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When the Evidence Is the Crime

David B. Lat

Case Notes

When the Evidence Is the Crime

Holmes v. California Army National Guard, 124 F.3d 1126 (9th Cir. 1997).

With its recent decision in *Holmes v. California Army National Guard*,[1] the Ninth Circuit became the fourth federal appeals court to uphold the military's "don't ask/don't tell" policy.[2] In doing so, it closely followed the reasoning set out by Judge Wilkinson in *Thomasson v. Perry*[3] and echoed by Judge Loken in *Richenberg v. Perry*:[4] Homosexuals are not a suspect class for purposes of equal protection review;[5] the government has a legitimate interest in preserving military unit cohesion,[6] an interest that is served by the prohibition of homosexual conduct;[7] and dismissal for statements of homosexuality does not penalize speech, but rather the conduct of which that speech is probative evidence.[8]

Taken in the context of the other circuit courts' decisions, *Holmes* represents a disturbing trend: the courts' progression toward a more and more facile dismissal of gay servicemembers' First Amendment arguments. The

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1. 124 F.3d 1126 (9th Cir. 1997).

2. The military's policy on homosexuals is codified at 10 U.S.C. § 654 (1994). The statute provides for dismissal of servicemembers who "demonstrate a propensity or intent to engage in homosexual acts," *id.* § 654(a). This demonstration may be made by engaging in homosexual acts, stating that one is homosexual or bisexual, or marrying a person of the same biological sex, *see id.* § 654(b)(1)-(3). This language differs only slightly from the former military policy; the main difference is that the previous policy was articulated in administrative regulations only and was not codified.

The part of the military's policy that departs in substance from the former policy—the "don't ask" provision—is contained not in the statute, but in the Defense Department's implementing regulations. *See* DOD Directives Nos. 1304.26, 1322.18, 1332.14, 1332.30, and DOD Instruction No. 5505.8. The substance of these directives is not mandated by the statute. Thus, the "don't ask" prong may be altered or dropped at the Defense Department's discretion.

3. 80 F.3d 915 (4th Cir. 1996) (en banc).

4. 97 F.3d 256 (8th Cir. 1996).

5. *See Holmes*, 124 F.3d at 1132; *Richenberg*, 97 F.3d at 260 & n.5; *Thomasson*, 80 F.3d at 928.

6. *See Holmes*, 124 F.3d at 1133-34; *Richenberg*, 97 F.3d at 261-262; *Thomasson*, 80 F.3d at 928-930.

7. *See Holmes*, 124 F.3d at 1133; *Richenberg*, 97 F.3d at 261-62; *Thomasson*, 80 F.3d at 929.

8. *See Holmes*, 124 F.3d at 1136; *Richenberg*, 97 F.3d at 262-63; *Thomasson*, 80 F.3d at 931-32; *see also* Able v. United States, 88 F.3d 1280, 1294-96 (2d Cir. 1996) (holding that the policy does not violate the First Amendment and remanding on the question of whether it violates the Equal Protection Clause).

Fourth and Second Circuits, the first to review the policy, devoted a moderate amount of space to the question of whether the policy's "don't tell" provision violates the First Amendment.[9] The *Richenberg* opinion, however, spent only one paragraph discussing the claim's merits and delegated the responsibility of a fuller explanation to a handful of cited cases.[10] The single paragraph *Holmes* offers[11] is even shorter than that in *Richenberg*, and *Holmes* cites to fewer precedents.

Yet it is far from the case that the courts have satisfactorily disposed of the relevant First Amendment questions. Even if the government's target is not speech, but the conduct evidenced by that speech, the First Amendment requires further inquiry—a point that only one of the circuit courts has articulated in the context of the military's policy.[12] The reviewing court must ascertain that the government's interest lies only in the nonspeech component of the speech act.[13] The *Holmes* court did not fulfill this constitutional obligation. Had it done so, it would have found that it is the expressive element of statements of homosexual orientation, rather than their evidentiary value, that underlies the government's interest in "don't tell."

I

In *Holmes*, the Ninth Circuit consolidated two cases on appeal, those of Lieutenant Richard P. Watson and First Lieutenant Charles Andrew Holmes. Each man had been discharged from military service after he offered information about his homosexuality. Each was discharged pursuant to 10 U.S.C. § 654(b)(2), which provides for dismissal of a servicemember who states that he is gay, "unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."[14] Both Watson and Holmes attended hearings in which they were afforded the opportunity to rebut the presumption that they engaged in homosexual conduct. Instead, they used the hearings to present evidence of their excellent records of military service. Subsequently, they were discharged.

