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Fifth Amendment--Preventing an Abusive Parent From Hiding behind the Self-Incrimination Privilege

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FIFTH AMENDMENT—PREVENTING AN ABUSIVE PARENT FROM HIDING BEHIND THE SELF-INCRIMINATION PRIVILEGE

Baltimore City Department of Social Services v. Bouknight, 110 S. Ct. 900 (1990)

I. INTRODUCTION

In *Baltimore City Department of Social Services v. Bouknight*,[1] the United States Supreme Court held that the self-incrimination privilege of the fifth amendment[2] does not protect a custodian from refusing to produce his or her child pursuant to a court order. This Note explores the ramifications of the *Bouknight* opinion and concludes that the Court correctly ruled that Ms. Bouknight could not invoke the privilege. This Note recognizes, however, that the opinion of the Court does not clearly express how attenuated Bouknight's fifth amendment claim is compared to previous precedent. Since the Court did not articulate clearly that production of the child was not testimonial and instead relied on the definition of a "noncriminal regulatory regime," this Note will explain how the Court has not forestalled future claims. The Note also will focus on the epidemic problem of child abuse in the United States and lament that the Court did not use this opportunity to incorporate a distinct balancing test, which weighs the interests of Bouknight against those of Maurice, in the logic of its decision. Finally, this Note concludes that by failing to stress that the rights of an abused child may outweigh the rights of the abuser facing possible criminal charges, the Court has failed to make a strong statement against child abuse and thereby better protect abused children in the United States.

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1 110 S. Ct. 900 (1990).

2 "[N]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

II. FACTS AND PROCEDURAL HISTORY: THE STORY OF MAURICE M.

A. THE INJURIES

Maurice M. was born on October 3, 1986 to Jacqueline Bouknight.[3] When he was two months old, Maurice was admitted to Johns Hopkins Hospital in Baltimore, Maryland, with chlamydia pneumonia.[4] X-rays revealed previous fractures of the right humerus (upper arm), scapula (shoulder blade) and glenoid (shoulder socket).[5] On January 23, 1987, less than two months later, Maurice was admitted to Francis Scott Key Medical Center in Baltimore, suffering from a fracture of his left femur (thigh).[6] This injury required a full body cast.[7] In addition, Maurice's upper right shoulder was immobile, suggesting either a spinal cord injury or nerve damage in the shoulder joint.[8]

The attending doctor at Francis Scott Key noted that it was an uncommon occurrence for a three month old infant to have long bone fractures and even more unusual for an infant to have multiple fractures involving different limbs.[9] The doctor believed that these injuries most likely resulted from severe child abuse, and feared that if these abusive conditions were not corrected, Maurice might suffer serious or fatal injuries.[10] During this hospitalization, parents of another patient witnessed Bouknight violently shake Maurice and drop him into his crib.[11]

B. THE CITY'S INITIAL ACTION AND EVALUATION

Prompted by several factors, including Maurice's second hospitalization, his prior history of injuries, his father's recent release from prison, Bouknight's emotional problems, and her verbally abu-

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[3] Joint Appendix to Briefs at 146, Baltimore City Dep't of Social Services v. Bouknight, 110 S. Ct. 900 (1990) (No. 88-1182) [hereinafter Joint Appendix]. Like her own child, Jacqueline Bouknight was also a Child in Need of Assistance (CINA) from 1982 through 1983. Brief for Petitioner at 4, Baltimore City Dep't of Social Services v. Bouknight, 110 S. Ct. 900 (1990) (No. 88-1182). A child is considered in need of assistance when "[h]e is mentally handicapped or is not receiving ordinary and proper care and attention, and . . . [his] parents . . . are unable or unwilling to give proper care and attention to the child and his problems." *Bouknight*, 110 S. Ct. at 913 (Marshall, J., dissenting) (quoting MD. CTS. & JUD. PROC. § 3-801(e) (1984)).

[4] Joint Appendix, *supra* note 3, at 11.

[5] *Id.* at 14.

[6] *Id.* at 15.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 12.

