-adverse-inference rule. Likewise, the enactment of a more powerful right to counsel during police questioning, which prohibits police interrogation outside counsel's presence, likely would have far greater consequences than does the present prohibition on the jury learning of, or drawing of adverse inferences from, a suspect's refusal to waive *Miranda* rights.

Seidmann and Stein seem to support *Miranda* jurisprudence, which goes far beyond simple prohibitions on adverse inferences, providing a right to counsel during custodial questioning, and a complex system of warning and waiver standards.²¹⁹ Elimination of *Miranda*'s warning requirements is highly unlikely, in light of the Supreme Court's affirmation of *Miranda* as constitutionally based. However, the form and parameters of *Miranda*'s warning requirements are constantly being adjusted, as are associated guarantees, such as the Sixth

217. See *Mitchell v. United States*, 526 U.S. 314, 330 (1999) (holding that *Miranda* is constitutionally based and stating that “[p]rinciples once unsettled can find general and wide acceptance in the legal culture, and there can be little doubt that the rule prohibiting an inference of guilt from a defendant’s rightful silence has become an essential feature of our legal tradition”). Even judges critical of *Miranda* and the right to silence have balked at the prospect of abandoning *Griffin* and allowing defendants’ trial silence to support an inference of guilt. While the dissenters in *Mitchell* criticized *Griffin* as a “breathtaking act of sorcery . . . [transforming] legislative policy into constitutional command,” *id.* at 336 (Scalia, J., dissenting), only Justice Thomas urged reexamining *Griffin* at this point. See *id.* at 341-42 (Thomas, J., dissenting). Justice Scalia, no fan of *Griffin*, remarked recently, “[T]he inference of guilt from silence [at trial] is not always ‘natural or irresistible.’” *Portuondo*, 529 U.S. at 67. For instance, “[a] defendant might refuse to testify simply out of fear that he will be made to look bad by clever counsel, or fear ‘that his prior convictions will prejudice the jury.’” *Id.* (quoting *People v. Modesto*, 398 P.2d 753, 763 (1965)).

218. See Seidmann & Stein, *supra* note 18, at 433, 446-47, 450. Seidmann and Stein’s analysis focuses on “whether the right to silence (in the form of immunity against adverse inferences, properly enforced) is available or not.” *Id.* at 464.

219. See *id.* at 498-500 (examining the effect of *Miranda* on confession and conviction rates and suggesting that *Miranda* studies, which show that it “significantly reduced the clearance rate,” are consistent with the theory that the right to silence does have costs in terms of declining conviction rates). See also *id.* at 503-04 (suggesting that a repeal of *Miranda* “would increase the conviction rate among both guilty and innocent defendants, without significantly affecting the confession rate”).

Amendment right to counsel, which comes into play only after formal accusation but applies regardless of formal interrogation²²⁰ and the due process voluntariness rule which applies to all contexts involving coercion.²²¹ Thus, the most important questions today concern whether various aspects of the right to silence should be either expanded or contracted. In this respect the “anti-pooling” theory points in directions which have important, but quite different, implications for the scope of the many faces of the right to silence.

B. *Enhancing the Right to Silence*

First, the “anti-pooling” theory strongly suggests that the right to silence, which currently is claimed at the pretrial stage by only a minority of defendants,²²² should be expanded and made even more attractive to guilty suspects. The more the guilty remain silent, the greater the “anti-pooling” effect and the more benefits flow to the innocent. As Seidmann and Stein put it, because the innocent must compete with the guilty in this enterprise, measures should be adopted which “drive false statements out of the market.”²²³ In the authors’ ideal world, the right to silence would be so attractive that the guilty would separate from the innocent by exercising the right, and the jury would draw “a favorable inference from any exculpatory statement” resulting in the acquittal of innocents, “who alone make such statements.”²²⁴ In short, no lemon seller would make false claims, and apple sellers always would be believed. Thus, the logic of “anti-pooling” suggests expanding the right to silence to make it even more appealing to the guilty, such that they will virtually always exercise it.

Full effectuation of “anti-pooling” benefits to the innocent, through exercise of the right to silence by guilty fabricators, would entail elimination of all false statements by guilty suspects and defendants. Because it is not possible to accurately separate all false claims from true exculpatory statements,²²⁵ we would

220. See *Michigan v. Jackson*, 475 U.S. 625, 626 (1986) (holding that the Sixth Amendment embodies the *Miranda-Edwards* rule, such that a defendant’s request for appointment of counsel at arraignment prevents police from initiating interrogation about the charged offense); *Texas v. Cobb*, 532 U.S. 162, 164 (2001) (holding that the Sixth Amendment right to counsel is “offense specific” and does not apply to uncharged offenses that are “closely related factually” or “factually interwoven” with the charged crime, unless they are “the same offense” under double jeopardy standards).

221. See *Colorado v. Connelly*, 479 U.S. 157 (1986) (holding that coercive police activity is a necessary predicate of finding both an involuntary confession under due process and an involuntary waiver of *Miranda* rights).

222. See Seidmann & Stein, *supra* note 18, at 448 (stating that “suspects do not exercise the right to silence very often either at interrogation or at trial”).

223. *Id.* at 460.

224. *Id.* at 469.