Watson and Holmes filed complaints alleging that the policy violated their rights to equal protection under the Fifth Amendment and to freedom of speech under the First Amendment. The United States District Court for the Western District of Washington granted summary judgment for the Navy in Watson's

9. *See Able*, 88 F.3d at 1292-96; *Thomasson*, 80 F.3d at 931-34.
10. *See Richenberg*, 97 F.3d at 263.
11. *See Holmes*, 124 F.3d at 1136.
12. *See Able*, 88 F.3d at 1295.
13. *See infra* text accompanying notes 31-33.
14. 10 U.S.C. § 654(b)(2) (1994).

case.[15] It reasoned that the prohibition of homosexual conduct was constitutional[16] and that the discharge was based on likelihood of homosexual conduct rather than expression of homosexual orientation.[17] The United States District Court for the Northern District of California, however, granted summary judgment to Holmes with respect to his equal protection and First Amendment claims, concluding that § 654(b)(2) punishes speech and status rather than conduct and is thus a violation of the First Amendment.[18]

In *Holmes*, the Ninth Circuit reversed the decision pertaining to Holmes and upheld the decision pertaining to Watson.[19] Applying rational basis review, the court rejected the equal protection challenge, finding that the government had a legitimate state interest (i.e., the maintenance of cohesion among troops)[20] and that its chosen means were rationally related to that interest.[21] The court rejected the argument that a mere statement of homosexual status is not rationally related to the interest in prohibiting homosexual conduct, finding that a declaration of homosexual orientation indicates a likely propensity toward homosexual conduct.[22] The court disposed of the First Amendment claim on similar grounds: It held that the "don't ask/don't tell" policy targets not the speech itself, but the conduct of which the speech is probative evidence, and that the First Amendment is therefore "not implicated."[23]

II

Many have questioned the application of the speech-as-evidence framework on the grounds that one cannot infer homosexual conduct from the words "I am gay."[24] This argument does not attack the use of speech as evidence generally—clearly, oral admissions of guilt may be used as evidence in court—but denies that a serviceperson's statement of homosexual orientation has any bearing on whether he or she will violate the military's prohibition on homosexual conduct. This argument fails largely because of the military's definition of homosexual conduct, a definition that includes the "propensity" to engage in homosexual acts.[25] It is a potentially problematic definition; in

15. *See* Watson v. Perry, 918 F. Supp. 1403 (W.D. Wash. 1996), *aff'd sub nom. Holmes*, 124 F.3d 1126 (9th Cir. 1997).

16. *See id.* at 1414.

17. *See id.* at 1415-16, 1417.

18. *See* Holmes v. California Army Nat'l Guard, 920 F. Supp. 1510, 1527-28, 1534-36 (N.D. Cal. 1996), *rev'd*, 124 F.3d 1126 (9th Cir. 1997).

19. *See Holmes*, 124 F.3d at 1128.

20. *See id.* at 1133-34.

21. *See id.* at 1134-36.

22. *See id.* at 1135.

23. *Id.* at 1136.

24. At the judicial level, the most cogent exposition of this argument is Judge Wald's dissent in *Steffan v. Perry*, 41 F.3d 677, 710 (D.C. Cir. 1994) (Wald, J., dissenting).

25. *See* 10 U.S.C. § 654(a)(15) (1994).

other (criminal) contexts, the Supreme Court has held it unconstitutional for the government to penalize someone criminally for her status absent identifiable criminal acts.[26] But as long as homosexual conduct is thus defined, it seems reasonable to treat a statement of homosexual orientation as bearing on the likelihood of such conduct.

Nonetheless, accepting that statements of homosexual orientation bear on the likelihood of homosexual conduct does not mean that the First Amendment is "not implicated." *Wayte v. United States*,[27] for example—a case cited for its speech-as-evidence rationale by all three of the other circuit courts that examined the military's policy[28]—addressed the First Amendment in detail. In *Wayte*, the government pursued a "passive enforcement" policy in prosecuting people who failed to register for the Selective Service: It prosecuted only those who communicated their intention not to register. Although the Court eventually determined, in part on a speech-as-evidence basis,[29] that this practice was permissible, it did not make this determination summarily. Instead, it recognized that any government practice that claims to target the nonspeech aspects of an expressive act must pass the test articulated in *United States v. O'Brien*.[30] This is equally true in the context of § 654(b)(2). The statement "I am gay" may have nonspeech value as evidence of conduct, but it clearly has speech value as well, and so the *O'Brien* test must be applied.

