SUPREME COURT OF THE UNITED STATES

No. 97–7541

AMANDA MITCHELL, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[April 5, 1999]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE THOMAS join, dissenting.

I agree with the Court that Mitchell had the right to invoke her Fifth Amendment privilege during the sentencing phase of her criminal case. In my view, however, she did not have the right to have the sentencer abstain from making the adverse inferences that reasonably flow from her failure to testify. I therefore respectfully dissent.

I

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." As an original matter, it would seem to me that the threat of an adverse inference does not "compel" anyone to testify. It is one of the natural (and not governmentally imposed) consequences of failing to testify– as is the factfinder's increased readiness to believe the incriminating testimony that the defendant chooses not to contradict. Both of these consequences are assuredly cons rather than pros in the "to testify or not to testify" calculus, but they do not *compel* anyone to take the stand. Indeed, I imagine that in most instances, a guilty defendant would choose to remain silent *despite* the adverse inference, on the theory that it would do him less damage than his own cross-examined testimony.

Despite the text, we held in *Griffin* v. *California*, 380 U. S. 609, 614 (1965), that it was impermissible for the prosecutor or judge to comment on a defendant's refusal to testify. We called it a "penalty" imposed on the defendant's exercise of the privilege. *Ibid.* And we did not stop there, holding in *Carter* v. *Kentucky*, 450 U. S. 288 (1981), that a judge must, if the defendant asks, instruct the jury that it may not *sua sponte* consider the defendant's silence as evidence of his guilt.

The majority muses that the no-adverse-inference rule has found "wide acceptance in the legal culture" and has even become "an essential feature of our legal tradition." *Ante*, at 14. Although the latter assertion strikes me as hyperbolic, the former may be true– which is adequate reason not to overrule these cases, a course I in no way propose. It is not adequate reason, however, to extend these cases into areas where they do not yet apply, since neither logic nor history can be marshaled in defense of them. The illogic of the *Griffin* line is plain, for it runs exactly counter to normal evidentiary inferences: If I ask my son whether he saw a movie I had forbidden him to watch, and he remains silent, the import of his silence is clear. Indeed, we have on other occasions recognized the significance of silence, saying that "'[f]ailure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question.'" *Baxter* v. *Palmigiano*, 425 U. S. 308, 319 (1976) (quoting *United States* v. *Hale*, 422 U. S. 171, 176 (1975)). See also *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 153–154 (1923) ("Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character").

And as for history, *Griffin*'s pedigree is equally dubious. The question whether a factfinder may draw a logical inference from a criminal defendant's failure to offer formal testimony would not have arisen in 1791, because

common-law evidentiary rules prevented a criminal defendant from testifying in his own behalf even if he wanted to do so. See generally *Ferguson* v. *Georgia*, 365 U. S. 570 (1961). That is not to say, however, that a criminal defendant was not allowed to *speak* in his own behalf, and a tradition of expecting the defendant to do so, and of drawing an adverse inference when he did not, strongly suggests that *Griffin* is out of sync with the historical understanding of the Fifth Amendment. Traditionally, defendants were expected to speak rather extensively at both the pretrial and trial stages of a criminal proceeding. The longstanding common-law principle, *nemo tenetur seipsum prodere,* was thought to ban only testimony forced by compulsory oath or physical torture, not voluntary, unsworn testimony. See T. Barlow, The Justice of Peace: A Treatise Containing the Power and Duty of That Magistrate 189–190 (1745).

Pretrial procedure in colonial America was governed (as it had been for centuries in England) by the Marian Committal Statute, which provided:

> "[S]uch Justices or Justice [of the peace] before whom any person shall be brought for Manslaughter or Felony, or for suspicion thereof, before he or they shall commit or send such Prisoner to Ward, shall take the examination of such Prisoner, and information of those that bring him, of the fact and circumstance thereof, and the same or as much thereof as shall be material to prove the Felony shall put in writing, within two days after the said examination. . . ." 2 & 3 Philip & Mary, ch. 10 (1555).

The justice of the peace testified at trial as to the content of the defendant's statement; if the defendant refused to speak, this would also have been reported to the jury. Langbein, The Privilege and Common Law Criminal Procedure, in The Privilege Against Self-Incrimination 82,

92 (R. Helmholz et al. eds. 1997).

At trial, defendants were expected to speak directly to the jury. Sir James Stephen described 17th- and 18th-century English trials as follows:

> "[T]he prisoner in cases of felony could not be defended by counsel, and had therefore to speak for himself. He was thus unable to say. . .that his mouth was closed. On the contrary his mouth was not only open, but the evidence given against him operated as so much indirect questioning, and if he omitted to answer the questions it suggested he was very likely to be convicted." J. Stephen, 1 History of the Criminal Law of England 440 (1883).

