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State v. Burgess: A Limitation on a Defendant's Right to Remain Innocent

ELIZABETH LAHEY*

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> The privilege against self-incrimination registers an important advance in the development of our liberty—one of the great landmarks in man's struggle to make himself civilized. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the

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> individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.[1]

I. INTRODUCTION

The Fifth Amendment and privilege against self-incrimination as recognized today have their origins in the Virginia Declaration of Rights of 1776.[2] Originally drafted by George Mason, the Declaration represented an enumeration of the inherent natural rights of all men.[3] Included in this enumeration was the right that during "all capital or criminal prosecutions," a man has a right not to be "compelled to give evidence against himself."[4] The Virginia constitutional right, enumerated in Section 8 of the Declaration, against self-incrimination

> applied to *all stages* of all equity and common-law proceedings and to all witnesses as well as to the parties. It could be invoked by a criminal suspect at his preliminary examination before a justice of the peace; by a person testifying at a grand jury investigation into crime; by anyone giving evidence in a suit between private parties; and, above all perhaps, by the subject of an inquisitorial proceeding before any governmental or nonjudicial tribunal, such as a legislative committee or the governor and council, seeking to discover criminal culpa-

1. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (citations and internal quotation marks omitted), *overruled by* United States v. Balsys, 524 U.S. 666 (1998).

2. LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 409–10 (Macmillan Publ'g Co. 1986) (1968) (referencing Section 8 of the Virginia Declaration of Rights).

3. *Id.* at 407–08.

4. *Id.* at 405–06.

> bility. *If one's disclosures could make him vulnerable to legal peril, he could invoke his right to silence*.[5]

The importance of Section 8 proved to be great, and the section quickly became the model for other states and the Bill of Rights.[6] Couched in the original text of Section 8 were defendants' rights relating to their ability to confront accusers and witnesses, to call evidence in their favor, to have a speedy trial in front of an impartial jury, and not to be compelled to give evidence against themselves.[7] In working to draft and pass the Bill of Rights, the Senate "clustered together the procedural rights of the criminally accused after indictment" into what is now known as the Sixth Amendment.[8] The right against self-incrimination was deliberately separated from the other rights contained in Section 8 and was left to stand alone as the Fifth Amendment.[9] "That the self-incrimination clause did not fall into the Sixth Amendment indicated that the Senate, like the House, did not intend to follow the implication of Virginia's Section 8, the original model, that the right not to give evidence against oneself applied merely to the defendant on trial."[10] Rather, the right was intended to be afforded to defendants and witnesses at "any phase of the proceedings."[11]

Despite arguments to the contrary, the Supreme Court has been clear that there are multiple phases to a "criminal case."[12] Most applicable here is its reiteration that criminal sentencing shall be considered part of the "criminal case" as described in the Fifth Amend-

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5. *Id.* at 406 (emphasis added).

6. *Id.* at 409–10 (stating that New Hampshire in 1784 was one of the states to adopt a similar constitutional provision as Section 8).

7. *Id.* at 405–06.

8. LEVY, *supra* note 2, at 427.

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* Mitchell v. United States, 526 U.S. 314, 327 (1999) (stating that sentencing is included in a "criminal case" under the Fifth Amendment); Jan Martin Rybnicek, *Damned If You Do, Damned If You Don't?: The Absence of a Constitutional Protection Prohibiting the Admission of Post-Arrest, Pre-Miranda Silence*, 19 GEO. MASON U. CIV. RTS. L.J. 405, 406–07 (2009) (citing Miranda v. Arizona, 384 U.S. 436, 471 (1966)) (stating that Fifth Amendment protections apply during pretrial police interrogations).

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ment, and that the privilege against self-incrimination should apply outside of the trial phase.[13] This note will explore the current state of the privilege against self-incrimination, particularly in regard to whether it works to bar negative inferences from being drawn from a defendant's silence during sentencing in order to determine his remorse for the crime of which he has been convicted. I will focus primarily on the issue in the context of the recent New Hampshire case *State v. Burgess*.[14] In that case, the court recognized the application of the privilege at sentencing, but nonetheless carved out a unique exception which made negative inferences permissible at sentencing when the defendant has admitted to the act underlying the charged crime but relied on some defense or legal justification to undermine his culpability.[15] This note will highlight the unworkability of this exception and demonstrate how it conflicts with common law precedent.

II. *STATE V. BURGESS*

On October 25 through 27, 2004, John Burgess appeared in Merrimack County Superior Court for several judicial proceedings.[16] To limit his ability to walk normally, the sheriff's department placed a leg brace on Burgess while he was in the holding cell in the basement of the courthouse.[17] The brace utilized a "locking mechanism," which prevented the defendant from bending his knee, thus requiring him to walk "stiff-legged."[18] To allow Burgess to sit normally, the brace had a lever that disabled the lock.[19]

13. *See Mitchell*, 526 U.S. at 325 (stating its repeated rejection of the argument that "incrimination is complete once guilt has been adjudicated"). The Court went on to hold that the privilege against self-incrimination will only cease to apply once "the sentence has been fixed and the judgment of conviction has become final." *Id.* at 326. *But see* McKune v. Lile, 536 U.S. 24, 36 (2002) (articulating an exception to the privilege); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 287–88 (1998) (no Fifth Amendment protections in clemency proceedings).

14. 943 A.2d 727 (N.H. 2008).

15. *Id.* at 737–38.

16. *Id.* at 728.

17. *Id.*

18. *Id.*

19. *Id.*

On October 27, 2004, Burgess was ordered to return to his holding cell following a hearing at the Merrimack County courthouse.[20] Deputy Sheriff Wayne Robie later testified that as Burgess stood in the courtroom, Robie noticed Burgess "[l]ooking at the different entrances and exits and the window areas in the courtroom, seeing where each bailiff was positioned."[21] While Burgess was speaking to his attorney, another Deputy Sheriff, James Moran, instructed Burgess to face the front of the courtroom and place his hands behind his back so that he could be handcuffed.[22] Moran later testified that as he began to handcuff Burgess, Burgess "turned toward the right and bolted towards the doors."[23] Multiple deputy sheriffs yelled for him to stop.[24] As he reached the exit, Burgess ran into Deputy Sheriff Robert Croteau, and both individuals were forced through the door.[25] In the small hallway between the inner and outer doors to the courtroom, Croteau tackled Burgess.[26] Burgess continued to resist until he was subdued by several other officers and was escorted back to his holding cell.[27] Once Burgess was in the holding cell, Deputy Sheriff Dennis Crawford unlocked the leg brace and observed part of a shoelace, which had been cut from one of Burgess's shoes and tied around the leg strap.[28] The shoelace was used to disable the lock, allowing Burgess to "run in a normal fashion."[29] Following the incident, Burgess was charged with attempted escape[30] and possessing an implement for escape.[31]

At a subsequent interview, Lieutenant Robert Krieger alleged that when asked how he thought he would get out of the courthouse, Burgess replied that "it wasn't a very well thought out plan and

20. *Burgess*, 943 A.2d at 728.
21. *Id.* (alteration in original).
22. *Id.* at 728–29.
23. *Id.* at 729.
24. *Id.*
25. *Id.*
26. *Burgess*, 943 A.2d at 729.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*; *see* N.H. REV. STAT. ANN. §§ 629:1, 642:6 (2007).
31. *Burgess*, 943 A.2d at 729; *see* N.H. REV. STAT. ANN. § 642:7.