The premise of the *O'Brien* test is that "a sufficiently important governmental interest in regulating the *nonspeech* element can justify *incidental* limitations on First Amendment freedoms."[31] The four-prong test the Court used to implement this standard contains the requirement that the governmental interest involved be "unrelated to the suppression of free expression."[32] At a minimum, then, the government must have an "important or substantial" interest that would remain even if the combined speech/nonspeech act were stripped of its expressive elements. In many cases, this inquiry will be an exercise in judicial imagination, since acts like burning a draft card (the act at issue in *O'Brien*) cannot be accomplished without an expressive component. But a court can still assert, as the *O'Brien* Court did, that the government would have an interest in preventing the destruction of a

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26. *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962) (holding that the mere status of being a narcotics addict may not be criminalized); *see also* Taylor Flynn, *Of Communism, Treason, and Addiction: An Evaluation of Novel Challenges to the Military's Anti-Gay Policy*, 80 IOWA L. REV. 979, 1000-01 (1995) (outlining the argument that propensity relates to status, not conduct).

27. 470 U.S. 598 (1985).

28. *See* Richenberg v. Perry, 97 F.3d 256, 263 (8th Cir. 1996); Able v. United States, 88 F.3d 1280, 1295 (2d Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 932 (4th Cir. 1996) (en banc).

29. *See Wayte*, 470 U.S. at 612 ("[T]he letters written to Selective Service provided strong, perhaps conclusive evidence of the nonregistrant's intent not to comply—one of the elements of the offense.").

30. 391 U.S. 367 (1968), *cited in Wayte*, 470 U.S. at 611.

31. *Id.* at 376 (emphasis added).

32. *Id.* at 377.

draft card even if this were a wholly noncommunicative act.[33] Similarly, in *Wayte*, the government would have an interest in the efficient enforcement of the registration requirement even if refusal to register did not communicate a point of view.

Would the government have a substantial interest in penalizing expressions of homosexual orientation if these expressions were stripped of their communicative element? In other words, would its interest in the evidence remain if the evidence were not expressive in nature? The answer, of course, depends largely on what the government's interest in the evidentiary component is. Because the *Holmes* court did not subject § 654(b)(2) to the *O'Brien* test, it did not require the government to state its interest in the evidentiary statements. It is only logical, however, to assume that the government's interest in responding to evidence of conduct is the same as its interest in prohibiting the conduct in the first place—an interest the government has repeatedly defined as the preservation of unit cohesion among military troops.[34] The question then must be: If the statement "I am gay" were stripped of its expressive, communicative element, would penalizing such a statement advance the government's interest in preserving unit cohesion?

Both logic and legislative history dictate an answer of no. A propensity to engage in homosexual acts that is in no way communicated to the unit does not, and logically cannot, affect the unit's morale. This simple intuition is confirmed by a glance at the testimony on which Congress relied in enacting the legislation. The report of the Association of the United States Army, for example, stated that "[h]eterosexual animosity toward *known* homosexuals can cause latent or even overt hostility, resulting in degradation of team or unit esprit."[35] General H. Norman Schwartzkopf testified that "the introduction of an *open* homosexual into a small unit immediately polarizes that unit."[36] General John P. Otjen stated that disruption occurs "when somebody identifies themselves [sic] as a homosexual."[37] These statements show that the expression of a serviceperson's propensity toward homosexual behavior is fundamental to the unit disruption such a propensity might cause. Where the confession is necessary to complete the crime,[38] it is more than just evidence. It is expression.

Framed in this way, § 654(b)(2) clearly fails the third prong of the *O'Brien* test. If this section of the statute is to survive a First Amendment

33. *See id.* at 382 ("For this noncommunicative impact of his conduct, and for nothing else, he was convicted.").

34. *See supra* text accompanying note 6.

35. H.A.S.C. 103-18, at 337 (emphasis added).

36. S. Hrg. No. 103-845, at 595-96 (statement of General H. Norman Schwartzkopf) (emphasis added).

37. S. Hearing No. 103-845, at 780 (statement of Gen. John P. Otjen).

38. The crime analogy is, of course, only an analogy; the statute does not subject those with propensities toward homosexual conduct to criminal sanctions.

challenge, therefore, it cannot be on the grounds that it is unrelated to the restriction of free expression.