See also J. Beattie, Crime and the Courts in England: 1660–1800, pp. 348–349 (1986) ("And the assumption was clear that if the case against him was false, the prisoner ought to say so and suggest why, and that if he did not speak that could only be because he was unable to deny the truth of the evidence"); 2 W. Hawkins, Pleas of the Crown, ch. 39, §2 (8th ed. 1824) (confirming that defendants were expected to speak in their own defense at trial). Though it is clear that adverse inference from silence was permitted, I have been unable to find any case adverting to that inference in upholding a conviction– which suggests that defendants rarely thought it in their interest to remain silent. See Langbein, *supra,* at 95–96.

No one, however, seemed to think this system inconsistent with the principle of *nemo tenetur seipsum prodere*. And there is no indication whatever that criminal procedure in America made an abrupt about-face when this principle was ratified as a fundamental right in the Fifth Amendment and its state-constitution analogues. See Moglen, The Privilege in British North America: The Colonial Period to the Fifth Amendment, in The Privilege Against Self Incrimination, *supra,* at 139–140. Justices of

the peace continued pretrial questioning of suspects, whose silence continued to be introduced against them at trial. See, *e.g.*, Fourth Report of the Commissioners on Practice and Pleadings in New York– Code of Criminal Procedure xxviii (1849); 1 Complete Works of Edward Livingston on Criminal Jurisprudence 356 (1873). If any objection was raised to the pretrial procedure, it was on the purely statutory ground that the Marian Committal Statute had no force in the new republic. See, *e.g.*, W. Hening, The Virginia Justice: Comprising the Office and Authority of a Justice of the Peace 285 (4th ed. 1825). And defendants continued to speak at their trials until the assistance of counsel became more common, which occurred gradually throughout the 19th century. See W. Beaney, The Right to Counsel in American Courts 226 (1955).

The *Griffin* question did not arise until States began enacting statutes providing that criminal defendants were competent to testify under oath on their own behalf. Maine was first in 1864, and the rest of the States and Federal Government eventually followed. See 2 J. Wigmore, Evidence §579 (3d ed. 1940). Although some of these statutes (including the federal statute, 18 U. S. C. §3481) contained a clause cautioning that no negative inference should be drawn from the defendant's failure to testify, disagreement with this approach was sufficiently widespread that, as late as 1953, the Uniform Rules of Evidence drafted by the National Conference of Commissioners on Uniform State Laws provided that "[i]f an accused in a criminal action does not testify, counsel may comment upon [sic] accused's failure to testify, and the trier of fact may draw all reasonable inferences therefrom." Uniform Rule of Evidence 23(4). See also Model Code of Evidence Rule 201(3) (1942) (similar).

Whatever the merits of prohibiting adverse inferences as a legislative policy, see *ante*, at 14-15, the text and

history of the Fifth Amendment give no indication that there is a federal *constitutional* prohibition on the use of the defendant's silence as demeanor evidence. Our hardy forebears, who thought of compulsion in terms of the rack and oaths forced by the power of law, would not have viewed the drawing of a commonsensical inference as equivalent pressure. And it is implausible that the Americans of 1791, who were subject to adverse inferences for failing to give unsworn testimony, would have viewed an adverse inference for failing to give sworn testimony as a violation of the Fifth Amendment. Nor can it reasonably be argued that the new statutes somehow created a "revised" understanding of the Fifth Amendment that was incorporated into the Due Process Clause of the Fourteenth Amendment, since only nine States (and not the Federal Government) had enacted competency statutes when the Fourteenth Amendment was adopted, and three of them did *not* prohibit adverse inferences from failure to testify.[1]

The Court's decision in *Griffin*, however, did not even pretend to be rooted in a historical understanding of the Fifth Amendment. Rather, in a breathtaking act of sorcery it simply transformed legislative policy into constitutional command, quoting a passage from an earlier opinion describing the benevolent purposes of 18 U. S. C. §3481, and then decreeing, with literally nothing to support it: "If the words 'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Self-Incrimination Clause is reflected." 380 U. S., at 613–614. Imagine what a constitution we would have if this mode of exegesis were gener-

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[1] The statutes prohibiting an adverse inference were: 1866 Mass. Acts, ch. 260; 1866 Vt. Laws No. 40; 1867 Nev. Stats., ch. XVIII, 1867 Ohio Leg. Acts 260; 1868 Conn. Laws, ch. XCVI; 1868 Minn. Laws, ch. LXX. The statutes not prohibiting an adverse inference were: 1864 Me. Acts, ch. 280; 1866 Cal. Stats., ch. DCXLIV; 1866 S. C. Acts No. 4780.

ally applied– if, for example, without any evidence to prove the point, the Court could simply say of all federal procedural statutes, "If the words 'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Due Process Clause is reflected." To my mind, *Griffin* was a wrong turn– which is not cause enough to overrule it, but is cause enough to resist its extension.

