
THEORIZING ABOUT SELF-INCRIMINATION

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When asked to participate in this symposium, I initially declined on the ground that I had already, to the best of my ability, analyzed those problems that interest me that lie within the self-incrimination aspect of the Fifth Amendment.¹ The thrust of that analysis was that theorizing about self-incrimination in general had been strikingly unhelpful, because the domain of the Self-Incrimination Clause is too unruly to be captured by what passes for theory within the legal realm. Professor Stein, rather bravely in my opinion, nonetheless asked me to come, suggesting that a revisiting of my theory of “the product of cognition” would be quite welcome.² Taken by the irony of revisiting what seems to have been understood as a “theory” of the Fifth Amendment that was really meant as a demonstration of the impoverishment of theorizing, I agreed, and here I am.

In my opinion, the efforts to theorize about the Self-Incrimination Clause have uniformly been failures, and the interesting question is why. One possibility is that the correct theory just has not been discovered yet, somewhat like the struggle over theorizing combustion,³ and we must keep trying until the problem is solved. I doubt this is true, and suspect the problem lies in a mismatch between the object of inquiry and the tools employed. What typically passes for theorizing about the law involves offering covering explanations or some variant on, to use the fancy term, deductive-nomological models in which logical forms are articulated that are supposed to map onto some aspect of reality relatively neatly.⁴ Debates over both the proper mode of

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¹ Ronald J. Allen, *Miranda's Hollow Core*, 100 NW. U. L. REV. 71 (2006) [hereinafter Allen, *Miranda's Hollow Core*]; Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989 (1996) [hereinafter Allen, *The Simpson Affair*]; Ronald J. Allen & M. Kristen Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243 (2004).

² Allen & Mace, *supra* note 1, at 266-68.

³ See, e.g., *The Overthrow of Phlogiston Theory: The Chemical Revolution of 1775-1789*, in HARVARD CASE HISTORIES IN EXPERIMENTAL SCIENCE 14 (James Bryan Conant ed., 1950).

⁴ See, e.g., KARL R. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* (1959); Carl G. Hempel & Paul Oppenheim, *Studies in the Logic of Explanation*, 15 PHIL. OF SCI. 135 (1948).

constitutional interpretation and law and economics, as disparate as they are, are nonetheless exemplars. Covering generalizations have to actually cover, and formal models actually accommodate, all the relevant variables, yet the extension of “self-incrimination” contains thousands of variables, some of which are continuous rather than discrete, and no theory with such coverage could be articulated, nor would its outputs be computable in real time.⁵

So, to me the interesting question no longer is “what is the, or the best, theory of self-incrimination,” because it is plain that there is and will not be any good ones of the standard sort. Rather, the interesting question is the puzzling persistence of the futile effort at standard theorizing. Unfortunately, that in turn means that, were I to follow my interests directly, I would engage in theorizing about theories. Even more unfortunately, though, everyone but a few strange ducks like me finds such abstract methodological discussions deadly dull, and anyway engaging in one would not be respectful of Professor Stein’s kind invitation to join a group to discuss self-incrimination. Therefore, I will not directly discuss the limits of theorizing.

I will indirectly discuss them. First, I intend to demonstrate the striking inutility of the entire set of theorizing about self-incrimination, including the three major efforts that have been published since I previously wrote. Second, I will explain why my purported theory of the Self-Incrimination Clause, while I think true in one important sense, was not really offered as a theory but as a critique of theorizing of a certain sort. Third, I will address directly, but, I promise, briefly, the nature of theories as an explanation for all of the above. Fourth, I will, equally briefly, identify how knowledge may nonetheless grow, and rationality be pursued, in the absence of effective standard theorizing. And last, in passing, I will speculate about whether any of this matters for much of the work product of the legal academy.

I. THE INAPTNESS OF FIFTH AMENDMENT THEORIZING

The Fifth Amendment had clear historical inspirations, none of which have any modern salience: torture,⁶ oaths,⁷ and preserving the

⁵ The theorizing about *Miranda* simply made a mistake, by contrast. See Ronald J. Allen, *In Praise of Yale Kamisar*, 2 OHIO ST. J. CRIM. L. 9, 13 (2004); Allen, *Miranda’s Hollow Core*, *supra* note 1.

⁶ See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 412-13 (1995).

⁷ LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* ch. 2 (Ivan R. Dee 1999) (1968); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1073-74 (1994); Stuntz, *supra* note 6, at 411-16.

sanctity of the confessional.⁸ Torture and its by-products would no longer be tolerated, regardless of the language of the Fifth Amendment; nor would oaths such as the oath *ex officio*. And the church has lost its capacity to coerce confessions out of the mouths of the laity that then might be used to their secular disadvantage.

That the historical justifications are meaningless today is surely why the Court no longer invokes them and has manufactured new ones, but the modern justifications are equally unpersuasive.⁹ First, the Court's arguments that the Fifth Amendment:

—*Protects against the “cruel trilemma of self-accusation, perjury or contempt.”*¹⁰ But, an innocent person who tells the truth will not commit perjury, engage in self-accusation or be subjected to a contempt citation for refusing to testify. This, then, reduces to the bizarre proposition that the Self-Incrimination Clause is designed reduce the probability of punishing guilty people.

—*Preserves a fair balance between the state and the accused*, which is empty rhetoric. What is the proper baseline, and what is fair about this as compared to, say, a universal obligation to cooperate in the investigation of crime?

—*Prevents prosecution for beliefs and association*, which it does not, and in any event the First Amendment already covers the ground.

—*Reduces the risk of convicting the innocent*. It may reduce the probability of false confessions during police interrogation, and possibly provide some protection to innocent defendants who would appear badly on the stand at trial.¹¹ However, restricting police interrogations

⁸ See Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins*, in R.H. HELMHOLZ ET AL., *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 145, 155 (1997); Langbein, *supra* note 7, at 1072.

⁹ See, e.g., Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968); see also Peter Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31 (1982). For criticisms of the various arguments favoring the privilege, see David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986); Donald A. Dripps, *Self-Incrimination and Self-Preservation: A Skeptical View*, 1991 U. ILL. L. REV. 329; Donald A. Dripps, *Supreme Court Review Foreword, Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699 (1988).

¹⁰ See, e.g., *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

¹¹ Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 332 (1991) [hereinafter Schulhofer, *Some Kind Words*]. In one of the high ironies of legal academic life, *Miranda's defenders* now assert the case has had little or no effect and thus there is no cause for its overruling. Stephen J. Schulhofer, *Miranda and Clearance Rates*, 91 NW. U. L. REV. 278, 280 (1996) [hereinafter Schulhofer, *Clearance Rates*]. For a spirited exchange on this matter, see *id.*; Paul G. Cassell, *Miranda's Social Costs: An Empirical*

and forbidding calling defendants to the stand at trial surely increase false acquittals at a much higher rate. Moreover, increasing the cost of convicting guilty people increases both the risk that other innocent people will be charged with the unsolved crime and the crime rate. It is implausible that this speculative benefit outweighs its obvious costs.