III

What lessons can be drawn from this conclusion? First, acknowledging that expression of homosexual conduct is key to the asserted harm has ramifications for other, facially nonspeech sections of the statute. Section 654(b)(1), for example, flatly prohibits engaging in homosexual acts. Of course, before the government can penalize such acts, they must be somehow "expressed." This is not a function of § 654(b)(1) in particular; as a practical matter, any illegal act must be communicated to others in some way before it can be penalized. A baseline quantity of expression is thus implicated in all restrictions on conduct—it is just too clearly "incidental" to require *O'Brien* analysis. But is it so clearly incidental in the case of § 654(b)(1)? The above analysis of § 654(b)(2) suggests that the expression of these acts—expression which must have occurred in order for the inquiry to arise in the first place—may be necessary not just for the prosecution of the crime, but for the crime itself. If this is the case, there has been a strange twist: Rather than expression serving as a proxy for conduct (the government's claim regarding the "don't tell" provision), conduct in § 654(b)(1) serves as a proxy for expression.

The conclusion that § 654(b)(2) and § 654(b)(1) deliberately restrict expression, however, does not guarantee the unconstitutionality of the military policy. The government may admit to treating statements of homosexual orientation (and even homosexual conduct itself) as expressive acts and still argue that it has a compelling reason to penalize such acts, given their effect on military cohesion. It might advance some kind of a yelling-"fire"-in-a-crowded-theater argument;[39] it would surely invoke the courts' traditional deference to the military in all matters,[40] including those implicating the First Amendment.[41] But in doing so, it would face the proper level of scrutiny demanded by government actions that directly target expression. Moreover, it could no longer promulgate the myth that the military's policy does not have serious implications for free expression. By uncritically accepting the speech-as-evidence framework, the *Holmes* court missed the opportunity to explode that myth.

—Elizabeth Goitein

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39. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

40. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 70 (1981) (noting that judicial deference "is at its apogee" when reviewing congressional acts that pertain to the military).

41. *See, e.g.*, Brown v. Glines, 444 U.S. 348, 354 (1980) ("[W]hile members of the military services are entitled to the protections of the First Amendment, 'the different character of the military community and of the military mission requires a different application of those protections.'" (quoting Parker v. Levy, 417 U.S. 733, 758 (1974))).

Sentencing and the Fifth Amendment

United States v. Mitchell, 122 F.3d 185 (3d Cir. 1997), *petition for cert. filed*, No. 97-7541 (U.S. Jan. 13, 1998).

In *United States v. Mitchell*,[1] the Third Circuit asked whether the Fifth Amendment privilege against compelled self-incrimination applies at sentencing in noncapital cases. Earlier understandings of the privilege held that upon conviction "criminality ceases; and with the criminality the privilege."[2] But in *Estelle v. Smith*,[3] the Supreme Court apparently rejected this established principle, at least in the context of capital cases, by holding the privilege applicable to the penalty phase of a capital murder trial.

The *Smith* Court, however, did not decide the applicability of the Fifth Amendment at sentencing for noncapital crimes. In *Mitchell*, the Third Circuit articulated a theory of the Fifth Amendment that would limit application of the privilege at sentencing. This Case Note argues that the *Mitchell* court's interpretation of the Fifth Amendment provides a significantly improved test for applying the privilege against self-incrimination in the sentencing context.

I

Amanda Mitchell pled guilty to engaging in a conspiracy to distribute cocaine, but reserved the right to contest the amount of cocaine she distributed.[4] At her sentencing, she provided no evidence and did not testify to rebut proof that she sold more than five kilograms of cocaine.[5] She was sentenced based on a determination that she distributed almost thirteen kilograms.[6] The district court

1. 122 F.3d 185 (3d Cir. 1997), *petition for cert. filed*, No. 97-7541 (U.S. Jan. 13, 1998).

2. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2279, at 481 (John T. McNaughton ed., rev. ed. 1961); *see also* United States v. Romero, 249 F.2d 371, 375 (2d Cir. 1957) ("[O]nce a witness has been convicted for the transactions in question, he is no longer able to claim the privilege of the Fifth Amendment and may be compelled to testify.").

