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### The Right to Remain Silent Helps Only the Guilty

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# The Right to Remain Silent Helps Only the Guilty

Stephanos Bibas\*

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In a recent issue of the *Harvard Law Review*, Professors Daniel Seidmann and Alex Stein argue that the Fifth Amendment privilege against self-incrimination helps innocent defendants. It does so, they contend, by encouraging guilty defendants to remain silent instead of concocting false alibis. Because juries know that guilty defendants will remain silent, Seidmann and Stein claim, juries will believe the alibis of innocent defendants at trial. Their argument rests on a game-theoretic account of how rational defendants should act during interrogation to maximize their chances of success at trial.<sup>1</sup>

Seidmann and Stein's elegant game-theoretic construct avails them little, however, because their premises, methodology, and conclusion do not mirror reality. Though their theory predicts that rational suspects will remain silent, roughly *eighty to ninety percent of suspects talk to the police*.<sup>2</sup> Seidmann and Stein acknowledge this fact but dismiss it as irrational behavior, because in their view rational suspects would remain silent in preparation for trial.<sup>3</sup> They succumb to the temptation to ignore messy facts

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

2. *Id.* at 448 n.60 (acknowledging that somewhere between 9.5% and 20.88% of suspects invoke the right to remain silent); *infra* note 23 (collecting statistics).

3. Seidmann & Stein, *supra* note 1, at 447-48 & n.60.

that do not fit their neat theoretical model. They, like most criminal procedure scholars, mistakenly view trials as the center of the universe and assume that rational suspects should care mainly about maximizing their chances of success at trial.<sup>4</sup> This academic obsession with trials bears little relationship to the real world, where only about 6% of felony defendants go to trial and most plead guilty.<sup>5</sup> We live in a world of guilty pleas, not trials, and in this world suspects have many options more desirable than fighting the government's case at trial. Suspects who think that they can divert suspicion may throw off the scent by concocting alibis. Those who expect to be convicted can earn favorable plea bargains by confessing early and perhaps doing undercover work against their co-conspirators. For most suspects, these other options are more attractive than remaining silent and gambling everything on a small chance of acquittal at trial.

In short, Seidmann and Stein err in viewing interrogation as a mere prelude to the inevitable trial and focusing on the latter. Instead, I will focus on the interrogation in its own right and the two options that Seidmann and Stein dismiss as irrational. Part I analyzes what happens if guilty suspects confess the truth. It shows that confessing brings psychic benefits, reductions in charges and sentences, and swift resolutions. Hence, many rational suspects do confess instead of remaining silent. Part II looks at the many suspects who lie under questioning and shows that lying is often a rational response. When lies succeed, the payoff of diverting investigators' suspicions is enormous. Because of this incentive, many suspects currently lie. They thereby pool with innocent suspects and prevent innocent defendants' alibis from being taken at face value, undercutting Seidmann and Stein's claim to the contrary. In short, Seidmann and Stein's model does not track observed real-world outcomes because it ignores many alternatives that are preferable to fighting the government at trial. They rely on an overly theoretical methodology and incorrect assumptions about the costs and benefits of confessing. As a result, they conclude that guilty defendants will remain silent, when in fact most defendants talk. Seidmann and Stein's theoretical approach typifies criminal procedure's broader, outmoded preoccupation with trials and its failure to focus on the real world.

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4. *Id.* at 442-47 (discussing at length how damaging at trial silence would be, how triers of fact would interpret it, and how it would affect a suspect's entire trial strategy).

5. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999, at 460 tbl.5.62 (reporting that a 1996 survey of the seventy-five largest urban counties in America found that only 1% of state felony defendants were acquitted after trial, 5% were convicted at trial, the cases of 29% were dismissed, and 66% pleaded guilty (the totals do not add up to 100% because of rounding)); *id.* at 432 tbl.5.32 (reporting that in 1999 only 1.4% of federal felony defendants were acquitted after trial, 4.3% were convicted after trial, the cases of 10.4% were dismissed, and 83.9% pleaded guilty or nolo contendere).