—*Prevents a person from being used instrumentally by the government and ensures that the government bears the entire “laboring oar” of proof of guilt.*¹² Unfortunately for the argument, citizens are used instrumentally by the government all the time; no one doubts the legitimacy of a military draft, for example. Moreover, suspects frequently are required to turn over evidence of guilt and cannot preserve sacrosanct even their bodily fluids and DNA.¹³

The scholars have stepped in where the Court has failed, but to no better effect:

—One argument is that the *privilege protects against the self-inflicted harm of self-condemnation because it is so intensely personal.*¹⁴ Why would this be limited to criminal cases? No such concern is extended to depositions in civil cases. More tellingly, immunity would not affect these concerns, yet immunity displaces the Fifth Amendment.

—Another, similar, argument is that *what makes “a suspect’s refusal to respond morally acceptable” is “the cruelty of forcing people to do serious harm to themselves, even when infliction of the same harm by others is warranted.”*¹⁵ Again, though, societies use citizens all the time, ranging from military service to paying taxes. And what is “cruel” about requiring individuals to provide accurate information about significant social events? Unpleasant for sure, but what is cruel about it? This cruelty is constantly referred to but never elaborated in the Fifth Amendment literature, most likely because it is very hard to take seriously.¹⁶ Never elaborating on the concept of cruelty

Reassessment, 90 NW. U. L. REV. 387 (1996); Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996); and Paul G. Cassell, Reply, *All Benefits, No Costs: The Grand Illusion of Miranda’s Defenders*, 90 NW. U. L. REV. 1084 (1996); and John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998) (commenting on the methodology employed by Professor Cassell in his “remarkable series of papers” with Professor Schulhofer).

¹² See, e.g., *Doe v. United States*, 487 U.S. 201, 207 (1988).

¹³ *Schmerber v. California*, 384 U.S. 757 (1966).

¹⁴ Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87 (1970).

¹⁵ R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 39 (1981).

¹⁶ Professor Schulhofer argues that “the concern is with the predicament of an innocent defendant who fears he will be manipulated, intimidated or misunderstood. When life or liberty

supposedly operating, this literature also never gets to the other side of the coin—the “cruelty” resulting from remaining silent. Where does the pain to victims factor into this equation?

—Building on the work of Henry Frankfurt distinguishing first order desires from second order volitions,¹⁷ Thomas and Bilder assert:

*[W]e read the self-incrimination clause to . . . protect the individual's choice to confess guilt or remain silent. This means that S must be free to not answer. If S is unfree in this regard, it does not matter that his first-order desire may be manifested in the outcome [of confessing]; his choice was denied—he did not want that desire to be his will—and choice is the heart of the self-incrimination clause.*¹⁸

The difficulties here involve a bit more complicated philosophizing. In brief, Frankfurt's argument is an effort to create a compatibilist defense of free will; but as Gary Watson has shown, the distinctions Frankfurt draws are untenable and thus the Thomas and Binder argument is insupportable.¹⁹ More to the point, it leads to absurd results. Virtually every criminal will “want their will to be not to want to answer questions that might incriminate them” (and how could we decide who the rare exception is?), but that means no statement could ever be voluntary. Indeed, their argument would forbid public school civics lessons that criminality is wrong and should not be engaged in. After

is at stake, to force such a defendant to run the gauntlet of adversarial cross-examination can fairly be characterized as inhumane or cruel.” Schulhofer, *Some Kind Words*, *supra* note 11, at 332. The passive articulation, “can fairly be characterized,” is a signal of the weakness of the assertion. Torture is cruel; wanton, random harm, like terrorism, is cruel. Betrayal of trust is cruel. But being cross-examined at a public trial with counsel under the control of a judge? Hardly, even if cross-examination can be “fairly characterized” as manipulation, intimidation, and involving the risk of being misunderstood, which in my opinion is a grossly unfair characterization of the process. Moreover, the argument neglects to identify how this kind of manipulation, intimidation and misunderstanding is any different from any other kind, and thus reduces to not putting innocent defendants in difficult straits. This is a laudatory goal, but the Self-Incrimination Clause is a weird way to accomplish it. Bear in mind that no other power of government is limited in this fashion. Thus, the government can search for evidence that may be misunderstood, put pressure of friends and family to testify, require the defendant to turn over incriminating, even if misleadingly so, evidence, threaten harsh sentences including the death penalty if the “innocent” defendant does not cooperate, and so on.

¹⁷ Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971).

¹⁸ George C. Thomas III & Marshall D. Bilder, *Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243, 271 (1991) (emphasis added). The implausibility of simplistic “choice” and “voluntariness” models has been recognized for quite some time. See *id.* at 245, 264 (quoting 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 824 (2d ed. 1923)) (“Dean Wigmore illustrated the interpretive difficulty [over the meaning of “volitional”] with a colorful example: ‘As between the rack and a false confession, the later would usually be considered the less disagreeable; but it is nonetheless voluntary.’”); see also Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979).

¹⁹ See GARY WATSON, AGENCY AND ANSWERABILITY 27-30 (2004).

all, surely the “second order volition” of most criminals is to get away with their criminality. Is it plausible, quite apart from philosophical niceties, that we need to respect the second order volition of a serial killer to be free to kill as much as he likes?

—*Protection of privacy*²⁰ cannot survive either grants of immunity or the total destruction of privacy that occurs in civil cases.

—A number of authors have articulated “*choice*” or “*excuse*” theories to the effect that individuals should not be exposed to the difficult choice of cooperation or self-incrimination²¹ or that it is the difficulty of the choice that excuses and thus immunizes the response.²² Two problems loom: first, the government puts people to difficult choices with regularity, such as testifying against a relative; and second, the cases contradict these theories. An individual has a choice to attempt to disguise a handwriting exemplar, but nonetheless the Fifth Amendment does not apply to the situation.²³

These assertions that the state of theorizing about the Fifth Amendment is uniformly unconvincing are not idiosyncratic. Amar and Lettow write, “[t]he Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights,”²⁴ and William Stuntz concludes, “[i]t is probably fair to say that most people familiar with the doctrine surrounding the privilege against self-incrimination believe that it cannot be squared with any rational theory.”²⁵ Nonetheless the deterrent efficacy of the futility of prior Fifth Amendment theorizing is not terribly great, and scholars seem inexorably drawn to the effort. Recent years have seen three more attempts to put the Fifth Amendment on a sound theoretical basis, and three more times the effort has failed.

—Alex Stein and Daniel Seidmann, responding to the various fatal flaws in self-incrimination theorizing, recently articulated a rational

²⁰ See, e.g., Arenella, *supra* note 9.

²¹ B. Michael Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect*, 43 S. CAL. L. REV. 597, 604 (1970).

²² William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227 (1988).

²³ See, e.g., *Gilbert v. California*, 388 U.S. 263 (1967) (handwriting exemplar); *United States v. Wade*, 388 U.S. 218 (1967) (voice exemplar).