225. Threatening extreme sanctions, such as the death penalty, for all fabrications also might drive lies from the market, but many true statements also would be lost.

have to exclude all claims of innocence, whether in the form of extrajudicial statements or trial testimony.²²⁶ Those suspected of or charged with crimes could only speak if they were willing to confess. In the pretrial context, a prohibition on all police questioning of suspects would come close to accomplishing the same objective, as would a requirement that counsel consent to all police questioning, although some suspects undoubtedly would assert their claims of innocence without being questioned.

Seidmann and Stein do not advocate such extreme measures but instead concentrate on the retention of existing right to silence principles, particularly the rule against adverse inferences and *Miranda* jurisprudence.²²⁷ However, their theory does suggest the expansion of rules which would increase the attractiveness of silence, at least to guilty fabricators, whose lies are the main source of the "pooling" problem. Thus, the "anti-pooling" theory may be seen as another reason for both accepting the arguments of those advocating the enlargement of procedural rights during police interrogations²²⁸ and rejecting arguments to alter right to silence rules to encourage suspects to make voluntary statements and defendants to testify in court.²²⁹ Implications of the "anti-pooling" theory regarding an even more protective right to silence are of considerable significance.²³⁰

Expansion of the right to silence at the pretrial stage might involve the bolstering of *Miranda*'s warning and waiver standards and the adoption of measures that increase the "rational use" of the right to silence, which the guilty

226. Of course, rules preventing the defendant from testifying would be unconstitutional. See *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (holding that an automatic rule limiting defendant's testimony to matters recalled and related prior to hypnosis is unconstitutional and stating that the right to testify is "essential to due process of law in a fair adversary process" and "basic in our system of jurisprudence").

227. See Seidmann & Stein, *supra* note 18, at 440. Seidmann and Stein analyze the right to silence as having two branches—the evidentiary rule against adverse influences from its exercise and the "contempt exemption" which gives one a privilege to refuse to testify if answers might contribute to criminal conviction. They note that their analysis will focus only on the former aspect. They also cite studies concerning the effect of *Miranda* and attack those who seek to eliminate *Miranda*'s warning and waiver standards. See *id.* at 498-500, 503.

228. See, e.g., Leo & Ofshe, *supra* note 35; Leo & Ofshe, *Consequences of False Confessions*, *supra* note 35; Leo & Ofshe, *Scapecoat*, *supra* note 35; see also Jackson, *supra* note 176 (advocating greater equality and fairness during police interviews by adoption of formalized, adversary-style procedures including clear guidelines on disclosure of police evidence and a requirement that those refusing ordinary legal advice be referred to the judge for appointment of a legal advisor who would advise the suspect "on behalf of the court").

229. See, e.g., AMAR, *supra* note 40; Cassell, *Balanced Approaches*, *supra* note 35; Cassell, *Wrongful Conviction*, *supra* note 35.

230. Of course, liars will always be with us. Even with a substantial right to silence, there will never be a time when only the innocent will claim innocence, or when lemon-sellers will stop praising their cars. The reality is that we must live with uncertainty regarding the validity of exonerating statements.

generally do not claim, although it is in their best interest to do so. For example, *Miranda* warnings might include an explicit "safe harbor" promise that the suspect's silence will not be known to the jury whether or not he later testifies.²³¹ Furthermore, in light of the "strong correlation" between the exercise of the silence right and representation by counsel,²³² measures could be adopted that would encourage more suspects to request legal advice. If the goal is to induce guilty suspects to act rationally,²³³ the best means would be to give them counsel, whose primary interest is in protecting their clients from conviction. For example, *Miranda* waivers could be held invalid unless explicit, which would require asking of indigent suspects whether they would like counsel appointed to advise them during questioning.²³⁴ Waiver of *Miranda* rights might be deemed invalid in the absence of counsel, thereby requiring the presence of counsel at every interrogation, whether or not requested by the suspect.²³⁵ Finally, rules might require disclosure of all evidence in the hands of the authorities prior to any questioning and prohibit all deceptions, including any suggestion that the incriminating evidence in the hands of the police is stronger than it actually is.²³⁶

231. The promise is not a part of required *Miranda* warnings, although it is regarded as implicit in them. See *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (stating that, while "*Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings" and holding that the use for impeachment purposes violates due process).

232. See Seidmann & Stein, *supra* note 18, at 465.

233. Seidmann and Stein rely on the assumption that, in the rational pursuit of exoneration, the guilty will refrain from "pooling" by exercising the right to silence if it appears in their interest to remain silent rather than to lie. See *id.* at 448.

234. Currently, an express waiver of the right to counsel is not required, but may be implied from the circumstances. See *North Carolina v. Butler*, 441 U.S. 369, 370 (1979) (rejecting a *per se* rule that a suspect must be shown to have "explicitly waived the right to the presence of a lawyer").

235. Presently, *Miranda* and its progeny do not require the actual presence of stationhouse lawyers. See *Miranda v. Arizona*, 384 U.S. 436, 474 (1966) (rejecting the notion "that each police station must have a 'station house lawyer' present at all times to advise prisoners"). Nor do defendants have the right to see a lawyer on request unless interrogated. See *Moran v. Burbine*, 475 U.S. 412, 423-24 (1986) (finding that *Miranda* rights had been waived despite the fact that the defendant had not been informed that counsel purporting to represent him had called police and requested that no questioning take place and that the police had assured counsel that the defendant would not be questioned); *Duckworth v. Eagan*, 492 U.S. 195 (1989) (holding that *Miranda* does not require that lawyers be producible on call, but only that a suspect be informed that he has the right to counsel before and during questioning and that a lawyer will be appointed for him if he could not afford one). Thus, "[i]f the police cannot provide appointed counsel, *Miranda* requires only that police not question a suspect. . . ." *Id.* at 204.

