
INTRODUCTION: WHEREFOR THE PRIVILEGE?

*Kate Stith**

This Symposium Issue features eleven papers concerned with the fate of the Fifth Amendment, and one concerned with the fate of the Sixth. All but one of the papers was presented at an extraordinarily lively and enlightening series of panels organized by Professor Alex Stein and held over two days at the Cardozo School of Law on March 2 and 3, 2008. The presentations, as well as the panel and audience discussions that followed, wrestled with a broad range of issues. We searched for theoretical rationales for a Privilege against compelled self-incrimination and for coherence in present U.S. Fifth Amendment doctrine. We examined comparative practices in other nations and courts for insight into our own. We asked how contemporary changes in the methods of criminal investigation might alter the significance of the Privilege. We disagreed about the meaning of the Privilege in an age of increasing pleas of guilty and fewer trials. And we heard a variety of perspectives on the relationship between the Privilege, on the one hand, and the reliability of verdicts and convictions, on the other.

The papers themselves reveal a variety of analytic and disciplinary approaches, and a range of normative commitments. About half of the contributions appear to share an anxiety that recent developments, in doctrine or in practice, have eroded the Privilege and the protections it assertedly once offered. Other contributors (as well as this reader) see costs as well as benefits flowing from a broad Privilege. In particular, once there is judicially-determined probable cause that the defendant committed a crime, it seems odd *not* to question that person about the crime, while videotaping or lay witnesses might better protect against potential police abuse of suspects.

* * * *

Two of the articles in this issue set out to defend the Privilege generally, one in game-theoretic and the other in epistemological terms.

* Lafayette S. Foster Professor of Law, Yale Law School. The author thanks her colleague Mirjan Damaska for his many insights on the role of the defendant as a source of evidence.

Alex Stein's *The Right to Silence Helps the Innocent: A Response to Critics*¹ answers objections to an important article he coauthored several years ago.² The earlier article argued that the principal benefit of a "right to silence" is to segment the pool of suspects and thereby reinforce the credibility of statements by innocents in the pool. A key insight of this argument is that the Privilege provides guilty suspects an alternative to offering false exculpatory statements, thereby allowing the investigator or fact-finder to place more confidence in the truthfulness of those who speak despite their right to silence. According to Seidmann and Stein's theory, the ordinary "pooling" of claims of innocence by both guilty and innocent defendants leads fact-finders to discount the probative value of all uncorroborated statements of innocence. In Stein's new article, published herein, he elaborates upon and defends this theory, noting that the anti-pooling effect is seen in situations where the evidence against the suspect is neither very strong nor very weak. Perhaps most impressively, Stein argues that the anti-pooling rationale also better explains Fifth Amendment jurisprudence than do other accounts of the Privilege.

A fundamental aspect of that jurisprudence is that the Privilege applies only to compelled *testimony*. In *Self-Incrimination and the Epistemology of Testimony*,³ Michael S. Pardo undertakes to develop a theoretical justification for this limitation—and answers critics who complain that the defendant is equally incriminated by "testimonial" evidence and "physical" evidence, such as blood samples, fingerprints and handwriting samples. Pardo explains that there is a fundamental difference between these two forms of incrimination: When a witness provides *testimony*, she engages in the social practice of purporting to convey information to an audience. It is this *purporting* that makes a defendant's statement different from a defendant's blood sample; whereas the blood speaks for itself, a statement is believed—if it is believed—in part because the defendant guarantees its truth. Under Pardo's approach, the privilege against self-incrimination is thus an extension of the presumption of innocence. The government, bearing the burden of proving the guilt of the defendant beyond a reasonable doubt, cannot shift this burden onto the defendant by requiring her to guarantee the truth of evidence. Pardo argues that merely compelling the defendant to participate in a lineup or produce handwriting does not require her to vouch for the accuracy (or even the relevance) of

¹ Alex Stein, *The Right to Silence Helps the Innocent: A Response to Critics*, 30 CARDOZO L. REV. 1115 (2008).

² 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).

³ Michael S. Pardo, *Self-Incrimination and the Epistemology of Testimony*, 30 CARDOZO L. REV. 1023 (2008).

whatever inferences may be drawn. Pardo uses his approach to explain why a court-ordered polygraph would violate the Privilege—not because the witness’s actions are the products of cognition (compare Allen, immediately below) but because the results of the test signal whether the suspect’s statements can be believed.