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laughed."[32] At trial, Burgess denied saying that his alleged escape attempt was not a well thought out plan; rather, he testified that "it was not [his] plan or [he] didn't have a plan to do that."[33] Instead, Burgess admitted that he had cut his own shoelace with a paper clip that he had found on the floor.[34] He also admitted that he had used the severed shoelace to disable the lock; however, he denied that he did it with the intention of escaping.[35] Instead, Burgess testified that he had disabled the lock during all three days of the proceeding to prevent the leg brace from "pinching" him.[36] He further testified that when he turned away from Deputy Moran, he was "trying to get out of being grabbed by a number of people" and that he was "upset," "nervous," and "[s]omewhat afraid" because he thought that "a number of court officers were moving very aggressively towards him."[37] Burgess maintained that when Deputy Moran "reached for his arm, he panicked a little bit and lunged toward the door."[38]

At the close of trial, the jury found Burgess guilty of attempted escape and possessing an implement for escape.[39] Before sentencing, the defendant refused to participate in a Pre-Sentence Investigation (PSI).[40] At sentencing, the State requested that Burgess receive the maximum sentence of ten to thirty years in prison.[41] Defense counsel asked the judge for leniency.[42] Burgess did not address the

32. *Burgess*, 943 A.2d at 729.
33. *Id.* (second alteration in original).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* (internal quotation marks omitted).
38. *Burgess*, 943 A.2d at 729 (internal quotation marks omitted).
39. *Id.*
40. *Id.* Aside from factual references, this note does not address any constitutional issues related to the defendant's refusal to participate in a PSI. For constitutional issues relating to a PSI, see United States v. Rivera, 201 F.3d 99, 102 (2d Cir. 1999) (stating that the court cannot impose five-year sentence enhancement when the defendant exercised his right to remain silent and refused to cooperate prior to sentencing).
41. *Burgess*, 943 A.2d at 729. The State's request was based on the defendant's character, his prior criminal history, the nature and circumstances of the offense, and the potential for deterrence and rehabilitation. *Id.*
42. *Id.*

court during the sentencing hearing.[43] In the end, the sentencing judge fulfilled the State's request and sentenced Burgess to the maximum extended term sentence.[44] In support of its sentence, the judge stated in his opinion that the defendant had "not cooperated in terms of the Pre-Sentence report in terms of telling any—or talking to me as he's had opportunities to do about his situation."[45] Following sentencing, Burgess moved to vacate the sentence relying on *Mitchell v. United States*[46] grounds, specifically that the trial court violated his right against self-incrimination by considering his silence at the sentencing hearing.[47] He argued that the court had impermissibly relied on his failure to participate in the PSI and speak at sentencing, thus violating his state and federal constitutional privilege against self-incrimination.[48] In response, the court stated that it did not rely on Burgess's silence during either PSI or sentencing in a manner violative of *Mitchell.*[49] With support from several other jurisdictions, the court explained that that it considered the defendant's silence and declination to participate in PSI

> in the context of dealing with the plea by his counsel for leniency or mercy, and in assessing the degree, if at all, the defendant had any rehabilitation potential, or ability to alter his undisputed long history of disturbing criminal activity, both in and out of prison, including three . . . prior convictions of Escape.[50]

In light of the sentencing court's statements and explanations, Burgess's motion to vacate was denied.[51]

On appeal, Burgess argued that the sentencing court had "violated his privilege against self-incrimination under Part I, Article 15

43. *Id.* at 730.
44. *Id.*
45. *Id.* (emphasis omitted).
46. 526 U.S. 314 (1999).
47. *Burgess*, 943 A.2d at 730.
48. *Id.*
49. *Id.*
50. *Id.* at 730–31.
51. *Id.* at 731.

of the New Hampshire Constitution[52] by using his silence as a factor in sentencing."[53] The State countered this by explaining that it had only used the defendant's silence to determine his ability for rehabilitation.[54] In its opinion, the New Hampshire Supreme Court reiterated that while a sentencing judge has "broad discretion to choose the sources and types of evidence upon which to rely in imposing sentence, *that discretion is not unlimited*."[55] In a question of first impression, the court rejected the "distinction between using a defendant's silence to infer a failure to express remorse and using it to punish a defendant for refusing to admit guilt." [56] Citing *Webster's Third New International Dictionary* and *Random House Dictionary of the English Language*, the court defined "remorse" as "a gnawing distress arising from a sense of guilt for past wrongs" or "deep and painful regret for wrongdoing."[57] The court then reasoned that "for a defendant to truthfully express remorse, he must to some degree acknowledge wrongdoing or guilt."[58] Accordingly, "[a] defendant . . . can hardly be expected to be remorseful for something he contends that he did not do."[59] Considering those principles, the court found no practical distinction or reason to differentiate between a defen-

52. "No subject shall be . . . compelled to accuse or furnish evidence against himself." N.H. CONST. pt. I, art. 15. Further, "[t]he privilege against self-incrimination found in the Fifth Amendment to the Federal Constitution is comparable in scope to the privilege afforded to the defendant under Part I, Article 15." *Burgess*, 943 A.2d at 731 (citing Knowles v. Warden, 666 A.2d 972, 976 (N.H. 1995)). Accordingly, references to the Fifth Amendment apply interchangeably to Part I, Article 15.

53. *Burgess*, 943 A.2d at 731. The defendant did not assert his federal constitutional rights. *Id.* In certain circumstances, "Part I, Article 15 provides greater protection to a defendant than does the Fifth Amendment." *Id.* at 732 (citing State v. Roache, 803 A.2d 572, 577 (N.H. 2002)).

54. *Id.*

55. *Id.* (emphasis added) (quoting State v. Lambert, 787 A.2d 175, 176 (N.H. 2001)).

56. *Id.* at 735–36.

57. *Id.* at 736.

58. *Id.* (citing People v. Ward, 499 N.E.2d 422, 429 (Ill. 1986) (Simon, J., dissenting)).

59. *Ward*, 499 N.E.2d at 429 (Simon, J., dissenting) (internal quotation marks omitted).

dant's failure to show remorse and a failure to admit guilt[60] and recognized that in either case the defendant "must admit wrongdoing and jeopardize his post-trial remedies, testify falsely and risk a perjury conviction, or remain silent and risk obtaining a greater sentence."[61]

The question of first impression addressed by the court in *Burgess* stems from an issue left open by the U.S. Supreme Court in *Mitchell*.[62] It is well settled that a defendant cannot be compelled to testify against himself or be forced to make incriminating statements against himself.[63] The Fifth Amendment (and state constitutional equivalents) offers protection against this type of self-incrimination.[64] However, questions arise as to the extent of such protections, particularly whether a sentencing judge may read into a defendant's silence during the process to assess his remorse or rehabilitation capacity and thus adjust the sentence accordingly.