236. The Supreme Court generally has tolerated police trickery and has done little to curb its use by excluding evidence. See WAYNE R. LAFAYE & JOSEPH H. ISRAEL, *CRIMINAL PROCEDURE* § 6.1(a)-(c) (1985); see also *Moran*, 475 U.S. at 423, 435 (viewing the deliberate misleading of defendant's lawyer by the police as "highly inappropriate" and "distasteful," but holding that such

1. *The Consequences of an Expanded Right to Silence.*—Expanding the right to silence at the pretrial interrogation stage, by rules designed to increase the “rational use” of the right, would lead to even more serious pooling problems, as well as to the release of more guilty defendants. Such rules would cause both greater use of silence by guilty suspects, who otherwise would make damaging statements, and more uncontradictable fabrications, which would pool with the true claims of innocents. Seidmann and Stein contend that the right to silence is used only by those who otherwise would fabricate; that is, the right causes the guilty to switch from lies to silence, but not from truth (confessions) to silence.²³⁷ I have argued that there are strong reasons to be skeptical of this assumption, but even if valid with respect to the rule against adverse inferences, it does not hold water with respect to those aspects of the right which would encourage suspects to exercise the right more rationally, such as preventing police deception, or increasing access to counsel and knowledge of the prosecution’s evidence.

2. *Enhancing the Right to Counsel.*—Expanding rules which promote the rational use of the right to silence, through the presence and advice of counsel, would result in a drastic reduction in statements to police, including both confessions and damaging denials. Competent lawyers know that, in our system of justice, confessing to the police without a plea agreement, or similar arrangement garnering an advantage,²³⁸ severely damages a defendant’s case. As supporters of *Miranda* point out, “[a]lthough confession may be good for the soul, it is lousy for the defense.”²³⁹ Furthermore, defense lawyers recognize that even claims of innocence or explanations of suspicious conduct can have damaging consequences.²⁴⁰

In Europe and England, the presence of counsel is not usually a significant barrier to pretrial questioning, but here it is. Only in rare cases will competent American counsel advise their clients to speak to police. For example, counsel

deception is irrelevant to the waiver issue when the suspect is unaware of it); *Colorado v. Spring*, 479 U.S. 564, 576 n.8 (1987) (holding that police have no obligation to advise a suspect of the crime concerning which they wish to question him, but leaving unresolved the question whether a *Miranda* waiver would be valid had there been “an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation”). For a rare case in which police trickery resulted in the exclusion of a confession, see *State v. Cayward*, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989) (excluding a confession obtained after police told the accused that they already had sufficient evidence to convict him).

237. See Seidmann & Stein, *supra* note 18, at 470 (stating that suspects who would confess “would not switch to silence were [it] to become privileged”).

238. For example, a defendant may seek to avoid statutory mandatory sentencing minimums by offering substantial assistance under U.S.S.G. § 5K1.1 (2001).

239. Weisselberg, *supra* note 7, at 154. Weisselberg agrees with Richard Leo that “all approaches to the analysis of human behavior that presume rationality would, if applied superficially, classify confession as an irrational act.” *Id.* at 154 n.226 (quoting Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 *STUD. L. PROB. & SOC’Y* 189, 194 (1997)).

240. See *supra* note 76 and accompanying text.

might deem it to be in the defendant's interest to speak to police if she firmly believes that the client is factually innocent and that his honest claims will convince authorities of his non-involvement.²⁴¹ Also, counsel may find a confession advantageous, where the prosecution's evidence is so overwhelming that the client has nothing to lose, and maybe something to gain, by giving a full statement.²⁴² Yet, in cases where the prosecution's evidence is very strong, Seidmann and Stein believe that suspects usually will confess even without a right to silence.²⁴³

It is in weak or marginal cases, when the police have probable cause to arrest

241. Even then, most defense lawyers would hesitate unless their clients' claims of innocence first were verified, such that it was reasonably certain that the statements would not be used against them. For a recent case involving the unusual situation in which a lawyer granted permission for his client to speak with the police, *see Texas v. Cobb*, 532 U.S. 162 (2001). While under arrest, defendant had confessed to committing an unrelated home burglary, but denied knowledge of the disappearance of the residents. Following his indictment for the burglary, his counsel gave police permission to question him concerning the disappearances and he denied any involvement. Counsel most likely believed that his client was not guilty and would provide a convincing account, which he apparently did, as he was neither arrested nor charged with the murder of the residents, but instead released on bond during the pendency of the burglary case. *See id.* at 165. Certainly, competent counsel would not have granted permission for the interview had she believed that her client would either confess or give an unconvincing or incriminating story.

While out on bond, the defendant confessed to his father that he had killed the residents. After his father told the police of the confession, the police arrested the defendant and, without seeking his lawyer's permission, questioned him after reciting *Miranda* warnings and procuring a waiver, whereupon he confessed to the murders. The Court held that the police did not have to first ask for counsel's permission because the Sixth Amendment right to counsel is "offense specific," *id.* at 178, and did not apply to the uncharged murder offenses although they may have been "closely related factually," *id.* at 186, or "inextricably intertwined with" the burglary charge. *Id.* at 173. The Court did not discuss what counsel would do if called by the police and asked for permission after learning of defendant's confession to his father. The concurring justices, however, assumed that counsel would object which would deny defendant "the choice to speak," whereas the dissenters implied that police would have received counsel's permission.