Not every contributor has set out to defend or justify the Privilege. Ronald J. Allen remains puzzled that we have declared a fundamental right to be released of the obligation to provide testimony that is clearly relevant to the proceeding at hand on the grounds that it incriminates oneself, as opposed to others. In his article *Theorizing About Self-Incrimination*,⁴ Allen more broadly takes the opportunity to champion scholarship that is descriptively accurate and empirical in nature, while leveling criticism again three types of legal theory. His first target is theory that attempts both to explain past decisions and to predict future doctrinal developments. Allen criticizes the extrapolation from descriptive to predictive accounts, which make the unwarranted assumption that courts will reason in the future as they are alleged to have reasoned in the past. His second target has special relevance to much writing about the Privilege: Allen has little use for justificatory theory that proceeds on the *premise* that the Privilege reflects fundamental values of our society; Allen calls for subjecting that premise to critical analysis. Finally, Allen posits that legal theorists often muddle the distinction between prediction, on the one hand, and prescription, on the other. Of equal interest to this reader is Allen’s own eminently plausible *descriptive* account of the Fifth Amendment as protecting the products of cognition.

Unlike the authors just discussed, many of the contributors to this Symposium address not the theories of, or rationales for, the Privilege and other trial rights, but how doctrine affects actual practice in the proverbial “real world.” Alexandra Natapoff’s *Deregulating Guilt*⁵ emphasizes the disconnect between stringent evidentiary and procedural rules that govern full-fledged trials on the one hand, and the opaque regulation of actual criminal justice practice on the other hand. She focuses her criticism in particular on the Supreme Court’s recent decision in *United States v. Ruiz*,⁶ which held that defendants are not constitutionally entitled to material impeachment evidence (as opposed to evidence that is *exculpatory*) before entering a plea of guilty. Drawing on information theory, Natapoff concludes that an increasingly deregulated information culture has shifted the determination of criminal guilt from a traditional evidence-driven inquiry (*i.e.*, the trial)

⁴ Ronald J. Allen, *Theorizing About Self-Incrimination*, 30 CARDOZO L. REV. 729 (2008).

⁵ Alexandra Natapoff, *Deregulating Guilt: The Information Culture of the Criminal System*, 30 CARDOZO L. REV. 965 (2008).

⁶ 536 U.S. 622 (2002).

toward a concession-based approach that rewards the defendant who submits to governmental authority (*i.e.*, the guilty plea). With *Ruiz* as the launching pad, Natapoff examines what she calls three different “informational spheres.” The first and smallest sphere is the *adversary trial*—characterized by formal and complex doctrine, skilled counsel and strong rights protections, including the Privilege and the requirement of proof beyond a reasonable doubt. The second sphere, to use Natapoff’s metaphor, is *plea bargaining*, a lightly-regulated informational process that explicitly admits of many informational asymmetries and inequalities. Third and largest is the *investigative sphere*, which Natapoff characterizes as the “most powerful adjudicative arena” because it is here that governmental authorities set the conditions under which a suspect confronts the state. Natapoff powerfully builds her argument that in sealing off the full *Brady* right for trials only, *Ruiz* leaves many suspects unprotected in the earlier spheres, where authorities make critical decisions and the defendant has little access to information or other sources of power, and voices her concern that this process is secret and mostly unregulated. Yet this reader also notes that much criminal investigation is *necessarily* secretive, and if further regulated—it is partially regulated, of course, by the Fourth Amendment and by *Miranda*, neither of which are trial rights at their core—it might simply be preceded by a yet broader “sphere” to use Natapoff’s metaphor (or an earlier “stage” to use the conventional metaphor).

Three of the Symposium articles undertake comparative analysis. In *English Warnings*,⁷ Mike Redmayne explores the nature of the English “right to silence” during a police interview and at trial. Under the Criminal Justice and Public Order Act of 1994 (CJPOA), the suspect or defendant has no legal obligation to speak, but fact-finders are permitted to draw an adverse inference from silence in either domain. In nuanced and balanced fashion, Redmayne provides a useful and thorough examination of the case law that has developed interpreting the CJPOA provisions; the courts have generally interpreted these provisions narrowly, to the benefit of suspects. With the same thoughtfulness and sensitivity to competing interests, Redmayne also considers whether the United States should adopt similar rules. Critics of *Miranda* (who are mostly found outside of the academy) argue that current federal constitutional doctrine overly protects the guilty by facilitating suspects in withholding information. The CJPOA increases the provision of information by making silence less attractive. Yet there are obvious costs to such an approach: The accused’s autonomy is infringed, and the penalty for remaining silent may potentially lead to more false confessions. Redmayne admirably canvasses the academic