III. HISTORY

In order to understand and fully assess the application of self-incrimination protection in criminal sentencing, it is necessary to appreciate the relevant case law that shapes the privilege we recognize today. Prior to 1965, the Court assumed *arguendo* that, while any defendant was free to invoke the rights provided by the Fifth Amendment at trial, the decision to remain silent was not completely free from negative consequence for the defendant.[65] Instead, those

60. *Burgess*, 493 A.2d at 736 (citing People v. Wesley, 411 N.W.2d 159, 165, 166 & n.2 (Mich. 1987) (Brickley, J., concurring)).

61. *Id.* (citing South Dakota v. Neville, 459 U.S. 553, 563 (1983)).

62. *See* Mitchell v. United States, 526 U.S. 314, 330 (1999).

63. *Id.* at 327.

64. U.S. CONST. amend. V; N.H. CONST. pt. I, art. 15.

65. *See* Twining v. New Jersey, 211 U.S. 78 (1908) (holding that even if such conduct violated the Fifth Amendment, no constitutional analysis would be necessary as the Fifth Amendment did not bind the States through the Fourteenth Amendment), *overruled by* Malloy v. Hogan, 378 U.S. 1, 6 (1964). In *Twining*, the court upheld a state court's jury instruction:

> [The defendant] has sat here and heard that testimony and not denied it—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt—if you believe that testimony

who elected to exercise their constitutional right subjected themselves to the instructions and comments of judges and prosecutors urging jurors to draw "unfavorable inference[s]" against them for their failure to testify where it was within their power to deny the evidence presented to incriminate them.[66] Drawing these inferences from defendants' silence remained permissible for nearly sixty years. However, in 1965, in *Griffin v. California*, the Court rejected this practice and held that it was a violation of a defendant's constitutional rights for such unfavorable inferences to be drawn.[67] Writing for the majority, Justice Douglas proclaimed that the Fifth Amendment must be taken in its literal sense, and therefore it "[forbade] either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[68] The Court recognized such comments and instructions as court-imposed penalties against those who opted to exercise a constitutional privilege.[69] Accordingly, *Griffin* established that in criminal trials, no negative inference could be drawn from a defendant's failure to testify.[70]

Following *Griffin*, courts were still left to grapple with the extent of protection offered by the Fifth Amendment. While *Griffin* held that negative inferences could not be drawn from a defendant's silence during the guilt phase of a trial, the decision itself was silent as to whether this protection extended into other phases, specifically sentencing proceedings.[71] Some viewed the Fifth Amendment and *Griffin* as only intending to offer protection when determining guilt, and that once a case had been adjudicated, the risk of self-

> beyond a reasonable doubt, [he] is guilty. And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it, and it is for you to take that into consideration.

Id. at 82.

66. *Id.* at 90.

67. 380 U.S. 609, 615 (1965). This holding was built upon an earlier holding in *Malloy*, which stated that the Fifth Amendment applied to the State through the Fourteenth Amendment. 378 U.S. at 8.

68. *Id.*

69. *Id.* at 614.

70. *Id.* at 614–15.

71. *See id.*

incrimination ceased.[72] Under this view, the privilege had no relevance outside of the determination of guilt or innocence, and in other phases, particularly in sentencing, judges and prosecutors were free to encourage jurors to extrapolate inferences from a defendant's failure to testify or comment in his own defense.[73]

However, sixteen years later, the Court in *Estelle v. Smith* put this view to rest and rejected the compartmentalized interpretation of the Fifth Amendment, stating that it saw "no basis to distinguish between the guilt and penalty phases of [a] capital murder trial so far as the protection of the Fifth Amendment privilege is concerned."[74] But rather than render the privilege absolutely applicable to sentencing, the Court first adopted what has been called an "exposure-based standard" for applying the privilege.[75] Under this standard, the "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."[76] Specifically, the Fifth Amendment "privilege would apply at trial and at capital sentencing—when a defendant's 'exposure' [wa]s at its highest—but not necessarily at noncapital sentencing."[77] The Court reasoned that when a defendant faced the grave consequence of the death penalty at sentencing, "the State [wa]s not relieved of the obligation to observe fundamental constitutional guarantees."[78]

While by its own words *Estelle* was limited to only capital cases, the Court later erased its own distinction between capital and non-

72. Estelle v. Smith, 451 U.S. 454, 462 (1981).

73. *Id.*

74. *Id*. at 462–63.

75. David B. Lat, Case Note, *Sentencing and the Fifth Amendment*, 107 YALE L.J. 2673, 2675 (1998).

76. *Estelle*, 451 U.S. at 462 (alteration in original) (quoting *In re* Gault, 387 U.S. 1, 49 (1967)).

77. Lat, *supra* note 75, at 2675; *see Estelle*, 451 U.S. 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.").

78. *Estelle*, 451 U.S. at 463 (citing Green v. Georgia, 442 U.S. 95, 97 (1979)).

capital cases in *Mitchell*.[79] Offering all criminal defendants the same protections previously only afforded to those facing capital punishment, the Court stated that the "Fifth Amendment by its [own] terms prevents a person from being 'compelled in *any criminal case* to be a witness against himself.'"[80] Accordingly, following *Mitchell*, all criminal defendants were entitled to the protections of the privilege during both the guilt and penalty phases of a trial. The only remaining limitation imposed on the application of the privilege was that the defendant must face a continuing risk of incrimination or adverse consequence.[81] In regard to this limitation, the Court specifically recognized that "[w]here the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony."[82] The Court highlighted that in the sentencing process, "the stakes are high" and that the adverse inferences drawn from a defendant's silence may result in years of added imprisonment.[83] Often, the Court said, the Government has a "motive to demand a severe sentence, so the central purpose of the privilege—to protect a defendant from being the unwilling instrument of his or her own condemnation—remains of vital importance."[84] Quoting its own language from *Estelle*, the Court reaffirmed that "[*a*]*ny* effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment."[85]

In its brief in *Mitchell*, the Government argued that even if the Court chose to recognize the extension of the privilege in all criminal sentencing, exceptions to this general rule still existed; particularly, that courts were entitled to draw adverse inferences with "regard to factual determinations respecting the circumstances and de-

79. Mitchell v. United States, 526 U.S. 314, 326 (1999) ("*Estelle* was a capital case, but we find no reason not to apply the principle to noncapital sentencing hearings as well.").

80. *Id.* at 327 (quoting U.S. CONST. amend. V).

81. *Id.* at 326 (stating the general rule is that when the defendant can be no further incriminated, there is no basis for the assertion of the privilege).

82. *Id.*

83. *Id.* at 329.