3. 451 U.S. 454 (1981).

4. *See Mitchell*, 122 F.3d at 186. Mitchell's guilty plea was open—i.e., not made pursuant to a plea agreement. *See id.* Mitchell was able to plead guilty while reserving the right to challenge the amount of cocaine involved in her offenses because the statutes under which she was convicted do not include the amount of drugs distributed as an element of the offense. *See* 21 U.S.C. § 846 (1994) (criminalizing attempts or conspiracies to distribute controlled substances); *id.* § 860(a) (criminalizing the distribution of controlled substances near schools or colleges). The penalties corresponding to particular types and amounts of drugs are contained in a different section of the Code. *See id.* § 841.

5. *See Mitchell*, 122 F.3d at 187-88. Distributing five or more kilograms of cocaine carries with it a mandatory minimum sentence of 10 years imprisonment. *See* 21 U.S.C. § 841(b)(1)(A).

6. *See Mitchell*, 122 F.3d at 188.

took Mitchell's silence at sentencing into account in making its findings.[7]

The Third Circuit affirmed, holding Mitchell unprotected by the privilege against compelled self-incrimination at sentencing.[8] The *Mitchell* court found Third Circuit precedent to stand for the proposition that a defendant retains a Fifth Amendment right with respect to conduct *for which she has not yet been convicted.*[9] The court distinguished cases from other circuits that appeared to contradict *Mitchell*'s holding, finding that in most of those cases, "the [already convicted] witness could have been subject to prosecution for *other crimes* as a result of the compelled testimony."[10] Reasoning that a defendant cannot invoke the privilege against self-incrimination with respect to crimes for which she has already been incriminated,[11] the court argued that a convicted defendant no longer enjoys Fifth Amendment protection with respect to the crime of conviction, although she would still be protected against being forced to testify about acts of "independent criminality" for which she might be prosecuted in the future.[12] In other words, the Third Circuit held, the privilege "is not implicated by testimony affecting the level of sentence."[13]

II

The Third Circuit's "independent criminality" test is in tension with, but does not run afoul of, the Supreme Court's opinion in *Estelle v. Smith.*[14] In holding the privilege against self-incrimination applicable to the penalty phase of Smith's capital murder trial, the Supreme Court found "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is

7. The district judge told Mitchell, "I held it against you that you didn't come forward today and tell me that you really only [sold cocaine] a couple of times." *Id.*

8. *See id.* at 191.

9. *See id.* at 190.

10. *Id.* (emphasis added). In reading precedents from other circuits, the *Mitchell* court adopted a functional, pragmatic approach that reconciled those cases with *Mitchell* by focusing more on their facts than on their reasoning, on holdings over dicta, and on what the cases actually did, as opposed to what they claimed to be doing.

11. *See id.* at 191; *see also id.* at 189 (citing Supreme Court cases making similar arguments).

12. *Id.* at 191.

13. *Id.*

14. 451 U.S. 454 (1981). *Mitchell* can be read broadly to hold that Fifth Amendment protection ceases after a defendant has been convicted of the crime about which she is being questioned, or narrowly to hold only that the privilege does not bar a court from drawing negative inferences from a defendant's silence at sentencing. A broad reading would focus on certain dicta in *Mitchell*, such as the Third Circuit's endorsement of Wigmore's statement that upon conviction, "criminality ceases; and with criminality the privilege." *Mitchell*, 122 F.3d at 191 (quoting 8 WIGMORE, *supra* note 2, § 2279, at 481). A narrow reading would divide the privilege against self-incrimination into different components, *see id.* at 189 (listing four aspects to the privilege), and then restrict *Mitchell*'s holding to the only component actually at issue in the case: a defendant's right not to be penalized for her silence. The narrow reading is superior because of its greater consistency with *Mitchell*'s own methodological approach of reading cases as narrowly as possible. *See supra* note 10. A narrow reading of *Mitchell* also avoids unnecessary conflict with *Smith.*

concerned."[15] Although in tension with this holding,[16] *Mitchell* does not violate any rule laid down by the Supreme Court. The *Smith* Court rejected the prosecution's argument that the Fifth Amendment can *never* apply at sentencing. But it did not hold that the privilege *always* applies at sentencing. The Court instead adopted an exposure-based standard for applying the privilege: "'[T]he availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.'"[17] Under this standard, the privilege should apply at trial and at capital sentencing—when a defendant's "exposure" is at its highest—but not necessarily at noncapital sentencing.[18]