⁷ Mike Redmayne, *English Warnings*, 30 CARDOZO L. REV. 1047 (2008).

scholarship on CJPOA, which, not surprisingly, is highly critical. He then considers how adopting a similar understanding of the Privilege would affect proceedings in the United States. Of critical importance is that in this country, but not in England and Wales, a defendant who testifies at trial can be impeached by prior convictions and other character evidence. Redmayne makes a good case that in these circumstances, formally penalizing the non-testifying defendant (by allowing an adverse inference to be drawn from her silence) “is deeply problematic.”⁸

Andrew Ashworth’s *Self-Incrimination in European Human Rights Law—A Pregnant Pragmatism?*⁹ (the only paper that was, unfortunately, not presented in person at the Symposium) also undertakes a thoughtful comparative analysis of the right to silence, here tracing recognition and refinement of the Privilege by the European Court of Human Rights. Neither the European Convention on Human Rights nor the U.N.’s International Covenant on Civil and Political Rights explicitly bestows a Privilege against compelled self-incrimination. Yet the Privilege has been found in these charters by the Court in Strasbourg; Ashworth sets out to explain how and why. The underlying premise of the doctrinal development is that forced self-incrimination violates the right to a fair trial, which is guaranteed in Article 6 of the Convention. Interestingly, the original 1993 case enunciating the Privilege dealt with a subpoena for physical records (bank statements), not testimony. Several years later, the Court held that there is a right to silence at police questioning, though it permitted an adverse inference to be drawn, and subsequently held that testimony obtained under threat of contempt could not be used in a subsequent prosecution of the witness. The precise contours of Europe’s new Privilege doctrine continue to be developed, but in ways that generally frustrate theorists because the Court often undertakes a form of balancing analysis, weighing the individual’s interests against those of the government. While he rejects such a balancing approach, Ashworth nonetheless recognizes that the Privilege cannot protect every person from ever producing documents or information needed by the government in a highly regulated society. He discusses, for instance, recognizing exceptions for “relatively minor offences connected to voluntary social enterprises” and for production of information regarding taxation and other regulatory requirements. He rejects as “unprincipled,” however, the Strasbourg Court’s apparent willingness to jettison the Privilege in cases involving the most serious crimes. Yet this reader notes that there certainly are principles or values that can

⁸ Redmayne, *supra* note 7, at 1088.

⁹ Andrew Ashworth, *Self-Incrimination in European Human Rights Law—A Pregnant Pragmatism?*, 30 CARDOZO L. REV. 751(2008).

justify such a limitation; it may be that Ashworth, like many other noteworthy scholars of jurisprudence, rejects “balancing” approaches as *inherently* unprincipled.

Unlike the other two comparative papers, the contribution by Kent Roach addresses not the general contours of the Privilege, but its application and consequences (intended and unintended) with respect to a particular type of investigation—terrorism investigations after 9/11. In *The Consequences of Compelled Self-Incrimination in Terrorism Investigations: A Comparison of American Grand Juries and Canadian Investigative Hearings*,¹⁰ Roach contrasts immunity practice in our federal courts with the self-incrimination regime in Canada. He argues that while the news media have focused on particularly abusive information extraction practices (such as “water-boarding”), developments in immunity doctrine and practice may be of wider and deeper significance. At the core of Roach’s article is the simple but often overlooked insight that the U.S. Constitution does not give an individual the right not to be compelled to provide incriminating evidence; it only prohibits the use and derivative use of this testimony in the prosecution of the witness herself. Moreover, the courts have defined derivative use so broadly that the effect is to make it highly unlikely that an immunized witness can be prosecuted for the underlying crime about which she testifies. Roach explains how the power to grant immunity affects the exercise of investigative and prosecutorial discretion, and argues that it may have a particularly distorting effect in cases involving terrorism. Witnesses who have been arrested under a material witness warrant may find their testimony delayed until it is clearer whether the witness is a member of the criminal conspiracy, at which point they might not be called to testify despite having been detained. Other witnesses might be immunized but then transferred to a jurisdiction elsewhere in the world that does not recognize such protections. Yet others may be granted immunity but end up being prosecuted for obstruction of justice or perjury. Let me make clear that Roach is *not* arguing that persons arrested under a material witness warrant (or witnesses who are given use-and-derivative use immunity) should never be prosecuted; moreover, he is unusually sensitive to the uncertainties and dilemmas that investigators and prosecutors face in deciding whether to immunize an apparent witness in a terrorism case. Rather, his concern is that immunity grants to overcome the Privilege produce a distorting influence on how terrorism cases are investigated, who is arrested and detained, and, ultimately, who can be prosecuted for what crimes. Roach’s argument is clear and