242. The Sentencing Guidelines applicable to federal cases provide that a defendant is entitled to a reduction for acceptance of responsibility if he "clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a) (2001). But for this purpose, the confession does not have to be made to the police; it can come after the defense has obtained discovery and fully assessed the strength of the prosecution's case. However, admitting guilt only after a verdict of guilty usually will not suffice and a guilty plea alone does not give a defendant an automatic right to the downward departure. *See id.* § 3E1.1(a), app. n.2 & 3.

243. Seidmann and Stein believe that if the incriminating evidence is "sufficiently strong," the right to silence "becomes irrelevant to behavior" since the guilty always will prefer "to confess and enjoy the small but positive remission of sentence." Seidmann & Stein, *supra* note 18, at 469. Apparently, Seidmann and Stein ignore or discount the many "dead cases" well known to career defense attorneys in which guilty defendants prefer going to trial rather than confessing or accepting a plea bargain.

but not enough evidence to convict, that, by increasing the rational use of the right to remain silent, the presence and advice of counsel would have the greatest effect. In such cases only the most incompetent counsel would advise a suspect to talk to the police.²⁴⁴ In cases where evidence of guilt is weak, even generally less aggressive English lawyers often will advise silence despite the possibility of adverse inferences.²⁴⁵ Consequently, increasing the involvement of counsel during police interrogation would tend to eliminate confessions and other damaging statements in all but the most unusual cases, and would be particularly harmful to accurate factfinding in cases where police do not have strong evidence of guilt. And these are the cases in which confessions are most needed to convict the guilty and where, according to Seidmann and Stein, exercise of the right to silence helps only the guilty.²⁴⁶

Our real dilemma, as posed by Justice Jackson over fifty years ago, is that “[t]o subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom.”²⁴⁷ However,

[t]o bring in a lawyer means a real peril to solution of the crime because, under our adversary system [a lawyer] owes no duty whatever to help society solve its crime [and] . . . any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.²⁴⁸

Since Justice Jackson wrote these words, our Supreme Court has developed a complex body of constitutional protections for those subjected to interrogation and various states have enacted or are considering further protections, such as time limits and recording requirements.²⁴⁹ But it remains true today, as it was then, that bringing a lawyer into an interrogation virtually guarantees its termination.

3. *Limiting Deception and Requiring Disclosure of Police Evidence.*—Rules that require early disclosure of prosecution evidence or which prohibit

244. See *People v. Claudio*, 629 N.E.2d 384, 385 (N.Y. 1993) (stating that the court has “accept[ed] the premise, which was shared by every court that has considered this case, that retained counsel’s conduct in advising defendant to confess to the police—at a time when there was no concrete evidence against him and no possibility of a plea offer—represented gross professional incompetence”); compare *People v. Smith*, 451 N.E.2d 157 (N.Y. 1983) (holding that counsel was not incompetent by agreeing to defendant’s meeting with the police in light of the fact that the prosecution’s case was overwhelming and that it was reasonable for counsel to believe that defendant had nothing to lose by speaking to the authorities and cooperation might result in a favorable plea bargain).

245. See *supra* notes 131-32 and accompanying text.

246. Seidmann & Stein, *supra* note 18, at 468-70.

247. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting).

248. *Id.*

249. See, e.g., Peter Erlinger, *Getting Serious About Miranda in Minnesota: Criminal and Civil Sanctions for Failure to Respond to Requests for Counsel*, 27 WM. MITCHELL L. REV. 941, 943-44 (2000) (noting Minnesota’s constitutional requirement that confessions be recorded).

deceptions, such as false statements of the strength of incriminating evidence, also would tend to reduce confessions and easily refuted false claims of innocence. All who have studied police interrogation know the importance of the suspect's unawareness of the evidence possessed by the police. As Seidmann and Stein recognize, the interrogation "game disadvantages the guilty suspect [who] must bluff in order to signal innocence, but . . . [i]n order to bluff successfully, the guilty suspect must be aware of the cards that the police hold."²⁵⁰ Seidmann and Stein conclude that under "stressful interrogation" and with "asymmetric information," "guilty suspects often choose the worst possible move, which brings about the worst possible outcome."²⁵¹ However, this "worst move" for the guilty is usually best for the innocent and for society because it operates to separate the guilty from the innocent and leads to more accurate factfinding. Thus, the authors appear to concede that deception is an effective technique for discovering the truth and for leading the guilty to separate themselves from the innocent. They state that the "typical suspect confesses . . . only when confronted with evidence that he believes to be irrefutable or when offered a tempting deal by the police or the prosecution."²⁵²

The availability of deception is particularly important in marginal cases, in which police have strong suspicions of a defendant's guilt but not enough evidence to persuade a jury beyond a reasonable doubt. These are the very cases in which confessions are most needed to convict the guilty and where, according to the "anti-pooling" theory, the exercise of the right to silence does not benefit the innocent but merely helps the guilty avoid conviction.²⁵³

A barrage of scholarly criticism has been leveled at the lenient attitude of American courts toward police deception.²⁵⁴ Professors Ofshe and Leo complain that police manipulate a suspect's perception of his situation with the purpose of leading him to conclude that confessing is a rational and appropriate response.²⁵⁵

250. Seidmann & Stein, *supra* note 18, at 443.

251. *Id.* at 464. Seidmann and Stein assume that the police are not obligated to familiarize suspects with incriminating evidence and that suspects usually have no information about evidence possessed by the police. *Id.* at 443-44.