Mitchell raised an issue of first impression for the Third Circuit. After *Mitchell*, a split among the circuit courts exists on this question.[19] The *Mitchell* court's reexamination of the Fifth Amendment and sentencing may augur significant change in judicial understandings of the privilege against self-incrimination.[20] Should the Rehnquist Court take up the issue considered in *Mitchell*, the possibility that it might adopt a *Mitchell*-like understanding of the privilege, limiting *Smith* to the death penalty context or to its own unique set of facts, should not be ruled out.[21]

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15. *Smith*, 451 U.S. at 462-63.

16. Interestingly enough, *Mitchell* does not cite to *Smith* in its discussion. That the *Mitchell* court overlooked a decision as prominent as *Smith* appears highly unlikely, especially since *Mitchell* cites to (and then refutes or distinguishes) other lower court cases that conspicuously rely upon *Smith* in their reasoning. *See Mitchell*, 122 F.3d at 190 (distinguishing *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067 (6th Cir. 1990), and refuting *United States v. Garcia*, 78 F.3d 1457 (10th Cir.), *cert. denied*, 116 S. Ct. 1888 (1996)).

17. *Smith*, 451 U.S. at 462 (quoting *In re* Gault, 387 U.S. 1, 49 (1967)).

18. Declining to apply *Smith*'s holding to noncapital cases like *Mitchell* finds support in the text of *Smith* itself. The language and reasoning of *Smith* consistently return to the fact that it was a capital case. *See, e.g., id.* at 462-63. Indeed, courts have recognized the importance of *Smith*'s status as a death penalty case, declining to apply its holding in noncapital cases. *See, e.g.*, Baumann v. United States, 692 F.2d 565, 576 (9th Cir. 1982) ("We believe it appropriate to read *Estelle* narrowly."). *But see* United States v. Chitty, 760 F.2d 425, 432 (2d Cir. 1985). Furthermore, *Smith* itself warns against a broad reading. *See Smith*, 451 U.S. at 461 (limiting its Fifth Amendment holding to "the circumstances of this case"), *id.* at 469 n.13 ("Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination.").

19. *Compare Mitchell*, 122 F.3d at 191, *with Garcia*, 78 F.3d at 1463-64 (holding that the district court erred in concluding that the privilege did not protect a defendant during sentencing, but affirming the sentence under "harmless error" analysis).

20. Under Chief Justice Rehnquist, the Supreme Court has limited or otherwise modified several rules of constitutional criminal procedure set forth by earlier Courts, often in ways that have benefited the prosecution. For discussions of how the Rehnquist Court's criminal justice jurisprudence compares with that of previous Courts, see, for example, STANLEY H. FRIEDELBAUM, THE REHNQUIST COURT: IN PURSUIT OF JUDICIAL CONSERVATISM 127-43 (1994); and Staci Rosche, Note, *How Conservative Is the Rehnquist Court?*, 65 FORDHAM L. REV. 2685, 2716-27 (1997).

21. The composition of the Court has changed significantly since *Smith*. Only two members of the *Smith* Court, Justice Stevens and Chief Justice Rehnquist, remain on the Court today. *Mitchell*'s reasoning is very similar to that of then-Justice Rehnquist's concurrence in *Smith*, suggesting that he would be sympathetic to *Mitchell*'s understanding of the Fifth Amendment. *See Smith*, 451 U.S. at 475 (Rehnquist, J., concurring in the judgment) ("I am not convinced that any Fifth Amendment rights were implicated by Dr. Grigson's examination of respondent. . . . [Dr. Grigson] only testified concerning the examination *after*

III

Adoption by the Court of *Mitchell*'s view of the privilege would mark a significant improvement in Fifth Amendment jurisprudence. The *Mitchell* test's virtue is its vindication of the justice system's interest in accurate and appropriate sentencing—the handing down of sentences that fit the defendant and the crime.[22] The *Mitchell* rule satisfies the system's need for relevant information by treating a defendant's silence at sentencing as another piece of "information" to be taken into account in the sentencing process.