²⁴ Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 857 (1995).

²⁵ William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1228 (1988). See also Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 6-10 (1986) (discussing lack of an accepted theory), cited in Stuntz, *supra*, at 1228 n.1; Schulhofer, *Some Kind Words*, *supra* note 11, at 311 (“The Self-Incrimination Clause is probably our most schizophrenic amendment.”).

choice account of the Fifth Amendment. They claim that the right to remain silent is an anti-pooling device that permits a signal to fact finders that those who actually testify are likely innocent.²⁶ The guilty can rationally remain silent, while the innocent can rationally testify. However, the guilty do not remain silent; they make statements to the police and plead guilty with great regularity. Stein attributes this to irrationality on their part,²⁷ but neglects the internal inconsistency of a rational choice defense of a system that operates on irrational actors.²⁸ Perhaps we should educate them better about their choices. Once we do, what would the rational choice prediction be? Obviously, that all guilty people would henceforth plead innocent and testify at trial to get the advantage of the signaling effect of being pooled with the truly innocent.²⁹ They resist this by the claim that, for some, the risk of lying is greater than the risk of silence, but the critical questions are: first, how strong is that effect as compared to the advantage of pooling with innocents; second, how many nonetheless would choose silence; and third, what other effects would a different legal regime have? The first two points are obvious. As to the third, it is easy to imagine how reducing the risks of guilty defendants could increase errors at trial in an unacceptable fashion, by, for example, increasing false acquittals with no effect on either true acquittals or false convictions (or increasing them).

Collectively, these three points demonstrate that this theory is just another “just so” story, where in the face of enormous empirical complexity everything is assumed to work out perfectly.³⁰ Similarly, the reason a defendant’s lies would be discovered, thus creating the incentive to choose silence, will almost always be evidence about the crime, which exists in any event. So, the very defendants to whom Stein’s analysis applies are precisely the ones who will be convicted in any event. Everyone else—those who do not believe they will be contradicted effectively if they testify—has the incentive to testify and gain whatever advantage pooling would provide, thus destroying the social advantages of pooling. Ergo, the right to silence is socially perverse under Stein’s own approach. Alternatively, perhaps people are presently behaving rational by speaking with their proven alacrity. In that case, Stein’s theory is wrong. So, either his theory is right in some

²⁶ 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).

²⁷ *Id.* at 447-48.

²⁸ See, e.g., Stephanos Bibas, *The Right to Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421 (2003).

²⁹ Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925, 943 (2002).

³⁰ Jeanne L. Schroeder, *Just So Stories: Posnerian Methodology*, 22 CARDOZO L. REV. 351 (2001).

theoretical sense but is falsified by the facts, or it is wrong. Either way, the theory is wrong as a justification or explanation for events in the real world.³¹

—Mike Redmayne, in an interesting and commendably cautious article, has attempted to resurrect autonomy as an explanation for the privilege.³² In essence, his argument is that the privilege protects the “valuable” “ability to keep some distance between us and the state . . . when assisting a prosecution would conflict with deeply held commitments.”³³ However, he also recognizes, first, that this argument is not persuasive, and second, it does not explain the contours of the privilege. As he notes, there are many instances when individuals are required to “assist[] a prosecution” that “conflict[s] with deeply held commitments,”³⁴ such as when a friend or family member is being prosecuted.³⁵ This barely scratches the surfaces of such cases. Political and religious beliefs intersect with the criminal law in myriad ways, virtually none of which result in the immunization from being a witness. A tax protestor who has information about someone else’s tax avoidance has to provide it; a Christian Scientist can be forced to testify about what he knows concerning the death of a child who was deprived of medical care, and so on. In my opinion, there are even deeper problems with autonomy theories of this sort, and I will note them in the discussion of the last of the three recent efforts to explain the Fifth Amendment.

—Andrew Taslitz, in an ambitious effort with detailed expositions of numerous conceptual landscapes, argues that the privilege “serves to protect the literal and metaphorical voices of those ensnared in the

³¹ Recently, Professor Stein has defended his theory on the ground that it is the best one going, and it takes a theory to beat a theory. ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 164 n.82 (2005). This is a common, but in my opinion curious, practice. Who says it takes a theory to beat a theory or for that matter that one needs a theory? Some other theory? And what is its theoretical justification? This is reminiscent of logical positivism, the very foundation of which fell prey to its own critique of verifiability. In any event, it is plainly false that the “best” theory wins in some sense; the best theory can obviously not be very good. Fifth Amendment theorizing is a perfect example. Stein’s theory is, by far, the best, but still struggles to explain very basic phenomena. For discussions on blogs of “it takes a theory to beat a theory,” see posting of Adam Kolber to http://prawfsblawg.blogs.com/prawfsblawg/2006/03/theory_v_theory.html (Mar. 16, 2006, 01:43 EST); and posting of Lawrence Solum to http://lsolum.typepad.com/legaltheory/2006/08/legal_theory_le_2.html (Aug. 20, 2006, 01:06 EST).

³² Michael Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 27 OXFORD J. LEGAL STUD. 209 (2007). He is English, but he takes as his topic the general Anglo-American approach to the question.

³³ *Id.* at 225.

³⁴ *Id.*

³⁵ *Id.* at 225-26.

criminal process.”³⁶ He labels this a privacy theory, but its focus is more autonomy and dignity than privacy.³⁷ His concern is only instrumentally the control over information; more fundamentally, he is worried about the effect of disclosure, “for the *compulsion* of such words itself forces the speaker to change his very nature without his choosing.”³⁸ He continues:

[O]ne powerful justification for the privilege, therefore, is this: it guards against the compelled articulation of words that raise a risk of *both* undue state intervention in the very creation of the speaker’s essential nature *and* the resulting extreme social stigma and social mis-definition of personality that result from the prospect of being judged by the criminal Justice system.”³⁹

Autonomy theories have had tough sledding in the self-incrimination domain, and this one like all the others runs aground. All the effects of the feedback relations between speech and identity are independent of the criminal process. They can occur whenever the state forces action or deed, and this happens, again, with regularity. Perhaps recognizing this, Taslitz emphasizes the unique stigmatizing consequences of the criminal process. This is standard rhetoric in academic debates about criminal law, but I know of no data that actually supports it. To continue to beat this dead horse, people are deeply humiliated all the time in both the legal process and by the decisions that government makes in other contexts, from legislative investigations to medical requirements such as inoculations or forced interventions to save children in the face of genuine religious beliefs. There is no reason to think there is something unique about the criminal process. Nor is there something unique here about compulsion, for witnesses in both civil and criminal cases are equally compelled, and often equally humiliated, and individuals who refuse medical interventions can have them forcibly imposed in some instances. Indeed, this theory, offered to elucidate the Fifth Amendment, cannot explain one of its most basic attributes—immunity. An immunized individual must speak in all the

³⁶ Andrew E. Taslitz, *Confessing in the Human Voice: A Defense of the Privilege Against Self-Incrimination*, 7 *CARDOZO PUB. L. POL’Y & ETHICS J.* 121, 134 (2008).