[10] *Id.*

[11] *Id.* at 15. Maurice was in a full body cast at the time. *Id.*

sive attitude toward the attending physicians and social workers,[12] the Baltimore City Department of Social Services (BCDSS) secured an order from the Circuit Court for Baltimore City to remove Maurice from Bouknight's custody and place him in an emergency shelter.[13] The court also declared Maurice a Child in Need of Assistance (CINA).[14] Notwithstanding his CINA status, on July 17, 1987, a modified shelter care order returned Maurice to his mother's custody.[15] This modified order required Bouknight to "cooperate with the department, continue therapy sessions, attend parenting classes, work on her parenting skills, and refrain from physically punishing Maurice."[16]

On July 27, 1987, a psychodiagnostic evaluation[17] revealed that Bouknight's overall intellectual level fell within the borderline range (I.Q.=74) of adult intellectual capacity.[18] The tests also showed that Bouknight lacked a genuine capacity for relating to the thoughts and feelings of others.[19] The evaluating doctor concluded that, only one week after receiving custody of Maurice, Bouknight was not able to relate constructively to him.[20] He recommended that since Bouknight did not appear emotionally capable of providing the adult protection, nurturing, and care required for Maurice's safety and security, she should not retain custody of her son.[21] The doctor further suggested that Bouknight needed "intensive and extensive" therapy in an attempt to develop adequate parenting

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12 *In re* Maurice M., 314 Md. 391, 394, 550 A.2d 1135, 1136 (1988). Maurice's father was serving a prison term for drug violations. *Id.*

13 Baltimore City Dep't of Social Services v. Bouknight, 110 S. Ct. 900, 903 (1990).

14 By definition, a CINA is "one who does not receive ordinary and proper care and attention and whose parents, guardians or custodians are unable or unwilling to give proper care and attention to him and his problems." MD. CTS. & JUD. PROC. § 3-801(e) (1984).

15 Petition for Writ of Certiorari at 5, Baltimore City Dep't of Social Services v. Bouknight, 110 S. Ct. 900 (1990) (No. 88-1182).

16 *Bouknight*, 110 S. Ct. at 903.

17 Joint Appendix, *supra* note 3, at 22. This test was part of the BCDSS's effort to help Bouknight learn her weaknesses so she could better care for Maurice. Dr. Joseph Eisenberg, a psychologist, conducted the test.

18 *Id.*

19 *Id.* at 24. Dr. Eisenberg noted that Bouknight may have been so involved with herself that she could not truly empathize and appreciate what others might experience, think, and feel.

20 The doctor further noted that Bouknight had become totally frustrated and enraged to find that she had been unable to gain a replacement in Maurice for the inadequacies that were present in her childhood. The doctor noted that when her frustration mounted, Bouknight would be likely to act out towards the child and see him as abusive to her rather than herself as abusive to him. *Id.* at 25.

21 *Id.*

skills.[22]

C. THE CITY'S FURTHER ACTION AND THE MISSING CHILD

The BCDSS again petitioned the juvenile court in Baltimore, on April 20, 1988, to remove Maurice from Bouknight's control and place him in foster care.[23] The BCDSS petition cited Bouknight's failure to cooperate with the department, her refusal to provide a current address or inform the department of Maurice's whereabouts, the shooting death of Maurice's father, and Bouknight's history of drug abuse.[24] The petition asserted that inquiries revealed that none of Bouknight's relatives had recently seen Maurice; it further stated the BCDSS both prompted the police to issue a missing persons report and referred the case to the police homicide division.[25] After Bouknight expressed fear of producing the child, the court ordered her to show cause why she should not be held in contempt for failure to bring Maurice forward in court.[26]

Bouknight refused to produce seven month old Maurice; instead, she informed the court that he was with a relative in Dallas, Texas.[27] After the relative denied Bouknight's allegation, the court found Bouknight in contempt for failure to produce the child as ordered.[28] However, Bouknight could purge the contempt charge by either producing Maurice or revealing his whereabouts.[29]

Bouknight's counsel claimed that the opportunity to purge may not be constitutional if it required the admission of a crime.[30] The juvenile court, however, rejected this claim, responding that the contempt order was issued not because Bouknight refused to testify in any proceeding, but because she failed to abide by the order of the court to produce Maurice.[31]

The Maryland Court of Appeals vacated the juvenile court's enforcement of the contempt order.[32] The court found that the "contempt order unconstitutionally compelled Bouknight to admit through the act of production [a] 'measure of continuing control

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22 *Id.*

23 Baltimore City Dep't of Social Services v. Bouknight, 110 S. Ct. 900, 903 (1990).

24 *In re* Maurice M., 314 Md. 391, 394, 550 A.2d 1135, 1136 (1988).

25 *Bouknight*, 110 S. Ct. at 904.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.* at 905.