The critical question the *Mitchell* rule raises is whether negative inferences drawn from a defendant's silence at sentencing are reliable enough to satisfy a defendant's due process right to be sentenced based on accurate information.[23] Although drawing negative inferences from silence at trial is prohibited,[24] drawing such inferences from silence at sentencing should be permitted for two reasons. First, inferences drawn from silence at sentencing will tend to be more reliable than inferences drawn from trial silence. At trial, a defendant may refrain from taking the stand for reasons unrelated to her guilt or innocence. Indeed, there are several possible reasons that an innocent defendant might not want to take the stand at trial: Her prejudicial prior record might become admissible if she takes the stand; she may have difficulty

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respondent stood convicted." (emphasis added)).

22. *See* 18 U.S.C. § 3661 (1994) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); *see also* United States v. Watts, 117 S. Ct. 633, 635 (1997) (per curiam) (noting that trial judges, in order to craft appropriate sentences, should possess as much information as possible concerning the defendant's life and characteristics).

The systemic interest in sentencing based on a complete record and comprehensive information has only increased since the institution of the Federal Sentencing Guidelines, which require courts to consider a variety of highly specific factors in determining sentences. Under the Guidelines, a district judge is empowered to conduct a broad inquiry prior to sentencing and "may consider relevant information *without regard to its admissibility* . . . provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S. SENTENCING GUIDELINES MANUAL § 6A1.3(a) (1997) (emphasis added).

23. *Cf.* Townsend v. Burke, 334 U.S. 736, 740-41 (1948) (holding that sentencing a defendant based on "materially untrue" assumptions is "inconsistent with due process of law"). This Case Note adopts a view of the Fifth Amendment privilege centered on the goal of reaching reliable determinations of guilt or innocence. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 65-71 (1997) (defending the reliability rationale for the privilege); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 327-33 (1991) (arguing that the privilege, in addition to preventing abusive interrogation, also protects against erroneous conviction of innocent defendants). Many courts and commentators, however, understand the privilege to be grounded primarily in other rationales. *See, e.g.*, Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415-16 (1966) (arguing that the privilege's purpose is "to preserv[e] the integrity of the judicial system" and to protect individual privacy); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 194 (1988) (identifying the limits that the privilege places on the exercise of state power against individuals). Those who view rationales other than reliability as the core justifications for the privilege may find my analysis less persuasive. For convincing critiques of many traditional justifications for the privilege, see David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1122-37 (1986); and Schulhofer, *supra*, at 316-20.

24. *See* Griffin v. California, 380 U.S. 609 (1965) (prohibiting comment by both the prosecution and the court on a defendant's silence at trial).

explaining certain "suspicious transactions or associations"; she may be "inarticulate, nervous or easily intimidated"; or her vague memory of the events in question may reduce her credibility in the face of a skilled cross-examination.[25] At sentencing, in contrast, the judge will generally be aware of any prejudicial prior record of the defendant. (In fact, under the Sentencing Guidelines, federal courts are required to take a defendant's criminal history into account at sentencing.)[26] The sentencing judge, unlike a jury, will not be disproportionately influenced by a defendant's poor performance on the stand;[27] as a repeat player in the criminal justice system, the judge has a better understanding of how the pressures associated with testifying can sometimes make even a truthful person appear dishonest.[28] Furthermore, as a general matter it is less likely that a defendant will perform badly at sentencing than at trial. In most cases,[29] a defendant at sentencing is under less pressure than at trial,[30] and she has a greater opportunity to share her story with the court, unencumbered by the inflexible, unfamiliar rules governing the trial process. If a defendant remains silent at sentencing, then, it is eminently reasonable and logical for a court to infer that her fear of perjuring herself outweighed the strong incentive to testify in mitigation of her sentence. In short, inferences from silence at sentencing would tend to be reliable in a way that cannot be said of inferences from silence at trial.[31]

The second reason for permitting negative inferences to be drawn from silence at sentencing is that the reliability standard at sentencing is significantly lower than the standard used at trial. This difference is reflected in the structures of the two processes. The purpose of trial is to determine whether the punishment power of the state will be brought to bear upon an individual. In contrast, the purpose of sentencing is to craft a sentence appropriate for the crime and the defendant.[32] In this arguably less weighty determination,[33] the

25. Schulhofer, *supra* note 23, at 330.

26. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(f).

27. *Cf.* AMAR, *supra* note 23, at 203 n.21 ("The jury, our innocent defendant might also fear, will likely overreact to any real or perceived slipup on his part on the stand.").