## I. TO TELL THE TRUTH

Traditional analyses of the right to remain silent, Seidmann and Stein note, take a moral and philosophical approach. Traditional analyses assume that the right protects guilty defendants' privacy and liberties at the expense of efficient crime control; they then debate the pros and cons of protecting guilty defendants.<sup>6</sup> Seidmann and Stein question the conventional assumption that the right helps only guilty defendants. They reject empirical analysis of this question because little evidence is available and because future criminals may not behave the way past ones have.<sup>7</sup>

Instead, Seidmann and Stein construct a game-theoretical behavioral model of how rational guilty and innocent defendants would react to questioning. As they put it, only "a relatively high level of [theoretical] abstraction" can produce a determinate explanation of how suspects behave.<sup>8</sup> They suppose that interrogated guilty suspects have two basic choices. First, suspects may choose to remain silent, which leads police to assume that they are guilty and focus their investigations on confirming their guilt. The right to remain silent prevents juries from inferring guilt based on silence; otherwise, guilty suspects would have to concoct lies to avoid adverse jury inferences. Second, suspects may lie and concoct false alibis. Lies, if believed, may throw the police off the scent, but if police disprove lies, trial juries will be more likely to convict the lying suspects. Seidmann and Stein conclude that silence is often the optimal choice for guilty suspects *if* juries are forbidden to infer guilt from defendants' silence.<sup>9</sup> Thus, they reason, guilty suspects will remain silent while innocent suspects will exculpate themselves.<sup>10</sup> Knowing that guilty defendants will remain silent, they argue, juries and police can trust innocent defendants' truthful alibis and therefore will free them.<sup>11</sup>

Seidmann and Stein focus on only two options that guilty suspects have: they can lie or remain silent. But suspects have a third option, namely telling the truth. Seidmann and Stein dismiss this option as irrational. They believe that "[a] typical suspect confesses to a crime only when confronted with evidence that he believes to be irrefutable or when offered a tempting deal by the police or the prosecution."<sup>12</sup> Furthermore, they claim, "in most criminal cases, the premium for confession is negligible."<sup>13</sup> By this logic, few

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6. Seidmann & Stein, *supra* note 1, at 434–36.

7. *Id.* at 436–37.

8. *Id.* at 437–38.

9. *Id.* at 466–70.

10. *Id.* at 445–48.

11. Seidmann & Stein, *supra* note 1, at 433–34, 457–61, 468–70.

12. *Id.* at 450–51.

13. *Id.* at 466; *see also id.* at 469 (stating that those who confess "enjoy [a] small but positive remission of sentence"); *id.* at 470 (making explicit the "assumption that confessions secure" not large reductions in sentence but only "small" ones).

guilty suspects should ever confess, because confessing will only hurt their cases at trial.

Unfortunately, this theory does not fit the facts. Many suspects, when questioned, do admit their guilt. One recent study showed that more than 42% of questioned suspects incriminate themselves.<sup>14</sup> Other studies have found that between 32% and 67% of those questioned incriminate themselves.<sup>15</sup> Seidmann and Stein's theoretical model simply does not account for the real world.

Why do guilty suspects confess? The many suspects who know that they will be convicted in any event gain important benefits from early confessions. First, guilty suspects gain important psychic benefits by confessing and expressing contrition and remorse for their wrongs.<sup>16</sup> Second, prosecutors may downgrade or drop charges as a reward for sympathetic defendants who confess early. Likewise, courts may show extra mercy at sentencing to those who confess and attempt to help the government early on.<sup>17</sup> And early confessions resolve cases more quickly. By confessing and pleading guilty early, suspects who are detained pending trial speed up their post-sentence moves to long-term confinement. Because the

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14. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 869 tbl.4 (1996) (reporting the results of an empirical study that showed that 42.2% of questioned suspects admit guilt even after *Miranda*, and that none of this incrimination was the result of locking a suspect into a false alibi).

15. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 280, 280 tbl.7 (1996) (reporting the results of an empirical study in which 24.18% of those questioned made full confessions, 17.58% made partial admissions, and 22.53% made other incriminating statements, for a total of 64.29%, and noting that other studies had reported rates of incriminating statements of 32%, 38%, 46%, 50%, 51%, and 67%).