252. *Id.* at 450-51. In fact, Seidmann and Stein assume that guilty suspects will confess "if, and only if, the evidence against them is strong." *Id.* at 499-500.

253. *See id.* at 468-70.

254. *See, e.g.,* Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957 (1997); Charles E. Glennon & Tayebe Shah-Mirani, *Illinois v. Perkins: Approving the Use of Police Trickery in Prison to Circumvent Miranda*, 21 LOY. U. CHI. L. J. 811 (1990); Ofshe & Leo, *Decision to Confess*, *supra* note 35, at 979; Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. IN L., POL. & SOC'Y 189 (1997); Daniel W. Sasaki, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593 (1988); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997); Welsh White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425 (1996).

255. *See* Ofshe & Leo, *Decision to Confess*, *supra* note 35, at 1114-15 (contending that

Professor Alschuler also contends that the Constitution should prohibit police from engaging in deceptive practices such as falsifying incriminating evidence or misrepresenting the strength of evidence against a defendant.²⁵⁶ But let's be realistic. If confessing to police in contexts other than plea bargaining, offers little or no advantage to a suspect and risks severely damaging his case, in order to induce guilty suspects to tell the truth, police must deceive them by some means, and one such means is to convince them either that the evidence is so strong that denials are useless or that confessing might offer some advantage. Because the act of confessing in today's justice system ultimately is damaging to a defendant and, in that sense, highly irrational, modern police interrogation must be a confidence game if it is to be an effective means of determining the truth.

In sum, enlarging the right to silence by adopting rules that encourage more guilty people to claim the right to remain silent most likely would lead to unhealthy consequences, including even greater "pooling" in ways that would not only harm innocent defendants but help more guilty defendants avoid conviction. Some Europeans advocate greater equality and fairness during police interviews, including the adoption of formalized, adversary-style procedures involving full disclosure of police evidence and court-appointed legal advisors such that all suspects are fully informed as to whether it is in their interest to cooperate.²⁵⁷ Under American rules, however, requiring disclosure of prosecution evidence and prohibiting deception, especially when combined with the assistance of counsel, are inimical to the discovery of truth when applied to pretrial interrogation.

While on its face the "anti-pooling" theory seems to favor an expanded right to silence, the assumptions underlying the theory show that increasing the rational use of the right to silence actually may lead to fewer confessions and

police manipulating often leads to unreliable confessions); see also Leo & Ofshe, *Consequences of False Confessions*, *supra* note 35, at 492 (attributing false confessions to poor police training, particularly to the reliance on manuals that teach police to use tactics "that have been shown to be coercive and to produce false confessions").

Professor Paul Cassell has vigorously criticized the contention that false confessions are pervasive or that they occur frequently. See Cassell, *Balanced Approaches*, *supra* note 35, at 1123-26; Cassell, *Protecting the Innocent*, *supra* note 35, at 497; Cassell, *Wrongful Conviction*, *supra* note 35, at 523. For a "final" response to Professor Cassell, see Leo & Ofshe, *Scapegoat*, *supra* note 35, at 557.

256. See Alschuler, *supra* note 254, at 974.

257. See R. J. Toney, *Disclosure of Evidence and Legal Assistance at Custodial Interrogation: What does the European Convention on Human Rights Require?*, 5 E & P 39, 53-54 (2001) (arguing that lack of clear guidance on police disclosure violates the equality of arms principle of Article 6 of the European Convention); Jackson, *supra* note 176, at 172 (advocating judicially appointed lawyers who would advise suspects "on behalf of the court" such that "[f]rom the beginning of the interview suspects would be given an appraisal of how much information there was against them and would be given a much more informed choice as to whether it was in their interest to cooperate with the proceedings").

rebuttable statements and thus to an even greater "pooling" effect and even more harm to the innocent. Consequently, Seidmann and Stein's analysis suggests good reason to be skeptical of proposals that would either expand the right to silence in the pretrial context or otherwise formalize the interrogation process by means of lawyers armed with knowledge of police evidence and sworn to use all legal means to prevent the prosecution from proving its case beyond a reasonable doubt.

C. *Restricting the Right to Silence*

With respect to the possibility of a significantly reduced right to silence, the implications of the "anti-pooling" theory remain intriguing. Seidmann and Stein suggest that, when the "anti-pooling" rationale does not apply, there is no valid reason to protect against adverse inferences from the defendant's silence.²⁵⁸ This raises an interesting implication of the "anti-pooling" theory which undercuts the right to silence in significant ways. The theory posits that, if the guilty "cannot fabricate evidence in a way that harms the innocent, then they should not be exempted from potential self-incrimination," and that "[o]nly the existence of a meaningful fabrication alternative should therefore activate the privilege."²⁵⁹ But because the right to silence helps innocent suspects only when the incriminating evidence is "of intermediate strength,"²⁶⁰ the privilege should offer no protection whenever the evidence against a suspect is either very weak or very strong. Furthermore, the theory suggests that the right to silence should protect only those who can lie effectively. Those who might confess anyway or who lack the ability or factual context that would enable them to lie convincingly (and imitate the innocent), should not be able to claim the privilege. If the rule were applied individually, rather than categorically, any person who had no believable story to tell would be unprotected by the privilege. This approach, of course, would amount to a radical, unworkable, and clearly unacceptable revision of the right to silence and privilege against self-incrimination.