84. *Id.*

85. *Mitchell*, 526 U.S. at 326 (emphasis added) (second alteration in original) (quoting Estelle v. Smith, 451 U.S. 454, 463 (1981)).

tails of the crime."[86] The Court rejected this suggestion and declined to create an exception to the general rule that no adverse inference may be drawn from a defendant's silence while he still faces the risk of self-incrimination or adverse consequence.[87] The Court's declination to create an exception for factual determinations respecting the circumstances and details of a crime garnered further support in Justice Scalia's dissenting opinion.[88] Despite disagreeing with the foundation of the majority opinion, Justice Scalia agreed that as long

86. *Id.* at 328; *see also id.* at 337–38 (Scalia, J., dissenting) (listing instances where the Court has stated that it is permissible to draw adverse inferences from silence as denials of clemency, imposition of punishment for violation of prison rules, and deportation). In his dissent, Justice Scalia presents the permissibility of drawing adverse inference in the three above-mentioned instances as contrary to the general rule that no adverse interference may be drawn from a defendant's silence during criminal sentencing while the risk of further incrimination or adverse consequence still exists. *Id.* Such a categorization is misleading. Specifically, the Court has recognized that "clemency proceedings are not an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant." Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 285 (1998) (alteration in original) (internal quotation marks omitted) (quoting Evitts v. Lucey, 469 U.S. 387, 393 (1985)). The Court recognized that during clemency proceedings, the defendant "is already under a sentence . . . determined to have been lawfully imposed. If clemency is granted, he obtains a benefit; if it is denied, he is no worse off than he was before." *Id.* Accordingly, clemency would be outside of the standards created in *Griffin* and *Mitchell* as the defendant's case had been fully adjudicated and as he faced no further risk of incrimination and consequence of the charges against him; it is outside of the Fifth Amendment "criminal proceeding." Similarly, the application of the Fifth Amendment in prison settings does not offer the same protections as it does in free society. McKune v. Lile, 536 U.S. 24, 36 (2002). While "[t]he privilege against self-incrimination does not terminate at the jailhouse door . . . the fact of a valid conviction and the ensuing restrictions on liberty are essential to the Fifth Amendment analysis." *Id.* (citing Sandin v. Conner, 515 U.S. 472, 485 (1995)). "[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.* (alteration in original) (quoting *Sandin*, 515 U.S. at 485). Finally, in regard to Justice Scalia's deportation exception, while a deportation hearing has elements of a criminal proceeding, it is more correctly categorized as civil in nature. Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (stating that a deportation hearing is "purely civil" in nature). By is own language, the Fifth Amendment only applies to criminal proceedings.

87. *Mitchell*, 526 U.S. at 329.

88. *Id.* at 337–38 (Scalia, J., dissenting).

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as "the guilt and sentencing phases create one inseparable 'criminal case,'" the Fifth Amendment privilege applied in the same way in both the guilt and sentencing phases of a trial.[89] It follows that since no exception for inferences regarding details and circumstances of a case exists in the guilt phase, the Court correctly held that one shall not exist during sentencing. To date, the Court has not recognized any exception to the *Griffin* "no negative inference" rule.[90]

A. *A Split Among the Circuits*

Despite the Court's decision in *Mitchell*, a distinction has developed in how courts treat a defendant's silence during sentencing. While it is well-established that a court cannot punish a defendant for standing trial rather than pleading guilty, some courts have drawn a distinction between considering the refusal to admit guilt as a reason to increase a sentence and viewing a defendant's silence after trial "as a failure to accept responsibility or failure to express remorse, and thus indicat[ing] that an individual has a reduced potential for rehabilitation."[91]

> These courts draw a "[d]istinction between imposing a harsher sentence upon a defendant based on his or her lack of remorse, . . . and punishing a defendant for his or her refusal to admit guilt, . . . the latter being a violation, *inter alia*, of a criminal defendant's right to due process, to remain silent and to appeal."[92]

In jurisdictions embracing this distinction, so long as the sentencing court does not suggest or imply a sentence will be reduced if the defendant admits his guilt, there is no constitutional violation

89. *Id.* at 338.

90. *Cf.* Dickerson v. United States, 530 U.S. 428, 453 (2000) (reiterating that "the Fifth Amendment's bar on compelled self-incrimination is absolute").

91. State v. Burgess, 943 A.2d 727, 733–34 (N.H. 2008) (citing United States v. Johnson, 903 F.2d 1084, 1090 (7th Cir. 1990)).

92. *Burgess*, 943 A.2d at 734 (alterations in original) (quoting State v. Meister, No. 30152, 2007 WL 2821981, at *15 (Idaho Ct. App. Oct. 1, 2007)); *see also* Bergmann v. McCaughtry, 65 F.3d 1372, 1379 (7th Cir. 1995); State v. Kamana'o, 82 P.3d 401, 407 (Haw. 2003); People v. Wesley, 411 N.W.2d 159, 162–63 (Mich. 1987).

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"when the court considers the defendant's silence as a failure to accept responsibility or express remorse for the limited purpose of determining whether rehabilitation efforts would be fruitful."[93] Other courts have rejected the distinction, instead choosing to enforce the strict *Mitchell* approach that no inferences may be drawn from a defendant's silence at any stage of a trial proceeding, holding that a "court cannot constitutionally consider [a defendant's] lack of an expression of remorse as an aggravating circumstance" when he exercises his Fifth Amendment right.[94] In declining to recognize the distinction, these jurisdictions require that, in order to be protected against such adverse inferences, the defendant being sentenced must have maintained his innocence throughout the trial.[95] These courts hold that contrition or remorse necessarily implies guilt, and that it would be irrational to expect one who maintains his innocence to express either contrition or remorse.[96] They reason that, while rehabilitation is an important factor to consider at sentencing, "allowing a court to draw an adverse inference from a defendant's silence at sentencing when he had maintained his innocence throughout the proceedings 'would force upon the defendant the Hobson's choice[,] which is condemned by the Fifth Amendment.'"[97] Specifically, a defendant cannot be forced to either incriminate himself at sentencing in order to show remorse or exercise his right to remain silent and possibly suffer the "imposition of a greater sentence."[98] This view is consistent with the Court's holding in *Estelle* that "[a]ny effort by the State to compel [a defendant] to testify against his will at the sentencing hearing clearly . . . contravene[s] the Fifth Amendment."[99]

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93. *Burgess*, 943 A.2d at 734 (citing *Meister*, 2007 WL 2821981, at *15); *see also Wesley*, 411 N.W.2d at 163.

94. People v. Young, 987 P.2d 889, 894 (Colo. Ct. App. 1999) (citing State v. Tinajero, 935 P.2d 928 (Ariz. Ct. App. 1997)); *see also* State v. Hardwick, 905 P.2d 1384, 1391 (Ariz. Ct. App. 1995).

95. *See* State v. Shreves, 60 P.3d 991, 996 (Mont. 2002).

96. *Burgess*, 943 A.2d at 735 (quoting *Hardwick*, 905 P.2d at 1391); *see also* Brake v. State, 939 P.2d 1029, 1033 (Nev. 1997).

97. *Burgess*, 943 A.2d at 735 (quoting *Shreves*, 60 P.3d at 996–97).

98. *Shreves*, 60 P.3d at 996–97.