16. See Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327, 329, 331, 364-67 (1998) (noting that confessions may help criminal defendants to achieve "forgiveness, reconciliation, and a clear conscience" as well as peace, joy, and redemption, but that many criminal defense lawyers ignore clients' desires to achieve these goals by confessing); Stephanos Bibas, *Harmonizing Substantive Criminal Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. (forthcoming July 2003) (manuscript at 46-69, on file with the Iowa Law Review) (discussing how confessions can lead to repentance, catharsis, reform, and forgiveness in defendants, victims, and communities and how pleas without confessions short-circuit these processes); see also *Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting) (noting that confessions are good not only for society but also for guilty defendants, because confessions are virtuous and promote both "justice and rehabilitation" (internal quotation marks omitted)); *Miranda v. Arizona*, 384 U.S. 436, 538 (1966) (White, J., dissenting) (noting that confession, far from hurting the suspect, "may provide psychological relief and enhance the prospects for rehabilitation").

17. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b), application notes 1(h), 6 (2001) (making timeliness of confessions a criterion for sentence reductions); George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis*, 1993 U. ILL. L. REV. 207, 247 (1993) (explaining that sentencing judges may give greater weight to prompt cooperation, as earlier cooperation is more likely to lead to additional information in time for officers to use it, whereas late cooperation may be redundant once police have developed other sources of information independently).

jails used for pretrial detention are often less pleasant than the prisons used for longer-term incarceration, defendants may prefer quick resolutions.<sup>18</sup>

Early confessions bring particular benefits in multi-defendant cases—everything from car-theft rings to fraud conspiracies to robbery gangs to drug cartels. For example, a low-level drug courier who is arrested may confess and agree to cooperate in the investigation of her co-conspirators. But to make it work, the courier must admit guilt, and often she must do so right away.<sup>19</sup> Once she does so, she may be able to deliver the drugs she was carrying to the intended recipient, giving police surveillance valuable evidence and perhaps leading to more arrests. She may also place recorded telephone conversations with others in the organization. She may even wear a body recorder and microphone to tape-record meetings in person, acting as a government informant for some time. All of these activities will earn her substantial credit come sentencing time, and they are virtually the only way that she can reduce the otherwise stiff drug penalties.<sup>20</sup>

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18. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 111 (1998); see also HUMAN RIGHTS WATCH, PRISON CONDITIONS IN THE UNITED STATES 18–22 (1991) (noting that some jails are overcrowded, and because they are for short-term incarceration they often lack recreation facilities, windows, privacy, and classification of inmates). Large dormitory-style jail cells are particularly unpleasant and make it easier for inmates to attack and sodomize each other. *Id.* at 26.

19. See Dix, *supra* note 17, at 247 (“For a variety of reasons, and perhaps especially in drug cases, officers may be willing to ‘deal’ with a suspect only if the suspect is willing to deal immediately, with the officers, and without consulting counsel or others,” because such deals are timely, flexible, and preserve confidentiality.); see also JAMES Q. WILSON, THE INVESTIGATORS: MANAGING F.B.I. AND NARCOTICS AGENTS 73–74 (1978) (explaining that the hours between arrest and arraignment are the critical time during which agents are best able to flip suspects and use them in ongoing investigations).

The confession is an important prelude to cooperation for three reasons. First, it is simply implausible to imagine someone who simultaneously denies guilt while going through the motions of continuing to take part in the denied crime. Second, if the courier is denying her innocence, she may avoid discussing her incriminating knowledge during taped conversations. This would greatly reduce the likelihood that she would elicit incriminating statements from others and that she would steer the police towards evidence that incriminates others as well as herself. Indeed, her stilted conversations might even tip off her co-conspirators that something was wrong. Third, confession is central to airing the facts in preparation for testimony at trial. Cooperating witnesses must be prepared to testify fully about the crime and their roles in it. To demonstrate candor, a witness must come completely clean before the jury. The witness is even more credible if she confessed her involvement right away to the police.

20. 18 U.S.C. § 3553(e) (2000) (authorizing sentencing judges to depart below mandatory minimum sentences for defendants who furnish “substantial assistance in the investigation or prosecution” of other criminals, on motion of the government); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2001) (authorizing departures from federal sentencing guidelines for defendants who provide “substantial assistance in the investigation or prosecution of” other criminals, on motion of the government); Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on “Substantial Assistance” Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 14–15 (1999) (explaining that “for most defendants virtually

If instead she remains silent, she loses this chance to cooperate. And if she decides to change her mind later, perhaps on an attorney's advice, it may be too late. After arrest, she may stay in jail for some time until she is arraigned and makes bail (or not). By that time, others may have noticed her absence, know or suspect that she has been arrested, and refuse to deal with her. The scheduled time for delivery of the drugs may long since have passed, raising suspicions and thwarting plans for a controlled delivery under police surveillance. Or the government may no longer want her help, having found a more cooperative courier or other sources of information in the meantime.<sup>21</sup> In the fast-paced world of investigation and cooperation, she who hesitates is lost.