30 *Id.*

31 *Id.* While the juvenile court's decision was being appealed, Bouknight was convicted of theft and sentenced to 18 months imprisonment. *Id.* at 904.

32 *In re* Maurice M., 314 Md. 391, 550 A.2d 1135 (1988).

and dominion over Maurice's person in circumstances in which Bouknight has a reasonable apprehension that she will be prosecuted.' "[33]

Chief Justice Rehnquist issued a stay of the Maryland Court of Appeals' decision.[34] The United States Supreme Court granted certiorari to decide whether the appellate court correctly ruled that Bouknight's fifth amendment right against self-incrimination was violated; the Supreme Court specifically reviewed that portion of the order which proclaimed "that Bouknight could comply with the order through the unadorned act of producing the child."[35]

D. POST-SCRIPT ON MAURICE

Although Bouknight has been incarcerated since April of 1988, she has remained silent concerning Maurice.[36] Despite the Supreme Court's ruling demanding production of the child, his whereabouts remain unknown and the authorities continue the search for Maurice, who would now be four years old.[37]

III. BACKGROUND

The fifth amendment of the United States Constitution provides that "[no] person . . . shall be compelled in any criminal case to be a witness against himself."[38] The First Congress proposed the addition of this language to the Bill of Rights to ensure a privilege against self-incrimination protected from federal government intrusion.[39] This protection against self-incrimination is part of an Anglo-American legal tradition dating back to the thirteenth century.[40]

The core of the privilege against self-incrimination has not

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[33] *Id.* at 403, 550 A.2d at 1141.

[34] He wrote, "There is undoubtedly a burden on Bouknight's liberty because of her confinement, but against it must be weighed a very real jeopardy to a child's safety, well-being, and perhaps even his life." Baltimore City Dep't of Social Services v. Bouknight, 488 U.S. 1301, 1303 (1988).

[35] *Bouknight*, 110 S. Ct. at 905.

[36] Interview with Andrew Baida, Counsel for the BCDSS (Sept. 12, 1990). Baida noted that perhaps Bouknight would rather be imprisoned for contempt than face possible criminal charges. *Id.*

[37] *Id.*

[38] U.S. CONST. amend. V.

[39] M. BERGER, TAKING THE FIFTH 1 (1980) [hereinafter M. BERGER].

[40] J. WALTZ & J. KAPLAN, CRIMINAL EVIDENCE 345 (1980). The origin of this privilege can be traced to the time of the Norman Conquest. At that time, a largely informal, though accusatorial, system of criminal justice prevailed in England. M. BERGER, *supra* note 39, at 3. Simultaneously, the laws of the church began to focus on an inquisitorial mode of procedure through the adoption of the oath "*ex officio*," which required truthful answers to all questions directed to the suspect. *Id.* at 7. The oath procedure was very

changed significantly from the principle established during the historical inquisitorial proceedings.[41] A survey of the most important Supreme Court opinions reveals the analytical foundation for fifth amendment decisions.

The cornerstone of fifth amendment analysis[42] is *Boyd v. United States*,[43] decided in 1886. In *Boyd*, Justice Bradley, writing for the majority, ruled that documents belonging to the defendant were immune from government seizure. Relying more on the fourth amendment than the fifth amendment privilege against self-incrimination, Justice Bradley stated that a sphere of privacy existed which the government could not intrude.[44] According to the Court, "the essence of the offense . . . [was] the invasion of the indefeasible right of his personal security, personal liberty, and private property."[45] Despite the opportunity, Justice Bradley's opinion did not clearly articulate a rationale for the right against self-incrimination. Although he stated that the "compulsory production of private books . . . [was] compelling [the defendant] to be a witness against himself, within the meaning of the Fifth Amendment of the Constitution,"[46] this conclusion was intended more as an appendage to the fourth amendment right against unreasonable search and

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efficient; the inquisitor did not have an obligation to inform the suspect of either the charges or the accusers. *Id.* at 4.

By the end of the seventeenth century, a substantial history of opposition to the oath "ex officio" existed. When Puritan ministers were called before the High Commission and asked questions about their beliefs, they faced a dilemma: if they answered truthfully, as they would being men of God, they would be punished for their deviant views; if they lied, they would risk punishment for perjury. Therefore, the Puritans began to claim the right not to answer. *See id.* at 14-20.