³⁷ Taslitz argues:

Why the Amendment requires compulsion can be answered without knowing precisely how its presence can be determined in any individual case. There are three reasons: first, compelled expression involves the state in actively changing the very thoughts and feelings that persons seek to keep private; second, though related, the words we speak or write shape our character; and third, state-compelled confessions are degradation ceremonies that violate the proper boundaries between the state and the individual in a decent, liberal society. State-compelled expression of thought and feeling, in at least these three respects, thus undermines the independence and uniqueness of human personality as well as exposing us to mis-definition by others.

Id. at 192.

³⁸ *Id.* at 135 (emphasis added).

³⁹ *Id.* at 136 (emphasis added).

self-forming, self-condemning ways that worry Professor Taslitz, and yet has no Fifth Amendment claim. To be sure, the person will not be convicted, but equally surely he will be stigmatized in ways difficult to distinguish from those who are.

There is a common thread through many of these constructed defenses of the privilege: They identify one variable and let it expand to its logical conclusion heedless of the consequences. Taslitz's argument is a good example. No doubt compulsion to testify has some of the consequences he identifies, but they are not limited to that context, and equally important and completely neglected they come with costs attached. I am sure, for example, that he is correct that there are feedback mechanisms so that what a person does or says affects who he is and his self-conception. But isn't that ubiquitous in modern life? Taslitz seems to acknowledge that it is,⁴⁰ but does not acknowledge the ensuing consequences. And does it really deserve the exalted place theories like this give it? Taslitz seems to imagine that every criminal case is a John Peter Zenger-like morality play with a looming, omnipotent, and malevolent government bound and determined to bend a conscientious objector to its arbitrary will.⁴¹ That is certainly not what goes on in the criminal courts, state or federal, in Illinois, or so far as I can tell in any courtroom in the land. Rather, and whatever the cause, a parade of mean, dangerous, avaricious, self-absorbed, anti-

⁴⁰ Taslitz writes:

[C]ontrol matters because you may not want to reveal all of yourself to all others in all contexts, and they may not want you to do so. What you do care about is revealing those aspects of your character in a particular setting in such a way so that those aspects will be fully understood. Thus, on the job, you might want to reveal information about your punctuality and self-discipline but not your love life. Indeed, fuller revelation of more aspects of your self is a mark of intimacy, both identifying and helping to create close personal relationships. If you lose control over self-revelation, therefore, you lose control over your intimate life. . . . [I]t is impossible to reveal sufficient information about yourself to most individuals to enable them to judge your entire nature fairly, even if they bothered to pay adequate attention, for full self-revelation takes years and is a continuing process, as we ourselves change over time. If we lose control over self-revelation, therefore, we necessarily risk mis-definition of our overall being. . . . [T]he act of being described itself changes our nature, so we may prefer to avoid self-revelation even if others' assessments of us are accurate.

Id. at 135 n.80.

⁴¹ He says, for example, that "compelled self-revelation in fact changes your fundamental nature, a grievous moral injury." *Id.* He cites as support a recently released book by Louis Michael Seidman praising "the right to silence as essential to human expressive freedom. 'A defiant silence,' his book cover explains, 'demonstrates determination, courage, and will,' as when draft resisters refuse to take a military oath, their silence serving as a 'manifestation of connection, commitment, and meaning.'" *Id.* at 15 n.61. I am not sure that Professor Seidman would embrace the comparison of draft resisters to criminal defendants. Criminal defendants hardly express a "defiant silence" while they sit passively and increase the difficulty of their conviction. Quite to the contrary, this is the embodiment of cowardly avoidance of the consequences of their acts, and quite unlike the draft resister who knows full well that he is exposing himself to harm as a matter of principle.

social criminal suspects are doing everything they can to avoid the consequences of their misbehavior. There are exceptions to be sure, and as always one can disagree about criminalizing this or that. Still, in general, the morality play here is not over the conscientious objector status of the defendant; it is over the promises government makes to the citizenry to keep the forces of lawlessness in check. Can it, for example, really be seriously claimed that the risk of meddling with some purported killer's self-conception is more important than an accurate adjudication of his guilt? Or that our highest calling is to not delegitimize the authentic "voice" of a serial rapist? And if these issues matter so much, what about the self-conception and authentic voices of all the victims out there when they have to face the emptiness of the government's promise to provide safety to them and their families, and to secure swift justice when that promise is broken by the miscreants whose psychological integrity motivates this theory? Indeed, the theory has it exactly backwards, it seems to me, and is a very powerful justification for the elimination of the privilege. It is hard to imagine a set of individuals who more need to engage in critical self-reflection and change than those charged with serious criminality, and a little compulsion to do so might be a very good thing.

II. THE COMPELLED PRODUCTS OF COMPELLED COGNITION "THEORY"

In an earlier article that apparently was instrumental to my being invited to this conference, I built on earlier work demonstrating the impoverished nature of Fifth Amendment theorizing, but with a twist. I distinguished between justificatory and explanatory theories:

But there is an ambiguity in the word "theory" threaded through the various judicial and scholarly treatments of the Fifth Amendment. It sometimes is used to refer to the justification of a practice, which is the sense in which Justice Goldberg was theorizing. At other times it is used to predict or prescribe the scope or limitations of governmental power on the one hand, or privacy, autonomy, and dignity interests of citizens on the other. Some of the theoretical difficulties infecting the Fifth Amendment may result from failing to sort out these different perspectives. To be sure, one reasonably may think that the theoretical justification for a practice must constrain its scope. Interestingly, the Fifth Amendment offers a counter-example to such a belief, which is the main burden of this article. While its justification is, we agree, hopelessly muddled, the scope of the Fifth Amendment (its implications in the real world for government/citizen interactions) can be specified quite clearly. In other words, while there is no general theoretical justification for the Fifth Amendment, there is a powerfully explanatory positive theory.