99. Estelle v. Smith, 451 U.S. 454, 463 (1981).

Despite the implications and the Court's holdings in *Estelle*, *Griffin*, and *Mitchell*, the Court has not specifically addressed whether a sentencing court may view a defendant's silence as demonstrative of his lack of remorse and increase his sentence accordingly. In his dissent in *Mitchell*, Justice Scalia insists that because the majority limited its rejection of proposed exceptions to the "no adverse inferences" rule to only "determining facts of the offense," the majority intentionally left the door open to create other exceptions.[100]

> 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 the facts of the offense."[101]

Justice Scalia opined that the majority intentionally ignored other potential exceptions, particularly in regard to inferring a lack of remorse, by sweeping the clutter under the rug and limiting the opinion only to determining facts of the offense.[102] These criticisms are misplaced. The majority opinion in *Mitchell* is clearly limited to determinations of facts, but in "creating" this limitation, the majority did not ignore any presented question; it did not sweep anything under the rug. In its brief, the broadest argument put forth by the government was that a court could draw negative inferences from a defendant's silence in regard to the facts and circumstances of a case.[103] The issue of whether it was permissible to draw adverse inferences as to the defendant's remorse was not presented.

The Court has specifically addressed circumstances where, despite a possible constitutional issue, it should refuse to hear and decide on a particular issue. In his concurring opinion in *Ashwander v. Tennessee Valley Authority*, Justice Brandeis stated that the Court "will not anticipate a question of constitutional law in advance of the

100. Mitchell v. United States, 526 U.S. 314, 340 (1999) (Scalia, J., dissenting).
101. *Id.* at 339.
102. *Id.* at 340.
103. Brief for the United States at 31 n.18, *Mitchell*, 526 U.S. 314 (No. 97-7541).

necessity of deciding it"[104] and that "[i]t is not the habit of the [C]ourt to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."[105] Additionally, "[t]he Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[106] Since *Ashwander*, the doctrine of constitutional avoidance has become a "well-settled doctrine of the Court."[107] In *Mitchell*, the Government's brief did not present any issue regarding inferring a lack of remorse from a defendant's silence. Accordingly, the Court was correct in not expanding its opinion and commenting on potential exceptions other than those presented in the Government's brief. Expanding its decision beyond the facts and circumstances of the case at hand would have violated *Ashwander* and the principles of constitutional avoidance.[108] Justice Scalia's suggestion that, by only commenting on the instant case and its presented issues, the Court expressly intended to leave open a future exception for determining lack of remorse is incorrect. While the Court's failure to comment on the issue of lack of remorse preserves the issue for another day, it is not demonstrative of the likelihood of the Court finding such an exception. As it stands, the Court has not decided the issue presented in this note.[109]

B. *Where New Hampshire Stands*

In deciding *State v. Burgess*, the New Hampshire Supreme Court foreclosed the idea of an exception to the "no negative inference" rule that would allow inferences to be drawn from a defendant's silence in regard to determining remorse or rehabilitation potential

104. 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (internal quotation marks omitted) (quoting Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885)).
105. *Id.* (quoting Burton v. United States, 196 U.S. 283, 295 (1905)).
106. *Id.* (internal quotation marks omitted) (quoting *Liverpool, N.Y. & Phila. S.S. Co.*, 113 U.S. at 39).
107. Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 211–12 (1960).
108. *Id.* at 482–83.
109. *But see* Dickerson v. United States, 530 U.S. 428, 453 (2000) (post-*Mitchell* case reiterating that "the Fifth Amendment's bar on compelled self-incrimination is absolute").

during criminal sentencing.[110] However, unlike other courts rejecting this potential exception,[111] the New Hampshire court created a strange exception to its otherwise firm prohibition on inferences from a defendant's silence at sentencing.[112] Unlike fellow jurisdictions, the New Hampshire court weakened its holding by stating that "a sentencing court's inference of a lack of remorse from a defendant's silence at sentencing does not violate the privilege against self-incrimination in all instances."[113] In spite of its holding that negative inferences at sentencing are impermissible, the court created its own distinction and proclaimed that the determination of whether a defendant's right to remain silent has been violated will be conducted on a case-by-case basis.[114] Specifically, rather than provide each defendant who has maintained his innocence at trial with the same constitutional protections, the court reasoned that "where a defendant admits to committing the acts underlying the charged crime, but disputes whether he had the requisite mental state for the crime, or offers a legal justification for committing those acts, the defendant's silence at sentencing might . . . legitimately be considered as a lack of remorse."[115] The court stated that since the defendant confessed to the acts underlying both crimes—he admitted to cutting the lace, disabling the lock, and pulling away when the sheriff attempted to handcuff him—he only denied that he had the requisite intent to escape.[116] Because the defendant theoretically could have expressed remorse for endangering the court personnel without undermining his assertion that his perceived escape attempt was simply his reacting to feelings of panic and anxiety, the court reasoned that "the defendant's asserted lack of intent to escape would not have conflicted with any feelings of remorse."[117]

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110. State v. Burgess, 943 A.2d 746, 735–36 (N.H. 2008).
111. *See, e.g.*, Brake v. State, 939 P.2d 1029, 1033 (Nev. 1997).
112. *Burgess*, 943 A.2d at 738.
113. *Id.*
114. *Id.*
115. *Id.* (citing *Brake*, 939 P.2d at 1034 (Shearing, C.J., concurring in part and dissenting in part)).
116. *Id.* at 739.
117. *Id. But see id*. at 735 (quoting State v. Hardwick, 905 P.2d 1384, 1391 (Ariz. Ct. App. 1995)) (stating that contrition and remorse "necessarily imply guilt" and

In garnering transjurisdictional support for its line of reasoning, the *Burgess* court looked to Chief Justice Shearing's dissent in *Brake v. Nevada*.[118] In *Brake*, the defendant was charged with first-degree murder.[119] Throughout his trial, he maintained his innocence as to the crime of first-degree murder by putting on a defense that he had killed the victim in self-defense.[120] In doing so, the defendant denied that he possessed the requisite intent to commit first-degree murder.[121] In assessing whether the trial court was correct in using the defendant's silence at sentencing to determine whether the defendant was remorseful, the majority considered the defendant's ability to show remorse without risking self-incrimination.[122] According to the majority, because the defendant's theory at trial was that he had killed the victim in self-defense, he had "maintained his innocence of the crime for which he was ultimately convicted and was unable to express remorse and admit guilt to first degree murder without foregoing his right to not incriminate himself."[123] Therefore, because the defendant maintained his innocence throughout trial, any consideration of his silence as insinuating a "lack of remorse" at sentencing was a violation of his right to remain silent.[124]

The majority opinion in *Brake* built on precedent established by an earlier Nevada case, *Brown v. State*.[125] In *Brown*, the defendant was charged with sexually assaulting a young girl,[126] though throughout trial, he denied committing the crime.[127] The court held that when a defendant proclaims innocence throughout trial, he cannot be expected to show remorse at sentencing (if he is later convicted) without compromising his right against forced self-

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that "it would be irrational or disingenuous to expect or require one who maintains his innocence to express contrition or remorse").

118. *Burgess*, 943 A.2d at 738–39; *see also Brake*, 939 P.2d at 1033–34 (Shearing, C.J., concurring in part and dissenting in part).