¹⁰ Kent Roach, *The Consequences of Compelled Self-Incrimination in Terrorism Investigations: A Comparison of American Grand Juries and Canadian Investigative Hearings*, 30 CARDOZO L. REV. 1089 (2008).

thought-provoking. While this reader wonders whether the bigger culprit here is the overly-broad reach of use and derivative use immunity, Roach remains committed to the constitutional desirability of a broad Privilege and broad immunity grants.

In *Corporate Confessions*,¹¹ Brandon L. Garrett addresses with considerable nuance a very different context in which the Fifth Amendment right against compelled self-incrimination provides little protection to a would-be defendant. Artificial entities such as a corporation are not protected by the Privilege. At the same time, the broad scope of (federal) criminal liability of corporations provides for a form of vicarious liability that is nowhere else countenanced in the criminal law. Yet corporations are not without defensive weapons. Corporations conducting internal investigations under the umbrella protection of the attorney-client privilege (which is very broad in federal law and under the law of most states) can gather information and use tactics unavailable to prosecutors. For instance, employees may be fired for non-cooperation, and even apart from such threats they may be especially forthcoming to a lawyer speaking to them at their worksite. Garrett observes that constitutional safeguards provide employees little protection in such investigations unless the corporation is formally acting as an agent of government investigators or prosecutors (in which case compulsion is not allowed, and *Miranda* applies). Employees therefore must rely on employment contracts and appeals to their firms' perceived self-interest for protection. So-called "Adnarim" warnings (*Miranda* spelled backwards), for example, may be given by corporate counsel to inform employees that the lawyer in the room represents the corporation and not the employee. Although these warnings are not constitutionally required, firms frequently find pragmatic reasons to explain potential conflicts of interest. In addition, employees with a contractual right to attorneys' fees will frequently avail themselves of separate counsel. Garrett considers whether the pressure on corporations to cooperate is great enough to treat them, *ipso facto*, as government agents, but ultimately concludes (persuasively to this reader) that such a conclusion is practically unwarranted and doctrinally unavailable. Still, he urges government investigators and prosecutors to reward rather than punish firms that honor their employees' contractual protections, and to seek only corporate cooperation that "elicits informed, sound, and conflict-free statements by employees."¹²

In light of apparent gaps in Fifth Amendment coverage, two authors propose new strategies to strengthen the right against compelled self-incrimination and other rights that apply outside of (as well as at) trials. Like Garrett, Erica Hashimoto calls for prosecutors to conform

¹¹ Brandon L. Garrett, *Corporate Confessions*, 30 CARDOZO L. REV. 917 (2008).

¹² *Id.* at 946.

their behavior to a proposed ethical standard. In *Toward Ethical Plea Bargaining*,¹³ however, Hashimoto goes one step further, arguing that the ethical standard should be codified in the Rules of Professional Conduct. Rule 3.8 of the Model Rules already requires that prosecutors make “timely” disclosures to defense counsel of information “tending to negate the guilt” of the accused, but it is not clear what “timely” means nor exactly which types of disclosures are required. As does Natapoff, discussed previously, Hashimoto takes aim at the Court’s recent decision in *Ruiz*,¹⁴ which Hashimoto thinks (contrary to this reader’s judgment) may be extended in the future to deny defendants who plead guilty a right to any *Brady* material, even that which exculpates the defendant. Moreover, she notes that the increasingly common practice of requiring defendants who plead guilty to waive their right to appeal means that there may be no available legal forum for these defendants to assert constitutionally or statutorily based discovery rights. To strengthen and clarify the obligations of prosecutors, Hashimoto proposes that Rule 3.8 be amended to apply to pre-plea disclosures and to apply to all exculpatory *and* impeachment evidence. This approach has advantages for defendants. First, a prosecutor’s ethical obligations—as opposed to defendant’s rights—cannot be waived. Second, as Hashimoto notes, the *Bagley* materiality standard (which considers whether the fact-finder might have reached a different verdict had the information been provided)¹⁵ is ill-suited to plea bargaining. Hashimoto does not mention yet another reason that obtaining a remedy for a *Brady* violation in the plea context will often be impossible: Assuming that a defendant who seeks to withdraw her plea due to a *Brady* violation must make the same showing that is required for withdrawal due to ineffective assistance of counsel,¹⁶ she would have to prove that she would not have pled guilty (as opposed to proving she would have received a better plea deal) had the particular information been disclosed to her. In sum, Hashimoto presents a most interesting proposal, and this reader looks forward to her future examination of institutional structures that would provide incentives and resources to litigate arguable breaches of the proposed new requirement in Model Rule 3.8.