Moreover, we can specify precisely where ambiguity remains, and the possible directions that future developments might take—indeed, must take, given what the Court has done to date. It is unclear which path the Court may choose, but it is apparent which paths will remain open. In this respect, the Court's treatment of the Self-Incrimination Clause may mirror its treatment of the Fourth Amendment. Both may defy general justificatory theories, yet both lead to relatively predictable results. This, in turn, may have implications for the nature and utility of some forms of legal scholarship, a point we return to at the conclusion of this article.⁴²

In what followed, we demonstrated that the Supreme Court's cases line up remarkably well under the "theory" that "the government may not compel disclosure of the incriminating substantive results of cognition that themselves (the substantive results) are the product of state action."⁴³ Indeed, all the cases are consistent with this proposition, and in a remarkable way seem to embody it, with very few wrinkles along the way.⁴⁴ We were also able to specify rather clearly that, were the Court to continue down the path it was on, it would have "to clarify two matters: first, whether the extent of cognition matters, and second, the derivative consequences of cognition."⁴⁵

However, and this is the key point, we made no assertions about the probability that the Court would continue down this path. It may be likely because there must be some explanatory reason why the Court has behaved so consistently, but we have very little idea what that might be beyond assertions like "focusing on cognition with respect to self-incrimination makes sense," and "one can see that the Court has opened up a few can of worms that it will need to deal with eventually," and so on. We made no claim that our "theory" discovered something true beyond that it was an accurate description of the cases. We did not assert that we had uncovered some generalizable proposition akin to a law of nature that would have its ineluctable force in the future. Of course, we did not, heaven forbid, claim the opposite. Maybe we had stumbled onto something profound. The future will tell, and others can judge. In short, we gave an adequate description of the empirical data that in passing noted something that others had neglected—that the cases all sort out over whether the government has compelled cognition and then relied on its products.

⁴² Allen & Mace, *supra* note 1, at 245-46. For a discussion of the incoherence and unpredictability of the Court's Fourth Amendment analyses, see Ronald J. Allen and Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149 (1998).

⁴³ Allen & Mace, *supra* note 1, at 247.

⁴⁴ The important "wrinkle" is *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), which is consistent with the "theory," but only by a very close vote of the justices; see also Allen & Mace, *supra* note 1, at 272-76.

⁴⁵ Allen & Mace, *supra* note 1, at 247-48.

This is, I suppose, a “theory” in one sense, if for example it were relied upon to explain why the cases reached the results that they did, but we made no such claims. It could also be a “theory” if used to predict outcomes, but again, no such claims were made. We only said two practical issues were opened up that, given our understanding of the legal system, would probably need to be addressed in the future. Nowhere did we assert how we think our “theory” requires these issues to be resolved. Others may think this disqualifies it from even being thought of as a “theory.”⁴⁶ Maybe so, and maybe useful explanations are somehow different from theories. If so, in many areas the legal academy might be better off scrapping theories and turning to useful explanations, as I suspect that is all that can be produced. To explain why requires a brief (I promise) detour through what it means to be a “theory.”

III. THE NATURE OF THEORIZING

Of course, it is a bit silly to suggest that I could identify what it means to be a “theory” for purposes of legal research and knowledge.⁴⁷

⁴⁶ See *infra* Part III.

⁴⁷ However, Larry Solum has provided an interesting description of legal theories on his blog. Legal Theory Blog, <http://lsolum.typepad.com/legaltheory/2008/02/legal-theory--6.html> (Feb. 24, 2008, 00:20 CST). His categorization can be summarized as follows (quotes from the blog itself are set off by quotation marks):

Positive Legal Theories:

1. Doctrinal theories—explain the principles or underlying theories of legal doctrines.
2. Explanatory theories—“theories about why the law is the way it is.”
3. Effects theories—“theories about the consequences that will be produced by a given regime of legal rules.” Predicts behavior without explicitly evaluating the desirability of the rule.

Normative Legal Theories:

1. “Ideal versus non-ideal Theory.” Ideal: “what the best legal rule would be in the world in which everything was politically possible.” Non-ideal: “theories that assume a variety of constraints on the choice of legal rules.”
2. “Justificatory Theories and Critical Theories”: These two types of theories “vary in their ‘attitude’ towards the status quo.” “They do not address the ultimate question, ‘What is the best legal rule?’” They either attempt to justify or critique existing doctrine.
3. “Normative Legal Theories, Political Philosophy, and Comprehensive Moral Theories”: “One picture of [the] relationship [between] normative legal theory, on the one hand, and moral and political philosophy, on the other, might be called ‘top-down.’ That is, we might start with a comprehensive moral doctrine Using the method of deduction, we might try to deduce the principles of political philosophy and ethics from a comprehensive moral theory, and the principles of normative legal theory might in turn be deduced from those of political philosophy and ethics. The top-down approach is exemplified by some consequentialists, who argue for a comprehensive moral doctrine such as welfarism or utilitarianism and then derive normative justifications or criticisms

To my knowledge, no good taxonomy of theorizing exists, in large measure because disciplines for the most part generate internally their own methodologies and conventions about what is taken as established, what problems should be worked on, how they are to be examined, and what counts as evidence.⁴⁸ Obviously, there is cross-fertilization and

from the comprehensive doctrine and facts about which legal rules will result in what consequences.

“Another possibility is that normative legal theory is relatively independent of ethics and political philosophy. It is at least conceivable that one might believe that the realm of interpersonal ethics is governed by a different set of principles and theories than is the law. For example, one might espouse deontological ethics, but believe that the laws should (for the most part) be aimed at maximizing utility.”

The Intersection of Positive and Normative Theory:

1. “Positive Theory in the Service of Normative Theory”: “Many normative theories underdetermine what the legal rules should be in the absence of substantial information about the effects of the rules.” For instance, “[w]ithout a positive account of the effects of a given rule choice, utilitarianism has nothing to say about what rule is best.”

2. “Positive Theory as a Constraint on Normative Theory”: “For example, public choice theory makes certain predictions about how legislatures will act in response to various incentives. Some legal rules that might be justified by ideal normative legal theory may be considered ‘unrealistic’ in light of positive theory. In cases like this, positive legal theory provides constraints that limit the options available to normative theory.”

3. “Interpretivism and ‘Law as Integrity’”: Dworkin’s theory “attempts to combine the aims of positive doctrinal theory and normative theory. The idea is that a legal theory should both *fit* and *justify* the existing legal landscape.”

Larry Alexander has provided a different taxonomy. Larry Alexander, *What We Do, and Why We Do It*, 45 STAN. L. REV. 1885, 1886-88 (1993). His categorization can be summarized as follows (quotes from the article itself are set off by quotation marks):

1. Doctrinal scholarship “describes legal rules and institutions, explicates their internal logic and their relationship to other rules and institutions, and perhaps urges their reform or extension along certain lines.”

2. Normative scholarship prescribes some change. It can be explicit or implicit. “It can be stated at the most abstract philosophical level . . . or much more specifically . . . [O]ne can focus the framework on either global . . . or local problems . . .”

3. Empirical scholarship “emphasizes reporting and predicting the social effects of legal rules and institutions.”

4. “Historical scholarship relates legal doctrines and institutions to various historical perspectives . . .”

5. Jurisprudential scholarship “seeks to answer questions regarding the essential nature of law, legal argument, and legal interpretation.”

Id.