41 *Id.* at 161. The most important aspect of the right to remain silent is its ability to control state sponsored interrogations. The historical background of the privilege does not extend much beyond official interrogations; yet, in modern American society, the use of the privilege has expanded beyond its historical role for two reasons. First, commercial and interpersonal transactions are much more complex today and require the production of supportive documents (*e.g.*, tax records). Second, privacy in contemporary American society is in need of greater protection to ensure some amount of human dignity due to the modern intrusive world. *Id.*

42 *Id.* at 165.

43 116 U.S. 616 (1886). In *Boyd*, the United States government brought an action for the forfeiture of plate glass which allegedly had been imported in violation of federal government standards. To establish its position, the government obtained a court order requiring production of the shipper's invoice conveying the plate glass shipment. Boyd objected because the statute authorizing the order provided that if a document was not turned over without good excuse, then the allegations that the document would tend to prove would be taken as confessed. *Id.* at 617-18.

44 *Id.* at 623.

45 *Id.* at 630.

46 *Id.* at 634-35.

seizure than as a reasoned argument in itself.[47]

Although *Boyd* has been heralded as a "case that will be remembered as long as civil liberties live in the United States,"[48] and as "among the greatest Constitutional decisions,"[49] a variety of fifth amendment decisions have narrowed its scope. For example, corporations are denied the protection of the self-incrimination clause,[50] as are custodians of corporate documents.[51]

The Supreme Court reaffirmed the *Boyd* doctrine in *Gouled v. United States*.[52] In *Gouled*, the Court ruled that the government could not compel production of private documents to be used against an individual in criminal proceedings. Like *Boyd*, the Court relied heavily on the fourth amendment, but it also added that evidence seized in violation of the fourth amendment was rendered inadmissable by the fifth amendment because the defendant was the "unwilling source of the evidence."[53] The Court concluded that documents should be treated like other forms of property; therefore, documents are immune from seizure only when they constitute evidence.[54] This conclusion significantly undercut the special privilege afforded private papers.[55]

In *Shapiro v. United States*,[56] the Court further defined the scope of the fifth amendment privilege.[57] In *Shapiro*, the defendant was suspected of illegal tie-in sales in violation of the Emergency Price Control Act. He was issued a subpoena to produce records which government regulations required him to keep.[58] To determine whether the defendant could invoke his fifth amendment privilege,

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47 *Id.* The Court did prevent the "forcible and compulsory extortion of a man's testimony or his private papers to be used as evidence to convict him of a crime." Justice Bradley, however, did not articulate the fifth amendment rationale used to arrive at this conclusion. *See id.*

48 Olmsted v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

49 Schmerber v. California, 384 U.S. 757, 776 (1966) (Black, J., dissenting).

50 Hale v. Henkel, 201 U.S. 43 (1906). In *Henkel*, the Court ruled that agents of collective entities benefitted from the "special privileges and franchises" conferred by the state but were still bound by duties to permit inspection and monitoring of documents held for the public. *Id.* at 57.

51 Wilson v. United States, 221 U.S. 361 (1911). In *Wilson*, the Court relied on the "reservation of the visitorial power of the state" to override the privilege and compel production by the custodian of corporate documents. *Id.* at 385.

52 255 U.S. 298 (1921). *See* M. BERGER, *supra* note 39, at 167.

53 *Gouled*, 255 U.S. at 306.

54 The *Gouled* opinion observed that there was "no special sanctity in papers . . . [if they constituted an] agency or instrument of a crime." *Id.* at 309.

55 M. BERGER, *supra* note 39, at 167.

56 335 U.S. 1 (1948). The Court ruled that these records were not covered by the fifth amendment privilege.

57 *Id.* at 29.

58 *Id.*

the court sought to ascertain whether "there [was] a sufficient relation between the activity sought to be regulated and the public concern so that the government [could] constitutionally regulate or forbid the basic activity concerned."[59] The Court concluded that no privilege existed to protect a custodian from the production of records which the government required the custodian to keep.[60]

The Court shifted to a group-focus test in *Albertson v. Subversive Activities Control Board*.[61] In *Albertson*, the defendant, a member of the Communist Party of America, failed to register with the Attorney General as required by the order of the Subversive Activities Control Board. The defendant asserted that registration would violate his fifth amendment privilege, since association with the Communist party presented a sufficient threat of prosecution.[62] The *Albertson* Court held that the registration requirement of the Subversive Activities Control Act violated the fifth amendment. Under the Court's group-focus rationale, production was required only if: (1) the statute was neutral on its face; (2) the group to which the statute was directed was not "inherently suspected of criminal activities;" and (3) the subject was "an essentially non-criminal and regulatory area of inquiry."[63]