119. *Brake*, 939 P.2d at 1030.

120. *Id.*

121. *Id.*

122. *Id.* at 1033.

123. *Id.*

124. *Id.*

125. 934 P.2d 235 (Nev. 1997).

126. *Id.* at 236.

127. *Id.* at 240.

incrimination.[128] Upon this foundation, the *Brake* court expanded the protection for those maintaining innocence during trial to include those who admit to committing the underlying act of the charged crime but provide some defense or legal justification for their actions.[129] Practically, the *Brake* court declined the opportunity to differentiate between defendants maintaining their absolute innocence as to the charged crime and those defendants maintaining their innocence as to the charged crime because of an affirmative defense or legal justification.[130] Under the *Brake* rationale, both classes of defendant would be afforded identical self-incrimination protection; specifically, each would be free to remain silent at sentencing without being subjected to the inference that he lacks remorse for his convicted crime.[131]

Dissenting in *Brake*, Chief Justice Shearing rejected the majority's reliance on *Brown*.[132] Chief Justice Shearing advocated that *Brown* was different than *Brake* because the defendant denied any involvement in the charged crime in *Brown*.[133] Because the *Brake* defendant admitted the act underlying the crime—killing the victim—Chief Justice Shearing disagreed that by speaking to show remorse at sentencing, the defendant risked any self-incrimination.[134] Despite the apparent conflict with the precedent established in

128. *Id.* at 245–46. *Burgess* adopted this same rationale. 943 A.2d 727, 738 (N.H. 2008) (stating that the holding is "limited to situations where a defendant maintains his innocence throughout the criminal process and risks incriminating himself if he expresses remorse at sentencing").

129. *Brake*, 939 P.2d at 1033.

130. *Id.*

131. Although Justice Scalia disagrees with the idea that trial and sentencing phases should be treated similarly with regard to Fifth Amendment protection, even he agrees that under the *Mitchell* holding that a trial and sentencing together form the "criminal case" noted in the Fifth Amendment, "there is no logical basis for drawing . . . a line within the sentencing phase." Mitchell v. United States, 526 U.S. 314, 327, 340 (1999) (Scalia, J., dissenting). *Brake* is in line with this reasoning and logic, while *Burgess* seems to depart.

132. *Brake*, 939 P.2d at 1033–34 (Shearing, C.J., concurring in part and dissenting in part).

133. *Id.*

134. *Id.* at 1034.

Mitchell, the *Burgess* court elected to align its decision with Chief Justice Shearing's dissent.[135]

IV. PROBLEMS WITH THE *BURGESS* LIMITATION

Using a *Brake*-like scenario as an example, assume that a defendant is charged with second-degree murder[136] for killing his neighbor after a disagreement over a poker game. At trial, the State presents a portrayal of the events, stating that the two men began arguing when the defendant lost all of his money during the game and accused the other of cheating. Fuming, the defendant stormed home. Still stewing over his lost money, he decided to show his friend that he will not tolerate being taken advantage of. He returned to the site of the game, confronted his cheating friend, and demanded his money back. When his friend refused, the defendant pulled out a gun from inside of his jacket and shot his friend dead. The defense paints a very different portrayal of the events. The defendant contends that he returned to the site of the game to get his money back, as he felt he had been cheated. When confronted, the friend became defensive, and started to yell. As his anger escalated, the friend began shoving the defendant. When the defendant again accused his friend of stealing his money, the friend grabbed a nearby baseball bat and took a swing at the defendant's head. Reaching for the registered gun that he always carried in his jacket, the defendant dodged his friend's attack. Backing him against the wall, the friend cocked the bat back, and began to take a would-be deadly blow at the defendant's head. Without any other option, the defendant raised his gun and fired, shooting his friend dead. At trial, the defendant testifies that he did not return to the site of the game with the knowledge that he would likely kill his friend; rather, he maintains that he killed his friend in self-defense. Despite evidence supporting the defendant's defense, the jury finds him guilty of second-degree murder.

135. State v. Burgess, 943 A.2d 727, 739 (N.H. 2008).
136. *See* N.H. REV. STAT. ANN. § 630:1-b (2007).

A. Burgess *Is Inconsistent with the Purposes of Sentencing*

Now, the defendant is sitting in front of a sentencing judge. When asked how he feels about the incident and what happened to his friend, the defendant opts to remain silent. Applying the New Hampshire exception to the general *Mitchell* rule, because the defendant, in claiming self-defense, still admitted to the act underlying the charged crime—killing his friend—the judge is free to infer from the defendant's silence that he is unremorseful and to punish him more severely as a result.

In *State v. Wentworth*, the New Hampshire Supreme Court stated that "[t]he real purpose of all sentencing is to reduce crime."[137] This purpose is promoted by rehabilitating the defendant so he will not offend again and by punishing him in the hope that he and others will be deterred from repeating his crime.[138] Bearing these purposes in mind, it is unclear how *Burgess*-mandated remorse furthers any of the stated goals of sentencing.

Deterrence is defined as "[t]he act or process of discouraging certain behavior, particularly by fear."[139] Considering a defendant convicted of second-degree murder who has maintained his innocence throughout trial by way of self-defense, it is unclear how the goal of deterrence is furthered by punishing a defendant more severely for refusing to express remorse for the underlying act of taking another's life. If the defendant truly killed in self-defense, the length of his imposed sentence is immaterial. Because the act of killing another is a reaction rather than an intention, there is no behavior that the punishment must deter.

A second purpose of punishment is rehabilitation, which refers to "[t]he process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes."[140] Some courts reason that those defendants who remain silent at a sentencing hearing lack remorse and thus have a de-

137. 395 A.2d 858, 864 (N.H. 1978).
138. *Id.*
139. BLACK'S LAW DICTIONARY 481 (8th ed. 2004).
140. *Id.* at 1311.

creased potential for rehabilitation.[141] However, in instances where a defendant maintains his innocence by way of legal justification or defense, it is unclear how any showing of remorse for committing the act underlying the crime without the requisite intent relates to a defendant's capacity for rehabilitation. Rather, in such a case, the defendant maintains that he was placed in a situation where he felt that he needed to kill his attacker in order to preserve his own life, and that he would not intentionally harm or kill another outside of this narrow circumstance. Under the goal of rehabilitation, it is not the commission of the act that needs to be rehabilitated; it is the intention to commit the act that must be remedied. Without intent, there is no criminal outlook or character that needs to be reformed. Regardless of the sentence of a defendant who maintains that he killed in self-defense, if he is later placed in a similar life-or-death situation, he, just as most others, would kill again to save his own life. Showing remorse for such a reaction is not suggestive of any rehabilitative capacity as there is no need for such a defendant to be rehabilitated.