⁴⁸ Nonetheless, the literature on theorizing is vast, ranging from the deeply philosophical, such as Quine’s theorizing about theory, through the fascination with the nature of scientific progress, to intensely practical debates about appropriate methodologies and the like. On the first, see Bruce Hauptli, *Quine’s Theorizing About Theories*, 57 SYNTHESIS 21 (1983). On the second, THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) is the standard cite. See also CRITICISM AND THE GROWTH OF KNOWLEDGE (Imre Lakatos & Alan Musgrave eds., 1970). On the third, see, for example, DEIRDRE MCCLOSKEY, *THE SECRET SINS OF ECONOMICS* (2002); J. David Singer, *Theorizing About Theory in International Politics*, 4 J. CONFLICT RESOLUTION 431 (1960). For efforts directed to legal theorizing, see, for example, Jules Coleman, *Tort Law and Tort Theory: Preliminary Reflections on Method*, in *PHILOSOPHY AND THE LAW OF TORTS* 183 (Gerald J. Postema ed., 2001); Gary L. Blasi, *What Lawyers Know:*

interdisciplinary work, and basic tools of analysis and rationality are common coins of the realm. At the same time, there are vast differences in the way that equally successful disciplines go about their work. Perhaps the two most spectacular modern success stories—physics and biology—are exemplars. These two fields have transformed the human condition in their considerable progress of taming different aspects of nature. The effects are everywhere from the extended, healthier life spans of humans with access to modern knowledge (dietary, environmental and the like) and medical care, to the transformation of our physical environment and capabilities that flowed from modern physics.

Though alike in their transformation of the human condition, the two disciplines are stark contrasts in the nature of their enterprises. Physics is a top-down field in which the distinction between theoretical physics and mathematics is almost nonexistent. The foundations of both relativity theory and quantum physics were laid mathematically and subsequently confirmed through experimentation.⁴⁹ Nothing like that happened in biology. Biology is not a mathematically driven, top-down field; it is a broad based, bottom-up field. Deduction from a small number of assumptions dominates physics; induction from a large number of observations dominates biology.⁵⁰ Physics is about searching for the ultimate Theory of Everything and the primary tool is mathematics; nothing like that is going on in the biological sciences.

As disparate as biology and physics might be in *how* they pursue their goals, they are quite united in *what* they pursue, which is propositions with truth value. They endeavor to understand how the external world really is. Very little time is spent on the philosophers' worries about whether there is such a thing as absolute truth, or whether propositions must, and only can, be judged relative to a framework or web of beliefs, or whether truth is even a useful concept. Except in rare instances, even less time is spent on moralizing, or what in the law schools would be called normative work.

Lawyering Expertise, Cognitive Science, and the Functions of Theory, 45 J. LEGAL EDUC. 313 (1995); Robert Fishman, Comment, *The Futility of Theory?*, 63 U. COLO. L. REV. 457 (1992); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992); and Ronald P. Loui, *A Mathematical Comment on the Fundamental Difference Between Legal Theory Formation and Scientific Theory Formation* (Sept. 2005) (unpublished paper presented at the fourth international Conference on Computation Models of Scientific Reasoning and Applications, Lisbon, Portugal, Sept. 21-23, 2005), available at http://centria.fct.unl.pt/~greg/conf/proceedings/doc_01.pdf. Debates about the fundamental nature of knowledge and epistemology also rage unabated, of course.

⁴⁹ GENERAL RELATIVITY: AN EINSTEIN CENTENARY SURVEY (S.W. Hawking & W. Israel eds., 1979); GEORGE W. MACKAY, *THE MATHEMATICAL FOUNDATIONS OF QUANTUM MECHANICS* (1963).

⁵⁰ EDWARD O. WILSON, *CONSILIENCE: THE UNITY OF KNOWLEDGE* (1998) is an effort to bridge the gap. Fields such as nuclear biology, molecular biology, and biochemistry are halfway houses.

And there we have one crucial variable that must be dealt with and put aside. My criticisms of Fifth Amendment theorizing have one common thread—each of the theories is obviously false as a matter of fact. They do not explain what would universally be agreed to be the relevant data—the language of the clause, its history, structural concerns about the Constitution, and the cases construing it.⁵¹ Theories with these kinds of disabilities would be quickly dismissed by the courts of the sciences, as it were. Not so, apparently, in the law schools where a form of normative “theorizing” not only is to be found, but often has pride of place.⁵²

For the most part, I find this utterly peculiar. The matter is complicated and deserving of extended treatment, but in brief the moralizing that goes on in a substantial part of legal scholarship appears to have virtually no capacity to persuade anyone.⁵³ And this seems perfectly generalizable—so far as I can tell, professional philosophers are no more influential than their amateuristic legal cousins.⁵⁴ To be sure, the young absorb moral lessons throughout their lives, and social views on morality change, but none of this seems to flow from normative scholarship. It was not the professors leading the forces culminating in either the Civil War or the civil rights movement; nor was it the intellectuals saving people from murderous regimes,⁵⁵ and so on. And it is hard to think of a modern counterexample. Even the philosophical giants like John Rawls are lionized not for their ultimate positions on contested moral questions but because of their creativity or their methodological advances, or in Rawls’ case, both. The Difference Principle and the veil of ignorance, for example, are two strikingly interesting ideas (to pick just my favorites). But the substance of Rawls’ moral positions were quite compatible with those conventionally held by most upper middle class philosophers in major American universities, which means moderately left of center. Neither he nor anyone else had to rethink their substantive positions after the

⁵¹ See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991). Some, such as Bobbitt, include ethical and consequentialist considerations as sources of interpretation. The typical legal theory has an abundance of both, and both are, equally typically, universally contradicted by the observable data of the type mentioned in the text. For a piercing discussion of the philosophical aspects of constitutional interpretation, see Brian Leiter, *Why Quine is Not a Postmodernist*, 50 *SMU L. REV.* 1739 (1997).

⁵² See Edward L. Rubin, *Law And and the Methodology of Law*, 1997 *WISC. L. REV.* 521 [hereinafter Rubin, *Law And*]; Rubin, *supra* note 48, at 892-93.

⁵³ See Richard Posner, *The Problematics of Moral and Legal Theory*, 111 *HARV. L. REV.* 1637 (1998). But see Ronald Dworkin, *Darwin’s New Bulldog*, 111 *HARV. L. REV.* 1718 (1998); Charles Fried, *Philosophy Matters*, 111 *HARV. L. REV.* 1739 (1998).

⁵⁴ Who are quite uninfluential. Ronald J. Allen, *Two Aspects of Law and Theory*, 37 *SAN DIEGO L. REV.* 743 (2000).

⁵⁵ See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999); Posner, *supra* note 53.

publication of *A Theory of Justice*, even if they did use it as the occasion to rethink, and justify to themselves, how they got there.

And there's the rub. Rather than persuading, normative scholarship simply resonates or not with the reader's already fully developed moral positions. Every law professor in this room knows that the single most frequently uttered comments in regard to workshop papers is either "I agree with most of what he said" or "I disagree with her."⁵⁶ When I was relatively new to the professoriate, I found this quite puzzling. The appropriate question, it seemed to me, was did anyone learn anything from the talk, but that was, and is, never the question raised with regard to normative work. This is because it is a form of autobiography, not a form of knowledge generation (except knowledge about the cartography of the speaker's mind), and one really does just agree or disagree, and that is the end of the matter.