Seidmann and Stein's theoretical model does not reflect these substantial benefits of confessions in its factual assumptions. Nor do Seidmann and Stein adjust their model to account for the observed facts: widespread confessions, cooperation, and guilty pleas. The point is that many suspects who can expect to be found guilty confess because they know that going to trial, let alone winning at trial, is not realistic. They understandably prefer the bird in the hand (the benefits of confession) to the bird in the bush (a slim chance of an acquittal at trial). Suspects are too savvy to pin all their hopes on trials that exist only in theory.

## II. GUILTY SUSPECTS LIE

Suppose that telling the truth is not an attractive option, perhaps because the evidence of guilt is shaky. The suspect can choose to lie or to remain silent. Despite the right to remain silent, a plurality of suspects choose to lie. As Seidmann and Stein acknowledge, "suspects do not exercise the right to silence very often either at interrogation or at trial."<sup>22</sup> The data they cite show that roughly 80% to 90% of questioned suspects do not invoke the right to silence.<sup>23</sup> Other data indicate that *Miranda* warnings and the right to silence reduce confessions by between 4% and 16%.<sup>24</sup> Roughly 46% of questioned suspects deny guilt, almost four times as many as remain silent.<sup>25</sup> Unless the police are formally interrogating huge numbers of innocent suspects, one must conclude that guilty suspects prefer lies to

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the only ground on which a departure from these stiff sentences might plausibly be based is 'substantial assistance' to the government").

21. See Dix, *supra* note 17, at 247.

22. Seidmann & Stein, *supra* note 1, at 448.

23. Cassell & Hayman, *supra* note 14, at 869 tbl. 4 (reporting results of empirical study showing that only 12.1% of suspects questioned invoked their *Miranda* rights); Leo, *supra* note 15, at 275 tbl.2 (reporting results of an empirical study showing that only 20.88% of suspects invoked *Miranda* rights).

24. Seidmann & Stein, *supra* note 1, at 500-01 (collecting statistics).

25. Cassell & Hayman, *supra* note 14, at 869 tbl.4 (reporting that 45.7% of suspects questioned denied guilt or made other non-incriminating statements).

silence. Some suspects remain silent, indicating that silence is at times advantageous, but many more find it beneficial to lie.

Seidmann and Stein acknowledge that guilty suspects have incentives to lie. If the police believe the lie, the suspect may divert police attention to other suspects. They may also release the suspect from custody. The suspect can then set up an alibi, destroy incriminating evidence, or intimidate potential witnesses.<sup>26</sup> The suspect can even flee the jurisdiction. Conversely, if the suspect remains silent, the police and prosecution will infer his guilt and focus on developing evidence against him.<sup>27</sup> In other words, lies may throw police off the scent, whereas silence will convince them of guilt.

Despite these compelling incentives to lie and the revealed preferences of suspects, Seidmann and Stein do not modify their theory to fit the observed facts. Instead, they maintain that “silence is usually the better choice.”<sup>28</sup> They reason that while silence causes pretrial damage, this damage is much less serious than the damage a false alibi will likely cause at trial.<sup>29</sup> They argue that most suspects act irrationally in talking to the police because they irrationally underestimate the likelihood of harm at trial.<sup>30</sup>

Seidmann and Stein are inconsistent. Their assertion of irrationality conflicts with their overall “rationalist approach” and their treatment of rationality as “the norm.”<sup>31</sup> If 80% to 90% of suspects are behaving irrationally, not much is left of Seidmann and Stein’s elegant theoretical rational-actor model. Or perhaps it is Seidmann and Stein who are being irrational. The revealed preferences of the 80% to 90% who do not remain silent belie Seidmann and Stein’s bare assertion of irrationality. Most of these 80% to 90% are street-savvy, experienced recidivists who know how the criminal justice system works.<sup>32</sup> Their behavior should make us question whether lying to the police is such an irrational move after all.