28. In the federal system and in most states, the sentencing function is performed by a judge rather than a jury. *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 1130 (5th ed. 1996). Several of the comparisons I draw in this discussion rely upon important differences between the jury's role in determining guilt and the judge's role as sentencer. In the minority of states where sentencing is done by a jury rather than a judge, and in bench trials, where a judge discharges both the sentencing and guilt-determining functions, such judge-jury comparisons lose significance.

29. Death penalty proceedings may be a key exception to this general rule. *See infra* note ?.

30. A defendant at sentencing will likely be under less pressure than she was at trial because the crucial question of guilt has already been resolved against her. In addition, sentencing proceedings are less formal than trials and the rules of evidence no longer apply, reducing the likelihood that a wily prosecutor, "skilled in the artificial rules governing courtrooms, will be able to trip [an honest defendant] up." AMAR, *supra* note 23, at 203 n.21.

31. As Akhil Amar argues, "Even if adverse inferences are unreliable to prove guilt, perhaps they may be reliably used in the sentencing process, *after* guilt has already been reliably established." *Id.* at 52.

32. *See supra* note 22 and accompanying text.

33. Because death penalty proceedings involve decisions of such great consequence, defendants at these proceedings are often accorded protections usually reserved for defendants at trial, as opposed to the

proceedings are somewhat less formal,[34] evidence that would be inadmissible at trial may be admitted,[35] and the prosecution bears its burden of proof by a mere preponderance of the evidence.[36] These differences in purpose and structure support the idea that a court can draw reasonable adverse inferences from a defendant's silence at sentencing that a jury should not make at trial.

Although drawing negative inferences from silence at sentencing advances sentencing policy goals, it cannot be permitted if it constitutes unconstitutional coercion under *Griffin v. California*.[37] Current case law suggests that the *Mitchell* rule is constitutional. The "coercion" permitted by *Mitchell*—allowing sentencing courts to draw negative inferences from silence—is rather weak. Plea bargains, which threaten to "coerce" admissions of guilt by offering defendants outcomes more favorable than what they would have received if convicted after a trial, have been upheld as constitutional.[38] The "acceptance of responsibility" provision of the Federal Sentencing Guidelines,[39] which threatens to "coerce" admissions by offering a sentencing "discount" to defendants who accept responsibility for a crime, has also been upheld.[40] In light of these precedents, it would seem, *a fortiori*, that no constitutional obstacle stands in the way of following *Mitchell*.

The trial and sentencing processes differ in purpose and structure, and the constitutional rules that govern the former should not be applied automatically and unthinkingly to the latter. A defendant facing sentencing has a strong incentive to offer any truthful testimony with the potential to reduce her sentence. If she remains silent, it is only logical for the court to infer that she has no such testimony to offer. Reason and common sense affirm the wisdom of drawing negative inferences from a defendant's silence at sentencing, and the Fifth Amendment raises no bar to this practice.

—David B. Lat

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reduced protections available to defendants at sentencing. In *Smith*, for example, the decision about whether to sentence the defendant to death was made by a jury rather than a judge, and the prosecution bore the burden of proof beyond a reasonable doubt. *See* Estelle v. Smith, 451 U.S. 454, 457-58 (1981). In the federal system and in two-thirds of the states that have statutes providing for capital punishment, the jury has final sentencing authority in capital cases. *See* Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 ALA. L. REV. 5, 9 (1994). Only four states provide for the capital sentencing decision to be made by a judge acting alone. *See id.* at 10.

34. Federal sentencing proceedings have become more formal since the Sentencing Guidelines went into effect in 1987. *See* U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 commentary (1997). *Mitchell* was a federal case; thus my analysis focuses on sentencing in the federal system (although the terms of *Mitchell* are not limited to federal prosecutions). My argument may apply with greater force in state systems with discretionary sentencing regimes, which generally exhibit the informality of the pre-1987 federal system.

35. *See id.* § 6A1.3(a).

36. *See id.* § 6A1.3 commentary.

37. 380 U.S. 609 (1965) (holding that comment by the prosecution or the court on a defendant's silence at trial violates the Fifth Amendment privilege against compelled self-incrimination).

38. *See* Brady v. United States, 397 U.S. 742 (1970) (upholding the constitutionality of plea bargaining).

39. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1.

40. *See, e.g.*, United States v. Henry, 883 F.2d 1010 (11th Cir. 1989) (upholding section 3E1.1 of the Federal Sentencing Guidelines against Fifth and Sixth Amendment challenges).