II

The Court asserts that it will not "adopt an exception" to *Griffin* for the sentencing phase of a criminal case, *ante*, at 13. That characterization of what we are asked to do is evidently demanded, in the Court's view, by the very text of the Fifth Amendment: The phrase "any criminal case" *requires* us to "accord the privilege the same protection in the sentencing phase. . . .as that which is due in the trial phase of the same case." *Ante*, at 14. That is demonstrably not so.

Our case law has long recognized a natural dichotomy between the guilt and penalty phases. The jury-trial right contained in the Sixth Amendment– whose guarantees apply "[i]n all criminal prosecutions," a term indistinguishable for present purposes from the Fifth Amendment's "in any criminal case"– does not apply at sentencing. *Spaziano* v. *Florida*, 468 U. S. 447, 462–463 (1984). Nor does the Sixth Amendment's guarantee of the defendant's right "to be confronted with the witnesses against him." (The sentencing judge may consider, for example, reports of probation officers and psychiatrists without affording any cross-examination.) See *Williams* v. *New York*, 337 U. S. 241, 252 (1949). Likewise inapplicable at sentencing is the requirement of the Due Process Clause that the prosecution prove the essential facts beyond a reasonable doubt. *McMillan* v. *Pennsylvania*, 477 U. S. 79, 92 (1986).

The Court asserts that refusing to apply *Griffin* would

"truncate" our holding in *Estelle* v. *Smith,* 451 U. S. 454 (1981), that the Fifth Amendment applies to sentencing proceedings. *Id.*, at 462. With the contrary indications in our caselaw, however, it seems to me quite impossible to read *Estelle* as holding, not only that the Fifth Amendment applies to sentencing as to guilt, but also that it has precisely the same scope in both phases. Thus the question before us, fairly put, is not whether we will "truncate" *Estelle* or create an "exception" to *Griffin*, but whether we will, for the first time, extend *Griffin* beyond the guilt phase. For the answer to that question, one would normally look to the historical understanding of the "no adverse inference" constitutional practice. Since, as described in Part I, there was no such practice, history is of no help here, except to suggest that a mistakenly created constitutional right should not be expanded.

Consistency with other areas of our jurisprudence points in the same direction. We have permitted adverse inferences to be drawn from silence where the consequence is a denial of clemency, see *Ohio Adult Parole Authority* v. *Woodard*, 523 U. S. 272, 285–286 (1998), the imposition of punishment for violation of prison rules, see *Baxter* v. *Palmigiano*, 425 U. S., at 318–319, and even deportation, see *INS* v. *Lopez-Mendoza*, 468 U. S. 1032, 1043–1044 (1984) (citing *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S., at 153–154).[2] There is no reason why the increased

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[2] Even at trial, I might note, we have not held the "no adverse inference" rule to be absolute. One year after *Griffin* v. *California,* 380 U. S. 609 (1965), we did say in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), that a defendant's postarrest silence could not be introduced as substantive evidence against him at trial. *Id.*, at 468, n. 37 (dictum). But we have also held that the Fifth Amendment permits a defendant to be impeached with his prearrest silence, *Jenkins* v. *Anderson*, 447 U. S. 231, 238 (1980), or postarrest silence, *Fletcher* v. *Weir*, 455 U. S. 603 (1982) *(per curiam),* if he later takes the stand during his criminal trial; we have also recognized the vitality of our pre-*Griffin* rule that a testifying

punishment to which the defendant is exposed in the sentencing phase of a completed criminal trial should be treated differently– unless it is the theory that the guilt and sentencing phases form one inseparable "criminal case," which I have refuted above. Nor, I might add – despite the broad *dicta* that it quotes from *Estelle* – does the majority really believe that the guilt and sentencing phases are a unified whole, else it would not leave open the possibility that the acceptance-of-responsibility sentencing guideline escapes the ban on negative inferences. *Ante*, at 15.