Indeed, lying to the police is often rational. The flaw in Seidmann and Stein’s theoretical model is their assumption that pretrial investigations are much less important than trials. As a rule, cases are won or lost during the investigation stage. A credible lie may divert police suspicion during an investigation and free the suspect from jail immediately. If the suspect does

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26. Seidmann & Stein, *supra* note 1, at 447.

27. *Id.* at 444, 446.

28. *Id.* at 448.

29. *Id.* at 447–48.

30. *Id.* at 448.

31. Seidmann & Stein, *supra* note 1, at 450.

32. See Leo, *supra* note 15, at 275 (noting that 58% of those questioned had felony records, 29% had misdemeanor records, and 13% had no records); *cf. id.* at 287 tbl.9 (noting that 69.90% of those with felony records, 89.36% of those with misdemeanor records, and 91.67% of those with no criminal records waived their *Miranda* rights). While experience with the criminal justice system does reduce the percentage of suspects who speak to the police somewhat, a solid majority of the most experienced criminals still think it is in their interests to speak.



not divert suspicion, however, the investigation is likely to be the end of the story. Police assume that suspects remain silent because they are guilty and cannot exculpate themselves, in contrast to the many defendants who already proffer alibis. Police and prosecutors have strong incentives and pressures to secure large numbers of convictions. So, once a suspect remains silent and thereby confirms the police's suspicion that he is guilty, police use many tools to find more proof of guilt. The police can conduct surveillance of every move he makes. They can show him to witnesses in line-ups or photographic arrays. They can target his friends and associates and pressure them to give evidence against him. Prosecutors can subpoena his telephone records, bank statements, and credit card bills for evidence. They can keep track of the telephone numbers he calls and the mail he receives, and can perhaps wiretap telephones to record incriminating conversations. In short, once the government focuses on a target, it can often build an overwhelming case. This helps to explain why only about 1% of felony defendants are acquitted at trial; most plead guilty.<sup>33</sup> Most suspects are right not to worry about damaging their cases at trial, because their chances of going to trial and winning are so small.

Put another way, Seidmann and Stein's claim is that the right induces guilty suspects to remain silent, because they know that juries will not infer guilt from silence (though police will). Without a right to remain silent, they claim, guilty suspects would concoct (credible) false alibis, leading juries to discount innocent suspects' alibis.<sup>34</sup> But why would those who could concoct credible alibis refrain from doing so, if alibis are so rarely refuted (as argued below)? The argument further supposes that guilty suspects care most about maximizing their chances of winning at trial, when in fact trials are rare and guilty suspects know it. Because trials are won or lost at the investigative stage, few cases are worth pushing to a trial where the no-adverse-inference rule might make a difference. Seidmann and Stein's entire argument hinges on the inferences that juries might draw at trial, when in 94% of cases there will never be a trial.

While silence is often not as attractive an option as Seidmann and Stein

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33. See *supra* note 5 (collecting statistics). While it is true that a fraction of cases is dismissed, the possibility of dismissal is hardly a reason for suspects to remain silent instead of lying. First, on Seidmann and Stein's model, the right to remain silent confers an added benefit only at trial, by preventing juries from drawing adverse inferences. Before trial, police and other actors are free to draw adverse inferences from suspects' silence, regardless of whether there is a right to remain silent. If the case never makes it to trial, there is no jury to draw an adverse inference, and the right has no effect. Thus, the right protects guilty suspects only in the fewer than 6% of cases that go to trial; it has no effect on dismissals. Second, as the text goes on to note, false alibis in practice do not come back to haunt suspects. If anything, plausible lies are more likely to lead the government not to charge or to dismiss cases where guilt is doubtful. In contrast, silence would only confirm the defendant's guilt and steel the government's determination to convict.

34. Seidmann & Stein, *supra* note 1, at 465-70.

make it out to be, lies are even more attractive than they suggest. Lies are not nearly as damaging as Seidmann and Stein assume, because they are unlikely to be disproved. A recent empirical study found that while 79 out of 173 interrogated suspects made non-incriminating statements, not a single suspect was locked into a demonstrably false alibi.<sup>35</sup> Once again, Seidmann and Stein fail to modify their theory to reflect these facts.