D. *Recognizing the Harm Caused by Uncontradictable Lies and the Importance of Unrehearsed Statements*

Critics of *Miranda* usually concentrate on the decision's effect on the confession rate. The "anti-pooling" theory is helpful in focusing attention on the consequences of statements other than confessions. Moreover, the "anti-pooling" theory demonstrates the importance of distinguishing between true and false claims of innocence, and between effective fabrications and those which can be easily rebutted and used to further accurate factfinding. Seidmann and Stein's

258. See Seidmann & Stein, *supra* note 18, at 480. Nor do Seidmann and Stein believe that the innocent need protection from adverse inferences based upon failure to testify, notwithstanding the argument that many innocent defendants may remain silent out of fear of prior conviction impeachment. See *id.* at 494.

259. *Id.* at 480.

260. *Id.* at 461-62.

analysis is particularly beneficial in pointing out the harm caused by convincing fabrications and the need to avoid rules which facilitate the manufacture of such statements—that is, those procedures which might help the guilty to create convincing and uncontradictable fabrications.

There is no disputing that, as Seidmann and Stein claim, lies can hurt and it is important to minimize false statements that are not susceptible of refutation. However, their focus is a bit narrow. They concentrate on the harm to the innocent caused by the “pooling” effect caused by “the ability to tell uncontradicted lies,”²⁶¹ on the ground that, the more the guilty lie, the less likely it is that factfinders will believe true claims of innocence. But convincing fabrications can frustrate accurate factfinding in more important ways than the general “pooling” effect in the marketplace of exonerating statements. False statements of innocence, which are plausible and not subject to effective contradiction, may not only lead to the release of the guilty; they may contribute to the arrest and conviction of the innocent by “specific pooling” (the creation of case-specific factual conflicts). This effect is more directly detrimental to accuracy than the marginally diminished credence given to statements by innocents due to the fact that a few more guilty people lie. A false but unrefutable denial may lead the police on “wild goose chases,” wasting resources and endangering others who may be wrongly accused. On the other hand, a suspect who refuses to speak gives the police good reason to believe that they have the right person. Even more damaging are statements falsely identifying another person as the perpetrator or claiming that another was the main actor. An accomplice to a crime may give false testimony, in the hope of a reduced sentence, which incriminates one who is either innocent or not as culpable as claimed. Furthermore, an accomplice’s confession to the police, which is both self-incriminatory and falsely accusatory, may be admitted into evidence despite the lack of any opportunity of the one falsely accused to cross-examine the declarant-accomplice.²⁶² In these cases, the innocent would be better off had the suspect remained silent.

Furthermore, the “anti-pooling” theory is helpful in emphasizing the importance of unrehearsed statements, that is, the suspect’s story before he or she

261. *Id.* at 480.

262. While the Confrontation Clause and hearsay rules may bar admission of blame-shifting statements to the police, the Supreme Court has left the door open to admission of out-of-court statements by unavailable declarants, which merely share culpability with others. *See Williamson v. United States*, 512 U.S. 594, 599 (1994) (holding that the against-penal-interest exception of FRE 804(b)(3) covers “only those declarations or remarks within the confession that are individually self-inculpatory”); *see also Lilly v. Virginia*, 527 U.S. 116 (1999) (holding that the Sixth Amendment’s confrontation right is violated by admission of a nontestifying accomplice’s entire confession that contains some statements against the accomplice’s penal interest and others that inculcate defendant, but leaving open the possibility of admitting only those parts of accomplice statements that equally inculcate both the accomplice and the defendant, as well as those accusatory statements made outside the context of police questioning in anticipation of prosecution).

has an opportunity to learn about the prosecution's case, consider what might be an acceptable defense, and contrive a reasonable but false response. However, such statements also are important to the defendant, and their admissibility should be a two-way street, which freely admits defendant's claims of innocence whether offered by the prosecution or the defendant. Defendant's exonerating statements, made in the immediate course of critical events, such as arrest or confrontation with incriminating evidence, which are significant and not the product of lawyer advocacy should be admissible when offered on a defendant's behalf. For example, evidence of a defendant's denial when confronted with contraband in the immediate circumstances of its discovery, which often is not admitted as an excited utterance,²⁶³ should be admitted on the defendant's behalf, at least as long as the defendant takes the stand and does not use the statement as a substitute for his own in-court testimony.²⁶⁴

263. See, e.g., *United States v. Sewell*, 90 F.3d 326, 327 (8th Cir. 1996) (affirming the trial court's exclusion of defendant's statement denying knowledge of the presence of a gun found in the trunk of his car, which was uttered immediately following its discovery, on the ground that there was not a sufficient showing of stress which "stills the reflective faculties").

264. Because the defendant is an available witness only to the defense, if the defendant could freely introduce his or her own prior exonerating statements, particularly those prepared and packaged by defense counsel, the defense could quite easily introduce defendant's personal story untested by cross-examination. Thus, we are faced with conflicting interests—the defendant's interest in presenting his or her own "transactional" statements made during critical events, which often have significant probative value, and the prosecution's interest in avoiding the presentation of a fabricated defense which cannot be tested by cross-examination. An adversary-oriented accommodation of these interests would lead to admission of such statements provided that they are not used as a substitute for the defendant's trial testimony. See *Van Kessel*, *supra* note 196, at 540-41.