In *The Confessional Penalty*,¹⁷ Talia Fisher and Issachar Rosen-Zvi also contemplate a new strategy that they argue would curb violations of defendants’ rights. Their particular concern is with false confessions.

¹³ Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949 (2008).

¹⁴ *Ruiz*, *supra* note 6.

¹⁵ See *United States v. Bagley*, 473 U.S. 667 (1985).

¹⁶ See *Hill v. Lockhart*, 474 U.S. 52 (1985).

¹⁷ Talia Fisher & Issachar Rosen-Zvi, *The Confessional Penalty*, 30 CARDOZO L. REV. 871 (2008).

Although they do not explicitly assume that all such confessions are produced through “compulsion” violating the Privilege, they argue that the Privilege and other evidentiary rules do little to prevent false confessions. There is an incentive to rely on confessions, they say, because they are inexpensive to obtain relative to other means of obtaining proof of guilt. This itself would not be problematic, but becomes so (the authors argue) because judges, police and jurors are prone to overestimate the veracity of confessions and their own ability to sort true from false confessions. Fisher and Rosen-Zvi therefore propose a “confession penalty.” In the current regime, confessing defendants may receive shorter sentences, at least if the confession leads to a plea of guilty. Under Fisher’s and Rosen-Zvi’s regime, trials that end in conviction would likewise result in a reduced sentence *if the government presented the defendant’s confession as evidence at the trial*. Assuming that prosecutors seek to maximize years meted out as punishment (a thoroughly unrealistic assumption, but acceptable for pedagogical purposes here), this proposal would discourage prosecutors from relying on confessions and encourage them to obtain other evidence proving guilt beyond a reasonable doubt, either to secure a conviction at trial or to provide an incentive for the defendant to plead guilty. Fisher and Rosen-Zvi recognize that recent empirical studies of erroneous convictions suggest that false confessions are a source of error only in certain types of crimes, especially murder cases; other sources of error, in particular erroneous witness identifications, are a far greater source of error in, for instance, rape cases. This reader notes that if we were in fact to adopt a “confessional penalty,” the effect could be to reduce the penalty for murder, while not addressing the serious problem of wrongful convictions in rapes and robberies. Indeed, this reader worries that a “confessional penalty” might constitute an incentive for rapists to murder their victim/witnesses.

Kenworthy Bilz, in *Self-Incrimination Doctrine is Dead; Long Live Self-Incrimination Doctrine*,¹⁸ argues that technological change has already reduced reliance on confessions. In the first part of her paper, Bilz explains that expert testimony and evidence obtained from forensic technologies such as biometric data (*e.g.*, DNA profiling), location tracking, and data mining are increasingly being used in court due to the rapidly improving reliability, availability, and falling costs of these techniques. She then infers that such forensic evidence will replace the need for confessions and eye-witness testimony. In Bilz’s estimation, such “traditional evidence” is, compared with the new forensic evidence, unreliable and expensive, in terms of both direct costs and

¹⁸ Kenworthy Bilz, *Self-Incrimination Doctrine is Dead; Long Live Self-Incrimination Doctrine: Confessions, Scientific Evidence, and the Anxieties of the Liberal State*, 30 CARDOZO L. REV. 807 (2008).