It is also the end of the matter, almost, of this diversion from the main theme. Normative work cannot be falsified. Maybe that is in part why it is so much fun. But it is also precisely why it has such staying power. It cannot be judged except by subjective responses, the most important of which are those of the author. If someone disagrees with your article, it is because they are unenlightened if not morally stunted, not because you are wrong. More to the point, one cannot even say a moral theory is wrong, for they have no truth value.⁵⁷ Only something with truth value can be "wrong" in any verifiable sense. Now recur to the various criticisms made of Fifth Amendment theorizing. They have a bite only if the constructs criticized are empirical theories. If they are not, the criticisms can be simply shrugged off. The market for such theories is not truth but other subjective criteria such as "creativity" and "insight" and the like.

As I said above, I find this all utterly peculiar, which is why I try to pursue propositions with truth value in my own work and suppress the impulse to moralize as best I can. Truth be told, I suspect that many of the authors of the various disverified theories of self-incrimination would also like their work to be acknowledged as "true" in some respect. But the problem is that they also can always and everywhere claim that, if something is not compatible with their theory, it should be changed—changed, in other words, to conform to their theory. So much for truth value, obviously, for if the theory is not presently true

⁵⁶ See, e.g., Rubin, *supra* note 48, at 892 ("The intensity of debate within the field [of law] can be measured by how rarely a legal scholar reads another scholar's work simply to learn something. We generally evaluate whether such works are good or bad, right or wrong, even as we read them for the information they contain.").

⁵⁷ Moore thinks to the contrary, but I think that he is wrong as a matter of fact. Compare Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, and Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992), with Ronald J. Allen, *Moral Choices, Moral Truth, and the Eighth Amendment*, 31 HARV. J.L. & PUB. POL'Y 25 (2008). See also Posner, *supra* note 53.

the world should be required to conform with it rather than it with the world.

And so much for knowledge, as well. The only knowledge generated by such theorizing is, on the one hand, knowledge about the author's preferences, and on the other hand, knowledge about how the world should be changed to conform to those preferences. So viewed, the impotence of such efforts to persuade is hardly surprising. Of course, knowledge is not the only possible criterion. Creativity, imagination, and fecundity in stimulating other work are possible competitors. This, however, begins to make legal scholarship sound like literature or rhetoric. Pursuing such values is perfectly understandable, but doing so gives up the knowledge and truth game and may explain in part why the theories of the Fifth Amendment are so easily falsifiable—they were not designed with falsification in mind.

If theorists want to explain the empirical world, by contrast, the single overriding concern is how well the theory explains the data. This point comes in many flavors, ranging over coherence, correspondence, falsification, verification, fallibilism, reliabilism, explanatory power, and the like. Although there are deep conceptual differences between these and other ways to understand knowledge and empiricism, they share some common characteristics, in particular that critical to theory appraisal is the fit between data and theory. With the exception of Stein's decision-theoretic approach to the Fifth Amendment, all the rest of the theoretical discussions of the Fifth Amendment seem oblivious to this point. Contrary data is not a strike against a theory; it is a problem to be removed through reform, and so on. Indeed, contrary data may be what motivates the "theory," in an effort to convince that some part of the legal system is morally lamentable.

And now to the ultimate point—to wit, why has not someone come up with a general theoretical account of the Fifth Amendment that is consistent with the data? To the extent the objective is not the production of an empirically adequate theory, it is no surprise that the object does not appear.⁵⁸ Still, although the general tenor of

⁵⁸ See, e.g., Rubin, *Law And*, *supra* note 52. There has been much energy directed towards the interrelated questions of whether law is an "autonomous" discipline, whatever that might mean, and what characterizes legal scholarship. Rubin's paper is an excellent example, "excellent" in all respects. It is not only an exemplar, but pursues the questions in a deep and insightful manner. The general conclusion that emerges from this literature is that the legal scholarship is dominantly normative, but there is vast disagreement about whether this is to be cherished and nurtured or lamented and excised. See, e.g., Symposium, *Law and Society & Law and Economics: Common Ground, Irreconcilable Differences, New Directions*, 1997 WIS. L. REV. 375. I hope it is clear to the reader that I am not addressing these questions. I am addressing the different question of why the varying theories of the Fifth Amendment are so woefully out of touch with the data they are supposedly theorizing about—why, in short, they are so empirically inadequate. The first answer, the one mentioned in the text above, is that their authors were not motivated to produce empirically adequate or even useful theories.

epistemological discussion within the law is that legal scholarship is mainly normative discourse,⁵⁹ I am confident that the next person who articulates a general theory of the Fifth Amendment will at least to some extent hope to convince others that it is “right” in some sense,⁶⁰ as deeply ironic as that is. The value of “rightness” could simply reduce to its consonance with the intuitions of others, but again it is pretty clear that there lurks within the legal academy the notion that there is really a

⁵⁹ Rubin, *Law And*, *supra* note 52. *But see* Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987). I also suspect this conclusion is wrong. It conflates the publications of faculty at elite law schools with legal scholarship. My guess is that legal scholarship at non-elite law schools tends to be much more empirical because it is much more doctrinal. That is probably to the good, if I may be allowed a normative comment.

⁶⁰ *See, e.g.*, Rubin, *Law And*, *supra* note 52, at 545. In his interesting examination of the nature of legal scholarship, Professor Rubin claims that the “aspiration” of legal scholars “is not to be objective, but to be significant and persuasive.” In my opinion, this neglects the relationship between the two. It is precisely the lack of objectivity that leads to much of the insignificance and unpersuasiveness of legal scholarship. He rejects this claim because “it seems implausible to suggest that legal formalism, the legal process school and, more recently, law and economics have had no such effects” *Id.* at 547. None of these three areas involve anything like the normativity that is the object of Professor Rubin’s inquiry. Whatever the motives of their various members, for the most part the work that they did involved, *seriatim*, examining the formal implications of doctrine, the limits of the judicial process, and the implications of microeconomics. In short, each had aspirations to achieve objectivity, and thus are counterexamples to the thrust of Rubin’s central argument. It is also a bit surprising in a paper chastising others for their empirical failures to find such unsupported claims as, “[t]he whole point of legal scholarship is to organize and maintain a normative debate.” *Id.* at 555. Some of Rubin’s work was in answer to the claims of the critical legal studies movement. *See, e.g.*, Rubin, *supra* note 48; Pierre Schlag, *Pre-Figuration and Evaluation*, 80 CAL. L. REV. 965 (1992) (responding to Professor Rubin). And so perhaps he was motivated to show that normative work is not just disguised politics. In any event, the characterization of legal scholarship is obviously false (there are other “points” to it than normative debate), and for me the interesting question is the significance of the aspiration to objectivity.