In *Sewell*, the defendant took the stand in his own defense, so the purpose of deterring defendants from "testimonial substitution" was not served by excluding the statement. See *Sewell*, 90 F.3d at 326. A rule admitting as non-hearsay a defendant's prior consistent statements, when helpful in evaluating the defendant's credibility as a witness, would serve this purpose if limited to transactional-type statements, as opposed to lawyer-created or packaged denials. See, e.g., MINN. STAT. ANN. § 50, Rule 801(d)(1)(B) (Michie 1989 & Supp. 2001).

Consider the highly publicized road rage case involving Leo, the white bichon frise. See *Nieves*, *supra* note 85, at A12. Following a fender-bender in San Jose, California, one of the drivers became enraged, reached into the other car, pulled out the owner's small dog, Leo, and hurled him into traffic where he was struck and killed. *Id.* Witnesses were available to testify to defendant's conduct but at his trial for animal cruelty, his lawyer said the defendant would testify that the dog bit him and he involuntarily jerked back causing the dog to be thrown onto the road. *Id.* (not a bad story in response to a very strong prosecution case). But did the defendant give the same account to witnesses at the scene or to the police upon his arrest, or did he remain silent and come up with the story for the first time at trial? If he had given the same statement in a "transactional-type" context, it would have been very helpful, whereas his remaining silent would have been highly probative of guilt. Yet, under today's rules, ordinarily a defendant may not introduce his prior statement and the prosecution may not bring up his silence. In the Leo case, the

E. Shaping the Right to Silence Through "Anti-Pooling" Measures Which Increase Accurate Factfinding

There remains the possibility of fashioning a right to silence that is used primarily by those guilty suspects who otherwise would tell uncontradictable lies, rather than by those who would confess or make damaging statements. According to the "anti-pooling" theory, there is no need to drive all false statements from the market, only those that are likely to be convincing, difficult to refute, and ultimately misleading. Consequently, the various aspects of the right to silence might be defined such that silence is used less by those guilty suspects who otherwise would confess or make damaging statements and more by those who would tell uncontradictable fabrications. Of course, all liars hope they will be believed, and it would not be possible to distinguish between those who would lie well and those who would not. Even if we could, it would be unfair and counter-productive to reward good liars with the right to silence, while denying the right to ineffective fabricators.

However, the right to silence and associated guarantees applicable to police interrogation could be shaped with a focus on avoiding procedures which enable suspects to lie in ways that harm the innocent through convincing fabrications. "Anti-pooling" could be furthered both by encouraging procedures which would tend to induce guilty suspects to tell the truth and by avoiding procedures which would give them additional opportunities or tools for creating uncontradictable fabrications. Seidmann and Stein give little attention to alternative "anti-pooling" methods that reduce confusing fabrications, but that offer fewer benefits for the guilty. They recognize that "the desired separation" also could be achieved by inducing more guilty suspects to confess rather than lie, but they dismiss the prospect of increasing incentives to confess, on the ground that they "generally incur greater social costs than do incentives for silence."²⁶⁵ They note only two alternative measures to "drive false statements out of the market." First, they argue increasing the punishment for lies, such as more prosecutions for perjury, would achieve similar results, but would not be feasible due to the difficulty of detecting and prosecuting liars.²⁶⁶ Second, they believe that inducing guilty suspects to produce true statements by such means as plea bargaining and witness agreements, also would achieve separation but, again, at a high social cost.²⁶⁷ They dismiss these alternatives, contending that a "much cheaper" and preferable way to "purge the lemons" is to pay potential producers of false statements to remain silent by giving them the right to do so "without sustaining punishment or adverse inference."²⁶⁸

Yet, encouraging guilty suspects to speak and incriminate themselves

judge ruled that, if the defendant testified, the prosecution could call a witness to his prior violent assault on another dog. The defendant never took the stand and was convicted. *See id.*

265. Seidmann & Stein, *supra* note 18, at 434.

266. *See id.* at 460.

267. *See id.* at 460-61.

268. *Id.* at 461.

directly, rather than remaining silent and incriminating themselves inferentially, would be a much more effective "anti-pooling" method and would more clearly separate the guilty from the innocent. The same may be said for avoiding procedures which give guilty suspects additional tools for creating uncontradictable fabrications. For example, opening the interrogation process to independent monitoring and verification would promote reliability, efficiency, and fairness. It would also lay a foundation for reconsidering some of *Miranda's* harsh and inflexible rules, such as the requirement of automatic exclusion regardless of the extent of the impropriety, the seriousness of the case, or importance of the statement, as well as its misleading right to counsel warnings, which operate only to shut down questioning. We also might reconsider rules which prohibit questioning with respect to all crimes and for all time following a request for counsel unless the suspect initiates further discussions concerning the investigation. Justice Ginsburg has noted that "the truth-seeking function of trials places demands on defendants" and that in some cases burdening constitutional rights may be justified by the aim of sorting the guilty from the innocent.²⁶⁹ Burdening the right to silence, to some extent, may be constitutionally justified if shown to further significantly the goal of truth-determination.²⁷⁰

CONCLUSION

Seidmann and Stein contend that we should retain the right to silence as an attractive alternative to speaking during interrogation and trial on the ground that by remaining silent, the guilty refrain from "pooling" their lies with the true denials of innocents, thereby rendering the accounts of innocents more credible which "minimizes the risk" of their wrongful conviction.²⁷¹ Although the right to silence may help some guilty people avoid conviction, the authors believe that it is a small price to pay for the benefits it provides to the innocent.²⁷² The theory may be appealing in the context of an economic analysis of a rational market for exonerating statements, but, in the real word of the American criminal process, only a very few innocents likely benefit from the general "anti-pooling" effect of

269. *Portuondo v. Agard*, 529 U.S. 61, 79 (2000) (Ginsberg, J., dissenting) (contending that the truth-seeking function was not advanced by allowing the prosecutor to invite the jury to convict on the basis of the defendant's ability to hear the testimony of witnesses who testified before he took the stand, regarding such conduct "as consistent with innocence as with guilt," and finding no justification for imposing the burden when it "will not yield a compensating benefit").