Outside of judicial efforts to reduce crime, courts also impose punishments as a form of retribution, which centers on the idea of an "eye for an eye" and that a punishment should fit the severity of a crime.[142] However, even proceeding from a retributivist perspective, consideration of the defendant's remorse in sentencing is incorrect. "Retributivist theory is forward looking and primarily concerned with assigning punishments that are in proportion to the severity of the offense. Feelings of remorse do not assist in determining the blameworthiness of a defendant, nor do they repair the harm caused."[143] A simple showing of remorse does not erase the harm and effect of the defendant's actions. If a criminal sentence is to correlate with the defendant's "blameworthiness" for the crime, his

141. State v. Burgess, 943 A.2d 727, 733; *see also* United States v. Johnson, 903 F.2d 1084, 1090 (7th Cir. 1990).

142. Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 132 (2006) (discussing the irrelevancy of remorse in the determination of criminal sentencing).

143. *Id.* (internal quotation marks and footnote omitted).

after-the-fact feeling about his actions should not be considered when determining his punishment.[144]

B. Burgess *Requires Defendants to Possess Some Degree of Linguistic Artfulness*

At its core, *Burgess* requires lay defendants to express moral remorse for committing the acts underlying a crime without expressing legal remorse for committing the actual crime itself.[145] In addition to drawing such a delicate distinction, defendants must also sufficiently articulate emotion that the judge will consider remorseful but cannot express the remorse in such a way that will be incriminating. They must show moral remorse while still maintaining their legal innocence.[146]

Given the inherent subtleties in such a distinction, *Burgess* begs the question: should an unsophisticated defendant be put in a position where he runs the risk of self-incrimination if he misspeaks and expresses the wrong remorse? Ideally, judges would like a defendant to express remorse for committing a crime during sentencing. Defendants are all too aware of this expectation. Under *Burgess*, a defendant must possess the understanding that he cannot be forced or encouraged to express this type of legal remorse and that he cannot be punished for remaining silent.[147] Rather, the defendant must recognize and separate the criminal element of intent and only express moral remorse for doing something "bad," even though he claims that he did not have the requisite intent to be held liable.

Some may argue that defendants typically are thoroughly prepared for sentencing and will be able to exhibit scripted moral remorse as instructed by their attorneys. Even proceeding under the assumption that every attorney will clearly delineate the difference between legal and moral remorse for his client and prepare the client to express only moral remorse, such canned and scripted showings of remorse may be more detrimental than helpful. Specifically, in order to avoid a harsher sentence, a defendant may express verbatim

144. *Id.*
145. *Burgess*, 943 A.2d at 738.
146. *Id.* at 738–39.
147. *Id.* at 734.

moral remorse as instructed by his attorney. However, it seems unlikely that such a scripted recantation of remorse would be believable to a judge. Given the breadth of discretion a judge has in sentencing a defendant,[148] it is possible that a clearly insincere defendant who expresses fake moral remorse would lead a judge to render a harsher sentence than he would have had the defendant simply remained silent. Forcing defendants to appear morally apologetic will undoubtedly encourage insincere and unbelievable expressions of moral remorse.

Given the subtle nature of the distinction between moral and legal remorse, it seems unnecessary for courts to place defendants in a situation where they could easily incriminate themselves by simply misspeaking when there are other recognized means to evaluate a defendant's remorse for his convicted crime. In *State v. Shreves*, the Montana Supreme Court recognized several other ways for a sentencing judge to determine a defendant's remorse without risking a Fifth Amendment violation.[149] Specifically, the court stated that sentencing judges could look to a defendant's pretrial and trial statements, the manner of the commission of the offense as demonstrated by presented evidence, and any other evidence properly admitted at the sentencing hearing.[150]

C. *The* Burgess *Rule Is Inconsistent and Potentially Difficult to Apply*

> [W]here a defendant admits to committing the acts underlying the charged crime, but disputes whether he had the requisite mental state for the crime, or offers a legal justification for committing those acts, the defendant's silence at sentencing *might*, *in certain instances*, legitimately be considered as a lack of remorse.[151]

According to *Burgess*, there are instances where a defendant has admitted to the acts underlying a crime, that it might—in certain cir-

148. *Id.* at 733; *see also* State v. Lambert, 787 A.2d 175, 176 (N.H. 2001).
149. 60 P.3d 991, 996 (Mont. 2002).
150. *Id.*
151. *Burgess*, 943 A.2d at 738 (emphasis added) (citing Brake v. State, 939 P.2d 1029, 1034 (1997)).

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cumstances—be permissible for the judge to read into the defendant's silence at sentencing to determine his lack of remorse.[152] Based on the court's own language, this inapplicability of the Fifth Amendment only occurs sometimes.[153] However, this rule is problematic as it begs a major question: when? *Burgess* provides little guidance as to when a defendant's right against self-incrimination will not be recognized. The court stated that when a defendant claims self-defense, his silence *may* be used to infer his lack of remorse for the underlying act of killing another human being.[154] Further, the court held that Burgess should have shown remorse for "endangering the safety of court personnel," even though he claimed to have bolted away from the attending officers as a result of his feeling that they were closing in on him too quickly.[155] Outside of these two narrow examples, *Burgess* provides little guidance for defendants as to when their silence may be legitimately inferred as a lack of remorse at sentencing. Specifically, the court does not even implement a firm rule that *whenever* a defendant has admitted to the acts underlying a crime, he will be expected to show remorse at sentencing. Rather the court states that this rule will only apply in "certain instances."[156]

The United States Supreme Court has been clear that the Fifth Amendment protects defendants from being compelled to incriminate themselves at trial.[157] Further, the Court has been clear that these same protections must be afforded to defendants during sentencing.[158] Given the unpredictability of *Burgess*, it seems that subjecting defendants to such an undefined and ambiguous limitation on the Fifth Amendment would do nothing more than compel them to

152. *Id.*

153. Such a scenario does not even occur every time the defendant has admitted to the acts underlying the charged crime. *See id.*

154. *Id.*

155. *Id.* at 739.

156. *Id.* at 738.

157. Mitchell v. United States, 526 U.S. 314, 326 (1999) ("As the Court stated in *Estelle:* 'Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.'" (alteration in original) (quoting Estelle v. Smith, 451 U.S. 454, 463 (1981))); Griffin v. California, 380 U.S. 609, 614–15 (1965).

158. *Mitchell*, 526 U.S. at 326.

speak,[159] as they would always be unsure whether their case was one of the chosen circumstances where drawing negative inferences from silence would be permissible.[160]

1. *Unanswered Questions*

The most significant question left open by *Burgess* is when will the limitation on the Fifth Amendment apply? Based on the case, it is inferable that the court can allow negative inferences to be drawn from a defendant's silence at sentencing in order to determine a lack of remorse when the defendant has admitted to the acts underlying the charged crime. However, even this is not absolute. The court is vague in its presentation of its limitation and gives little guidance as to how it will be enforced in the future.

a. *How Will Courts Handle a Defendant Who Presents Multiple Defenses?*

Assume hypothetically that a defendant is charged with first-degree assault.[161] He pleads not guilty. There is no "smoking gun" linking the defendant to the crime. Also, there is another man who could have committed the act. At trial, the defendant maintains his innocence as to the charged crime. However, the defendant also states that he has a history of sleepwalking. In the alternative, he states that even if he committed the crime, he did so while sleep-walking and therefore should not be held culpable.[162] Despite his

159. *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966) ("The privilege against self-incrimination protects the individual from being compelled to incriminate himself in *any manner*; it does not distinguish degrees of incrimination." (emphasis added)).