Suspects in white-collar crimes have particular reasons to lie instead of remaining silent in anticipation of trial. For reputable business executives and professionals, merely being indicted is enough to besmirch their reputations and harm their livelihoods.<sup>36</sup> Avoiding indictment is the name of the game, and they will do whatever it takes—either telling the truth and making a quick deal or lying to divert suspicion. Silence is often the absolute worst option, as it will lead not only to indictment but also to search warrants and subpoenas. This further investigation will almost certainly turn up incriminating evidence, because white-collar cases turn on business records and paper trails.<sup>37</sup>

True, lying has its risks. The police may be able to disprove lies, especially grandiose alibis, which will hurt the suspect. As noted, however, this outcome is not nearly as common as Seidmann and Stein suppose. Seidmann and Stein use a hypothetical example in which an eyewitness remembers seeing the suspect at some time, but is confused about whether it was at the crime scene or on another occasion. To counter this identification evidence, the guilty suspect can guess at another, innocent occasion on which the witness says she might have seen the suspect. The suspect's only alternatives are to guess at the alternative possibility voiced by the witness, or else stay silent.<sup>38</sup>

Seidmann and Stein's hypothetical is far-fetched. Most lies are much more mundane and general, such as: "I didn't do it. I have no idea what you're talking about. I've never seen that guy before." The government cannot use this lie against the defendant, because it is impossible to prove its falsehood without independently adducing sufficient evidence of guilt. Or the lie may be specific, as where a suspect counts on his mother or girlfriend to say he was at home during the crime. Granted, the lie may not work, as the police are skeptical of self-serving statements. But the payoff for a successful lie is high and the downside is low. Given the low rates of acquittal and the massive benefits for pleading guilty, going to trial usually is not a

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35. Cassell & Hayman, *supra* note 14, at 869 tbl.4.

36. See Pamela H. Bucy, *White Collar Crime and the Role of Defense Counsel*, 50 ALA. LAW. 226, 228 (1989) (explaining that the very returning of indictments hurts white-collar defendants, even if they are later acquitted, because indictments cloud professional reputations, alert potential civil plaintiffs to possible improprieties, and subject defendants to financial and emotional stress).

37. See *id.* at 231.

38. Seidmann & Stein, *supra* note 1, at 462–64.

realistic option.<sup>39</sup> Thus, suspects do not care much about how lies might hurt them at trial. Most suspects have only two real options: either deflect suspicion by lying or plead guilty. In short, lying is an entirely rational gamble for many, many suspects. A few who cannot concoct good lies will remain silent, but this modest amount of silence is not enough to lead juries to trust all alibis.

Moreover, Seidmann and Stein divide cases into three neat compartments: those with strong, intermediate, and weak evidence. They then reason about whether guilty and innocent suspects are better off remaining silent or protesting their innocence in each type of trial.<sup>40</sup> This trial-focused approach is unrealistic. Sometimes, interrogators will confront a suspect with overwhelming incriminating evidence or arrest her red-handed. Very often, however, suspects must decide whether to speak long before they know the evidence against them,<sup>41</sup> or in the face of bluffing by interrogators. Suspects often do not know as of the time of the interrogation whether the evidence will be strong, intermediate, or weak if and when the case gets to trial. Thus, they cannot make the detailed trial forecasts that Seidmann and Stein expect them to make. What they do know is that an immediate lie can throw the police off the scent, and in practice many use this option.

Seidmann and Stein's entire argument depends on the premise that "many guilty suspects opt for silence instead of lies," so that juries will assume that those who talk are telling the truth.<sup>42</sup> But in a world where few defendants find it advantageous to press on to jury trials, convincing the police matters far more than convincing the jury. This explains why 80% to 90% talk. And in a world where 80% to 90% of suspects talk, talk is cheap. Some guilty suspects choose to remain silent, but many more talk, mimicking innocent defendants and so leading juries and police to distrust all alibis.

The 10% to 20% of suspects who remain silent may benefit from the right to silence, but the spillover effect of this silence is negligible. Doubtless some of these silent suspects are guilty. Innocent suspects may also remain silent, however, either because they lack strong alibis or because they fear

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39. See *supra* note 5 (collecting statistics on rates of acquittals and convictions at trial); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150, 1153-54 (2001).

Lies might also be relevant if they made plea bargains less favorable (or if, conversely, silence made plea bargains more favorable). But given that lies are so rarely disproved, there is little reason to think that they lead to plea bargains that are harsher than those following silence.