270. The Supreme Court has stated that not every pressure or encouragement to waive a constitutional right is invalid and that "[t]he question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether the effect is unnecessary and therefore excessive." *United States v. Jackson*, 390 U.S. 570, 582 (1968) (holding that seeking reimbursement for trial expenses is a legitimate state objective and does not impose an unnecessary or excessive burden on the right to jury trial).

271. See Seidmann & Stein, *supra* note 18, at 457-58.

272. See *id.* at 473, 494.

the guilty who exercise their right to silence. It is unlikely that today's jurors accumulate the market savvy of serial car buyers concerning the quality of their purchases but, even if they do, only those innocent suspects who tell unconvincing stories, and against whom the evidence is neither very strong nor very weak, are in a position to reap the good that comes from fewer guilty fabricators choosing to remain silent. Furthermore, only a small proportion of guilty suspects and defendants who now claim the right to silence would, absent the right, speak and "pool" their fabrications in a way that would harm innocents. Only those guilty suspects and defendants who would tell convincing stories, absent the right to silence, would spread its "anti-pooling" benefits to the innocent by remaining silent. If the "anti-pooling" theory works at all, it does so only when the guilty pool their unverifiable stories with unverifiable explanations of the innocent, and when other evidence is neither very weak nor very strong. Thus, any benefit to the innocent, from the general "anti-pooling" effect of guilty suspects' choosing to speak rather than to remain silent, most likely is marginal at best.²⁷³

Furthermore, the right to silence is not free. A safe harbor in silence alters the conduct of not only those who would fabricate convincingly, but also of those who otherwise would confess or lie in ways which could be readily investigated and rebutted at trial. Silence on the part of the guilty may not only help them avoid conviction, it may harm the innocent in numerous ways. When the guilty either confess or lie ineffectively, witnesses and victims may avoid the trauma of testifying at trial, and innocent suspects may be cleared of suspicion. If more innocent suspects are released or innocent defendants acquitted as the result of guilty suspects' speaking and incriminating themselves than are harmed by guilty suspects' fabricating effectively, restricting the right to silence might result in an overall net benefit for the innocent.

The "anti-pooling" theory is somewhat deceptive in its implication that the right to silence is golden and should be expanded in ways that encourage more guilty people rationally to claim it. Increasing the rational use of the right to silence, particularly in the context of pretrial interrogation, can have perverse bootstrapping consequences which undermine accurate factfinding. Rules which encourage the rational use of the right to silence would tend to discourage damaging statements while encouraging effective fabrications. This would make it more likely that, when guilty suspects choose to speak to the police, their statements will not harm them but will have adverse consequences for witnesses, victims, and innocent defendants. In short, the more that interrogation rules encourage uncontradictable fabrications, as opposed to confessions or ineffective lies, the less helpful pretrial statements are to accurate factfinding. Ultimately, the loss of incriminating statements by the guilty would lead to even greater "pooling" in ways that would not only harm more innocent defendants but would help more guilty defendants avoid conviction.

273. Assuming the theory works to some extent, it should be applied according to the degree of "pooling" dangers present in a particular context. By this measure, it works less well in the pretrial context than at trial.

Yet the "anti-pooling" theory is helpful in focusing attention both on the harm that can be caused by convincing lies and on the importance of unrehearsed statements. Convincing fabrications can frustrate accurate factfinding and harm the innocent in ways even more significant than their general "pooling" effect in the marketplace of exonerating statements. Lies come in various forms and it is important to distinguish between them. Convincing falsehoods can be highly beneficial for the guilty but highly harmful to the innocent. Rebuttable and ultimately incriminating falsehoods can be as important to accurate factfinding as confessions.

More generally, Seidmann and Stein's "anti-pooling" analysis helpfully points out the dangers of a run-away right to silence and the importance of avoiding procedures which discourage unrehearsed statements and assist the guilty in their efforts to create uncontradictable fabrications. Pretrial interrogation rules designed to expand the right to silence through furthering the rational use of the right by such means as increasing the presence and advice of counsel, prohibiting deceptions, or requiring early disclosure of prosecution evidence, would cause both more effective fabrications and more use of silence by guilty suspects who otherwise would make damaging statements.

The better course would be to shape the right to silence and associated guarantees governing police interrogation by avoiding procedures which enable suspects to lie in convincing ways that harm the innocent. Without disturbing the rules prohibiting adverse inferences or *Miranda's* basic right to silence warnings, we could separate the guilty from the innocent by adopting procedures which induce guilty suspects to tell the truth and by avoiding procedures which give them greater opportunity or means to create uncontradictable fabrications. Such reforms would offer fewer benefits to the guilty than would an expanded right to silence and would further "anti-pooling's" goal of protecting the innocent in more significant ways than the general effect of reducing the number of lies in the marketplace of exonerating statements.