Interest in the postmodern movements represented by Rubin and Schlag’s writings appears to have quieted down considerably, perhaps in no small measure because of their apparently ineradicable internal contradictions. For example, in explaining aspects of various post-modern epistemologies, Professor Rubin notes:

The critique of methodology may seem to contain a rather pessimistic message about the value of the scholarly enterprise, but any sense of dismay is based upon false expectations born of a positivist model. The idea that there exists some accessible, culturally independent description of reality that provides an absolute standard for evaluation is an illusion generated by our own specific cultural context, a bit of Judeo-Christian mythology.

Rubin, *supra* note 48, at 906-07.

It is difficult to imagine a more self-confident “culturally independent description of reality that provides an absolute standard for evaluation” than this assertion that no such thing exists. In this respect, the critiques of positivism fall prey to the essence of the very critique they make, to wit that they fail the test of applying their own standards to themselves. Under the influence of H.L.A. Hart, modern jurisprudence takes questions of knowledge quite seriously. *See, e.g.*, Kenneth Einar Himma, Book Review, *Substance and Method in Conceptual Jurisprudence and Legal Theory*, 88 VA. L. REV. 1119 (2002). Perhaps it takes it too seriously (but for quite different reasons than the post-modernists), according to Danny Priel. Danny Priel, *The Boundaries of Law and the Purpose of Legal Philosophy*, 27 L. & PHIL. 643 (2008), available at http://www2.warwick.ac.uk/fac/soc/law/staff/academic_old/priel/boundaries_pre_publication.pdf.

reality out there, which this new theory is trying to get “right.” This leads to the second reason for the run of such inadequate theories. In part, it is because much of the legal professoriate is not trained in any of the sciences or mathematics, and thus does not think naturally in terms of verifiability or propositions with truth value, and the like. More fundamentally, this legal field is much more like the subject matter of biology than physics. Indeed, perhaps most legal fields are more like biology than physics. It is more like biology than physics because it is big, sprawling, complicated, dynamic, and so on. It is computationally intractable and some of its variables are more or less continuous (like coercion), but the messiness is even deeper than that. The Fifth Amendment sprawls over much of modern life and can arise in untold and unpredictable ways. There are gaps, in other words, and how they will be filled in when a case arises will have a heavy dose of pragmatism that no theory constructed in the absence of knowledge about the yet-unanticipated events could capture. In any event, any theory would involve too many variables to be computationally tractable.⁶¹

IV. WHAT IS A LEGAL SCHOLAR TO DO?

As banal as it is, I would say it depends—it depends on the objective of the legal scholar. Much of what I have discussed above will be of no moment to many working legal academics precisely because their job description does not involve the production of empirically adequate theories. Nor do they see their role as predicting the future of the legal system or its various parts, or as providing the engineering tools that exploit empirically adequate theories to permit the manipulation of the environment. The only “tool” to remake the environment that emerges from this form of legal scholarship is persuasion based upon moral vision, which has proven a notoriously unreliable tool in the hands of law professors. Those who trod this path should thus not be surprised to find the legal environment largely unaffected by their efforts. If the value being pursued is simple creativity or what is sometimes called insight, then none of this matters, of course, but it does matter if the objective is effect through law reform.

This is not to say that normative arguments cannot be deployed in successful efforts to control the legal environment. In many instances, they may very well be necessary to such efforts, but rarely will they be sufficient, I suspect. For normative arguments to persuade, they must

⁶¹ Allen & Rosenberg, *supra* note 42, at 1190-1200.

rest on adequate understandings of the present condition and plausibly project the suggested change into a counterfactual future world. In short, a necessary component of moral persuasion is likely to be empirical adequacy—an accurate description of what is and a reliable prediction of the consequences of change. Everyone, in short, is a pragmatist.

This puts in stark relief the failings of virtually all of the theorizing about the Fifth Amendment. None of them are even close to empirically adequate. They treat the world as something to be bent to the will of the theorist rather than as a mystery calling for clarification. In doing so, they neglect that ongoing social processes surely are ongoing for reasons, however complex they may be.⁶² Without a reasonable grasp of the underlying reasons that can only be approached through a clear understanding of what the current reality is, normative calls for change will appear uninformed and naive at best, and at worst just so much hot air. So, even the normative scholar who is interested in having an impact will likely be assisted by attending to the empirical adequacy of his theory, first to demonstrate what is and then to argue for what could be in a sensible fashion.

And last, one could, as I more and more do, think that there are wonderful mysteries out there that are in need of explanation, and thus spend one's time trying to add to our stock of knowledge about them and not worry too much about normative matters—which is what we tried to do in our self-incrimination article. Some might criticize this on the ground that our self-incrimination “theory” is just a description and thus gives no reason to think that the next case will be consistent with it. We think the “thus” is quite wrong. We doubt that the system threw up a consistent pattern of cases randomly, although this is induction to be sure. There may very well be reasons, and some obvious ones appear, such as an interesting relationship to both the wording of the Fifth Amendment and its salient history. The problem, though, is that any deeper “theory” on our part would entail a heavy dose of psychology explaining how justices vote. It is hard to imagine a more contingent, and thus more useless, enterprise.

That is why critics of our approach might then respond by saying no, we have missed the point. What is needed is a *normative* theory that justifies this pattern of cases and that will secure its future, but that is just what the ineffectual history of theorizing shows is very unlikely to be found and what the complexity of the underlying dynamic shows is almost surely impossible to construct. Moreover, suppose some such

⁶² For discussions of how intractable nature interferes with legal theorizing, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); and William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1 (1997).

theory is articulated that “justifies” the compelled product of cognition “theory.” It will be constructed based on our present knowledge of the problems within the purview of the Fifth Amendment, and there is no good reason to think the nature of those problems will not continue to change over time. More importantly, what reason would there be to think that the votes of future justices would be influenced by this normative theorizing? That question reinvokes all the messiness and complexity that explains the ineffectual nature of previous Fifth Amendment theorizing.

At the end of the day, the normative approach to the Fifth Amendment reifies the enormous number of variables pertinent to it and treats it as though it had a concrete and discernable substance. To the contrary, it is obvious that the “Fifth Amendment” is a covering label for a complex social process. For all the reasons I have discussed, I doubt that much progress can be made on reducing such things to simple theoretical models or top-down theories, but it does seem that considerable progress can be made in understanding aspects of them. The Fifth Amendment, in short, is biology, whereas the theorists have been employing the tools of theoretical physics.

I will end by returning one last time to the compelled products of cognition theory. Our theory explains every single pertinent case the Supreme Court has decided of which I am aware. Applying normal tools of legal analysis such as a regard for precedent, logical analysis uncovering unanswered questions, regard for text and history, one can also see, as we laid out, the obvious open questions. However, we made no claims that we captured the unique essence of compelled self-incrimination because we do not think there is one in quite the same sense that there is such a thing as a lion or a tiger with a knowable essence. Rather, we have an account of what the forces of history, interpretation, and pragmatism have created. It is remarkably consistent, and its consistency may constitute a strong recommendation for its extension into the future. That is for others to judge.