40. Seidmann & Stein, *supra* note 1, at 467-70.

41. See, e.g., N.J. CT. R. 3:13-3(b) (explaining that discovery is not ordinarily due until fourteen days after indictment).

42. Seidmann & Stein, *supra* note 1, at 433.

the police and want lawyers to protect them. Seidmann and Stein do not consider this possibility, let alone quantify it. Since the pool of silent suspects is not large, and some of those silent suspects may be innocent, silence tells us little about the bulk of suspects who speak. One can draw only the weakest of inferences that the 46% of suspects who deny guilt are innocent.<sup>43</sup> Moreover, jurors are never told to trust testifying defendants. Nor will they read the *Harvard Law Review* and find out that they are supposed to trust alibis, at least in cases of intermediate strength. On the contrary, jury instructions warn them that witnesses, including defendants, may shade their testimony out of bias and interest in the outcome.<sup>44</sup> And common sense teaches jurors not to trust self-serving alibis. In sum, when guilty and innocent suspects alike talk frequently, jurors cannot infer that talk is truthful.

### III. CONCLUSION

Seidmann and Stein's effort to use game theory to model interrogation is elegant, but it proceeds from abstract premises that are often erroneous or not nuanced enough. They fail to found it on the real-world experience of suspects, police, prosecutors, and defense attorneys. Rather than adjusting their model to fit and account for observed empirical facts, they disregard inconvenient data. And their premises, like those of most criminal procedure scholarship, are stuck in the mythical world of jury trials. Their too-abstract methodology, coupled with flawed premises, leads them to a

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43. See *supra* note 25. If one assumes that silent suspects are disproportionately guilty, and if one assumes that jurors somehow know this, and if one assumes that lay jurors are aware of and respond to fine gradations in pooling phenomena, and if one assumes that jurors will draw inferences in favor of testifying defendants but not adverse inferences against silent defendants, perhaps a few jurors might theoretically trust alibis slightly more, but any such effect seems exceedingly speculative and negligible. Any such effect is a far cry from the large, significant effect claimed by Seidmann and Stein. And to the extent that jurors draw favorable inferences from alibis, they are likely to draw correspondingly unfavorable inferences from silence. This would undercut any incentive to remain silent and so induce silent suspects to speak, which would unravel the supposed anti-pooling effect.

44. Seidmann and Stein assume without argument that juries know they should trust alibis because they somehow know that guilty defendants will remain silent. See Seidmann & Stein, *supra* note 1, at 469 ("[T]he jury draws a favorable inference from any exculpatory statement."). This assumption does not square with my own experiences as a federal prosecutor. In various Westlaw searches through the jury-instructions database (JI-ALL) on October 5, 2002, I found not a single pattern jury instruction to that effect. Nor would any juror with common sense assume that a defendant must be telling the truth. On the contrary, judges instruct juries to consider a witness's stake in the outcome in deciding whether or not to believe that witness's testimony, and some explicitly tell jurors to judge defendants' testimony by the same standards. COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N OF THE FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS (Criminal Cases) § 1.08 (2001); COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N OF THE SEVENTH CIRCUIT, FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 1.03 (1999); COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N OF THE SIXTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS § 7.02B (1991).

conclusion at odds with empirical fact. I have written elsewhere about the need to move past the outdated fixation on trials.<sup>45</sup> Seidmann and Stein's article exemplifies this fixation with abstractions and trials. Instead of focusing exclusively on trials, scholars must analyze the myriad other real-world options that suspects have. Often, deflecting suspicion, cooperating with the government, or otherwise striking a favorable plea bargain will be much more attractive than trial. Thus, many talk and few stay silent.

This messy reality lacks the theoretical elegance and beauty of Seidmann and Stein's model. For example, it requires exploring the incentives to confess created by stiff drug sentences and the Sentencing Guidelines' cooperation and acceptance-of-responsibility provisions. But the messy model explains the data much better than the elegant one does. Beauty is not always truth, nor truth, beauty. It is time to stop assuming that every criminal case ends in a jury trial and to heed facts that undercut theories. We must scrutinize how police, prosecutors, defense counsel, and suspects respond to multifarious incentives in the real world and tailor our theories to fit these facts.

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45. See Bibas, *supra* note 39.