Which brings me to the greatest– the most bizarre– inconsistency of all: the combination of the rule that the Court adopts today with the balance of our jurisprudence relating to sentencing in particular. "[C]ourts in this country and in England," we have said, have "practiced a policy under which a sentencing judge [can] exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Williams* v. *New York*, *supra*, at 246. "[A] sentencing judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.'" *Nichols* v. *United States*, 511 U. S. 738, 747 (1994) (quoting *United States* v. *Tucker*, 404 U. S. 443, 446 (1972)). "Few facts available to a sentencing judge," we have observed, "are more relevant to 'the likelihood that [a defendant] will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, [and] the degree to which he does or does

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defendant may be impeached with his refusal to take the stand in a prior trial. *Jenkins*, *supra*, at 235–236, and n. 2 (recognizing vitality of *Raffel* v. *United States*, 271 U. S. 494 (1926)).

not deem himself at war with his society'" than a defendant's willingness to cooperate. *Roberts* v. *United States*, 445 U. S. 552, 558 (1980). See also 18 U. S. C. § 3661 ("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 to the purpose of imposing an appropriate sentence.") Today's opinion states, in as inconspicuous a manner as possible at the very end of its analysis (one imagines that if the statement were delivered orally it would be spoken in a very low voice, and with the Court's hand over its mouth), that its holding applies only to inferences drawn from silence "in determining facts of the offense." *Ante*, at 15. "Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in §3E1.1 of the United States Sentencing Guidelines (1998) is a separate question" on which the majority expresses no view. *Ibid*. Never mind that we have said before, albeit in dicta, that "[w]e doubt that a principled distinction may be drawn between 'enhancing' the punishment imposed upon the petitioner and denying him the 'leniency' he claims would be appropriate if he had cooperated." *Roberts*, *supra*, at 557, n. 4.

Of course the clutter swept under the rug by limiting the opinion to "determining facts of the offense" is not merely application of today's opinion to §3E1.1, but its application to *all* determinations of acceptance of responsibility, repentance, character, and future dangerousness, in both federal and state prosecutions– that is to say, to what is probably the *bulk* of what most sentencing is all about. If the Court ultimately decides– in the fullness of time and after a decent period of confusion in the lower courts– that the "no inference" rule is indeed *limited* to "determining facts of the offense," then we will have a system in which a state court *can* increase the sentence of

a convicted drug possessor who refuses to say how many ounces he possessed– not because that suggests he possessed the larger amount (to make such an inference would be unconstitutional!) but because his refusal to cooperate suggests he is unrepentant. Apart from the fact that there is no logical basis for drawing such a line *within* the sentencing phase (whereas drawing a line between guilt and sentencing is entirely logical), the result produced provides new support for Mr. Bumble's renowned evaluation of the law. Its only sensible feature is that it will almost always be unenforceable, since it will ordinarily be impossible to tell whether the sentencer has used the silence for either purpose or for neither.

If, on the other hand, the Court ultimately decides– in the fullness of time and after a decent period of confusion in the lower courts– that the extension of *Griffin* announced today is *not* limited to "determining facts of the offense," then it will have created a system in which we give the sentencing judge access to all sorts of out-of-court evidence, including the most remote hearsay, concerning the character of the defendant, his prior misdeeds, his acceptance of responsibility and determination to mend his ways, but declare taboo the most obvious piece of first-hand evidence standing in front of the judge: the defendant's refusal to cooperate with the court. Such a rule orders the judge to avert his eyes from the elephant in the courtroom when it is the judge's job to size up the elephant.

The patent inadequacy of *both* of these courses with regard to determining matters other than the "facts of the offense" is not finessed by simply resolving, for the time being, not to choose between them. Sooner or later the choice must be made, and the fact that both alternatives are unsatisfactory cries out that the Court's extension of *Griffin* is a mistake.

The Court asserts that the rule against adverse infer-

ences from silence, even in sentencing proceedings, "is of proven utility." *Ante*, at 14. Significantly, however, the only utility it proceeds to describe– that it is a "vital instrument" for teaching jurors that "the question in a criminal case is not whether the defendant committed the acts of which he is accused," but rather "whether the Government has carried its burden to prove its allegations"– is a utility that has no bearing upon sentencing, or indeed even upon the usual sentenc*er*, which is a judge rather than a jury.

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Though the Fifth Amendment protects Mitchell from being compelled to take the stand, and also protects her, as we have held, from adverse inferences drawn from her silence at the guilt phase of the trial, there is no reason why it must also shield her from the natural and appropriate consequences of her uncooperativeness at the sentencing stage. I respectfully dissent.