160. *See* Gardner v. Johnson, 247 F.3d 551, 557–58 (5th Cir. 2001) (stating that defendant must be warned that statements can be used against him in order for the privilege against self-incrimination not be violated at sentencing); United States v. Chitty, 760 F.2d 425, 430–32 (2d Cir. 1985) (stating that in order for pretrial statements to be used against the defendant at sentencing, the defendant must be put on notice that the statements could be used against him).

161. *See* N.H. REV. STAT. ANN. § 631:1 (2007).

162. United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1196 n.11 (9th Cir. 2000) (recognizing that sleepwalking is a valid defense to crimes of specific intent). Massachusetts, Delaware, Florida, Arizona, and Ohio, as well as Canada, Austra-

contentions, the jury convicts the defendant of first-degree assault. As the defendant prepares for trial, he faces several questions. Mainly, which defense will trump the other? Will the court consider that he first maintained absolute innocence and affirm the extension of Fifth Amendment protections into his sentencing? Alternatively, will the court look at his sleepwalking defense, determine that, he is admitting to the acts underlying the assault, and enforce the *Burgess* limitation, thus allowing the sentencing judge to infer a lack of remorse from his silence if he chooses not to speak? Still, the overarching question still exists: How will the defendant know if the *Burgess* limitation applies to this sentencing hearing? Without very explicit guidance as to when the court is going to consider the Fifth Amendment waived at sentencing, a defendant may be compelled to express remorse at sentencing out of the fear that if he does not, the sentencing judge may be allowed to infer that he is not remorseful and punish him accordingly.

b. *How Will the* Burgess *Limitation Apply If the Defendant Chooses Not to Testify During His Trial?*

The situations presented in both *Burgess* and *Brake* are the result of richly developed records. In each case, the defendant chose to testify on his own behalf and clearly explained the circumstances surrounding the alleged crime and his own involvement in the act. In assessing the workings of the *Burgess* limitation, it is unclear how the rule would be enforced, or whether it would be enforced at all, if the defendant chose not to testify during his trial. Specifically, will *Burgess* be relevant where the defendant opts not to testify, but his attorney, through evidence and witness testimony, presents that the defendant, in committing the actions underlying the charged crime, acted in self-defense?

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lia, and the United Kingdom have all recognized sleepwalking as a valid defense. *E.g.*, State v. Cabrera, 891 A.2d 1066, 1072 (Del. Super. Ct. 2005). Aside from sleepwalking, alcoholism (en bloc blackouts) and intoxication defenses may also be used by a defendant. *E.g.*, Smith v. State, 622 S.E.2d 413, 414–15 (Ga. Ct. App. 2005).

Taking the facts of the first hypothetical,[163] assume that the defendant does not testify. Rather, another poker player testifies that he saw victim lunge toward the defendant and only when the victim tried to strike the defendant with the baseball bat did the defendant reach for his gun and shoot the victim. In light of this testimony, the defendant's attorney contends, on his client's behalf, that the defendant killed the victim in self-defense.

Applying the *Burgess* limitation to this hypothetical, there is no question that, through his attorney's words, the defendant has admitted to the acts underlying the charged crime, specifically that he killed his friend. *Burgess* held that in *Brake*-like scenarios involving self-defense, it is permissible for a judge to infer a lack of remorse from a defendant's silence when determining his sentence. However, *Burgess* is unclear as to whether this limitation on the Fifth Amendment hinges on the defendant's own assertion of self-defense during trial or whether self-defense may be presented through his attorney.

As discussed above, these vagaries are problematic because they leave defendants in positions of uncertainty. Without a clear delineation as when the *Burgess* limitation applies, defendants will be left to wonder when their silence can be used against them and when it cannot. There will be instances where the defendant's fear that his silence can be used against him will compel him to express remorse at sentencing. This expression of remorse is especially problematic when the defendant has not testified at trial, because it will necessarily imply his guilt for conduct that he did not admit to committing at trial.[164] This cannot be the case. The case law is clear: a defendant cannot be compelled during a criminal proceeding to testify against himself.[165] Accordingly, since the *Burgess* limitation is so undefined that it may work to compel speech that may otherwise not be made, it conflicts with the very spirit of the Fifth Amendment.

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163. *See supra* Part IV.

164. If the defendant is later granted a new trial, his statements from sentencing could be used against him. *See* FED. R. EVID. 801(d)(2)(a). Such a statement would not exist had the defendant not been forced to express remorse at sentencing.

165. Mitchell v. United States, 526 U.S. 314, 327 (1999).

V. CONCLUSION

Perhaps one of the most vocal critics against the extension of the Fifth Amendment into sentencing is Justice Scalia.[166] Still, regardless of his criticisms of the *Mitchell* majority, he does concede that if one accepts the theory that a "criminal case" includes both the trial and sentencing, "there is no logical basis for drawing such a line *within* the sentencing phase" as to when the Fifth Amendment will apply and when it will not.[167] This is precisely what *Burgess* attempts to do. Specifically, under *Burgess*, the privilege against self-incrimination will apply only to a defendant who maintains his innocence as to the charged crime but not to the defendant who chooses to maintain his innocence through a legal justification or defense. However, even the limitation that the privilege against self-incrimination does not apply when the defendant relies on a legal justification or defense is not absolute; the limitation only exists in "certain instances."[168] Accordingly, under *Burgess*, a defendant will walk into sentencing unsure as to whether negative inferences from his silence will be permissible or whether he is safe to exercise his constitutional rights. The unworkability of such a limitation highlights Justice Scalia's words; it does not make sense to draw lines within sentencing as to when the privilege will and will not apply. Because a defendant's lack of remorse can be "gleaned, without more, from the manner of the commission of the offense as demonstrated by the evidence at trial or from other competent evidence properly admitted at the sentencing hearing," [169] it is illogical to create intricate rules that attempt to define specific instances where the privilege need not apply. Further, given that the common law is clear that the privilege against self-incrimination applies during both the trial and sentencing, and that the privilege is absolute, limitations

166. In his dissent in *Mitchell*, Justice Scalia completely rejects the applicability of the Fifth Amendment in the realm of sentencing, arguing that not prohibiting judges from drawing negative inferences from a defendant's silence at sentencing "runs exactly counter to normal evidentiary inferences." *Id.* at 332 (Scalia, J., dissenting).

167. *Id.* at 340.

168. State v. Burgess, 943 A.2d 727, 738 (N.H. 2008).

169. State v. Shreves, 60 P.3d 991, 996 (Mont. 2002).

such as the one created in *Burgess* are misplaced.[170] Only when the Court opts to alter its definition of a criminal case may the privilege against self-incrimination and *Burgess*-like limitations coexist.

170. *See* Dickerson v. United States, 530 U.S. 428, 453 (2000) (reiterating that "the Fifth Amendment's bar on compelled self-incrimination is absolute").