indirect societal costs—most importantly, wrongful convictions. The author ventures that the observed rise in the use of forensic science in the United States can thus be expected to correlate with a decline in the use of confessions, given limited resources. In the second part of her paper, Bilz proceeds to a novel and intriguing argument: Despite the diminishing importance of confessions, the advent of forensic evidence has not eliminated certain fundamental anxieties associated with the “confession era.” She identifies these anxieties as including fear about the overreaching power of the state relative to the individual, and fear about the possibility that certain types of evidence can undermine the importance of the citizen-jury in our adversarial system. In Bilz’s view, forensic evidence may be more empirically reliable than confessions and eye-witness accounts, but its use can still undermine the adversarial system or foster state coercion of the individual, just as is true of a regime that relies on confessions. Bilz asserts that the evolving doctrine governing the admissibility of scientific evidence (as set forth in, for instance, Federal Rule of Evidence 702 and the *Daubert* line of cases) reflects these same anxieties. According to Bilz, this is why despite the greater reliability of forensic technologies, skepticism about scientific evidence in criminal law has increased. Still, this reader would give greater weight than does Bilz to the potential of the new forensics to reduce the principal anxiety about use of confessions and eye-witness testimony: conviction of the innocent (see the discussion of the Fisher and Rosen-Zvi article above).

Concerns about state power and about the reliability of convictions are not limited to discussions of the Fifth Amendment Privilege, of course. One of the papers at the Symposium discussed some of these concerns in the context of the trial rights guaranteed by the *Sixth* Amendment. In *The Sixth Amendment and Criminal Sentencing*,¹⁹ Stephanos Bibas and Susan Klein describe how the Supreme Court has dramatically redefined modern sentencing jurisprudence over the past several terms. *Blakely*²⁰ (prohibiting an increase in the lawful sentence on the basis of judicial fact-finding at sentencing) and *Booker*²¹ (applying the *Blakely* rule to the Federal Sentencing Guidelines) originally emerged, in the authors’ view, as curious departures from precedent. Now that they have become permanent fixtures in—indeed the very foundation of—sentencing law, commentators have scrambled to assess their likely impact. In an admirable contribution to this effort, Bibas and Klein discuss the implications and effects of a recent trilogy

¹⁹ Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775 (2008).

²⁰ *Blakely v. Washington*, 542 U.S. 961 (2004).

²¹ *United States v. Booker*, 543 U.S. 220 (2005).

of Supreme Court decisions—*Rita*²², *Kimbrough*,²³ and *Gall*²⁴—in which the Court continued *Booker*'s transformation of the Federal Sentencing Guidelines from “mandatory” to what the reader might term “rebuttably recommended.”²⁵ While these cases will not have an immediate impact on most state sentencing schemes, because most states do not rely on mandatory or presumptive guidelines, federal sentencing outcomes may change significantly. In particular, Bibas and Klein predict that recent rulings will inject greater uncertainty into sentences, and hence into plea negotiations, and that this uncertainty will generally redound to the benefit of defendants for three reasons. First, they contend that knowing the prosecutors seek to avoid uncertainty, federal defendants and defenders will be psychologically emboldened to negotiate lower sentences. Second, because judges are now empowered to “inject their own policy views”²⁶ at sentencing, and as a general rule federal judges consider the Federal Sentencing Guidelines too harsh, judges will use their new authority to impose lower sentences. Third, the recent sentencing decisions of the Supreme Court have reduced the credibility of prosecutors who threaten retaliation (and higher sentences) if the defendant does not accept the plea offered. Together these factors will provide additional bargaining power to criminal defendants, and as a consequence will yield lower sentences—both in the federal system and in the few state regimes that are affected by the *Blakely* rule. Bibas and Klein are also to be commended for their most helpful Appendix, which sets forth the sentencing regime in each jurisdiction and notes which states will be affected *Blakely* and its progeny. This reader looks forward to the authors' examination, in a future paper, of the impact of *Blakely* and *Booker* on the reliability of guilty pleas and the issue of wrongful convictions, the animating concerns of so many papers in the Symposium.

* * * *

Together, the articles published in this Symposium Issue represent a thoughtful, well-reasoned collection of essays that push modern Fifth Amendment (and Sixth Amendment) scholarship toward new frontiers. The Cardozo Law Review and Professor Alex Stein are to be

²² *Rita v. United States*, 127 S. Ct. 2456 (2007).

²³ *Kimrough v. United States*, 128 S. Ct. 558 (2007).

²⁴ *Gall v. United States*, 128 S. Ct. 586 (2007).

²⁵ See generally Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008).

²⁶ Bibas & Klein, *supra* note 19, at 780.

congratulated for arranging this unusual opportunity to engage in depth the fundamental question at hand: Under what circumstances may civil society require testimony or other evidence that will implicate the witness in commission of a crime?