In *California v. Byers*,[64] the Court once again confronted the problem of balancing the government's need to regulate conduct and the individual's fifth amendment right against self-incrimination.[65] In *Byers*, the defendant argued that California's "hit and run" statute, which required a driver involved in an automobile accident causing property damage to provide his or her name and address to the other vehicle's owner, violated the fifth amendment. Following the *Albertson* test, the *Byers* Court found no fifth amendment violation, because the statute was a generally applicable civil regulatory scheme designed to promote the satisfaction of civil liabilities, not the facilitation of criminal convictions.[66]

The Court continued to refine its fifth amendment analysis in

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59 *Id.* at 32.

60 *Id.*

61 382 U.S. 70 (1965).

62 *Id.* at 77.

63 *Id.* at 86. Some commentators do not regard the group-focus test as the perfect solution but as an appropriate first step for fifth amendment protection. M. BERGER, *supra* note 39, at 188.

64 402 U.S. 424 (1971).

65 *Id.* at 434.

66 *Id.* at 430. Although the Court found this act of production incriminating, the degree of incrimination was too insubstantial to warrant fifth amendment protection. *Id.* at 427-28.

Couch v. United States.[67] In *Couch*, the Court ruled that the defendant must produce her tax returns even though she had turned them over to her accountant.[68] The Court rejected the defendant's assertion that her "ownership" of the records entitled her to object to the compulsory production of her tax records by her accountant.[69] The Court further reasoned that since the defendant had regularly turned her records over to her accountant, she had completely transferred possession of her documents to a third person; therefore, requiring the accountant to produce the tax records did not involve personal compulsion on the part of the defendant.[70] The majority's emphasis on possession as the basis for a claim of privilege implied that even private documents might lose fifth amendment protection if not in the owner's actual possession.[71]

The fifth amendment privilege was further defined in *Andresen v. Maryland*.[72] In *Andresen*, a Maryland attorney was suspected of fraud, and the government seized his real estate development files. The Court allowed the development files to be admitted into evidence, because the petitioner had not been asked to say or do anything, except to produce the documents. Justice Blackmun, writing for the majority, argued that the fifth amendment protected privacy only "to some extent" and had no bearing when the state did not exert compulsion.[73] The decision in *Andresen* focused on a limited fifth amendment role based on a particular form of state coercion;[74] the fifth amendment remained a guardian against compulsory testimonial communications.[75]

Fisher v. United States,[76] also decided in 1976, provided yet an-

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67 409 U.S. 322 (1973). According to the Court, the core of the fifth amendment prohibition was directed at "the use of physical or moral compulsion to extort communications" from the accused. *Id.* at 328.

68 The subpoena ordered the accountant, not the defendant, to produce the defendant's tax records. *Id.* at 325.

69 *Id.* "To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line. Since possession bears the closest relation to the personal compulsion forbidden by the fifth amendment, the defendant's claim is invalid." *Id.* at 331.

70 *Id.* The Court recognized, however, that in certain situations, the relinquishment of possession may be too temporary to prevent substantial compulsion. *Id.* at 333.

71 M. BERGER, *supra* note 39, at 172.

72 427 U.S. 463 (1976).

73 *Id.* at 473.

74 M. BERGER, *supra* note 39, at 174.

75 *Andresen*, 427 U.S. at 463.

76 425 U.S. 391 (1976). In *Fisher*, the Court declared that taxpayers could not invoke the privilege as a bar against the production of work papers prepared by their accountants, because the act of producing the evidence did not rise to the level of testimony protected by the fifth amendment.

other twist to the interpretation of the self-incrimination clause and opened the possibility that the state could demand production of self-incriminating documents.[77] In *Fisher*, several taxpayers, following visits from Internal Revenue Service agents, secured from their accountants various work papers relating to their tax returns; the taxpayers then transferred these documents to their attorneys.[78] The government summoned the attorneys to produce the work papers; the attorneys refused, arguing that production would violate the taxpayers' fifth amendment privilege against self-incrimination.[79] Justice White, writing for the majority, ruled that the taxpayers' fifth amendment privilege was not violated, because the summons was directed to a third party; therefore, no element of compulsion existed against the taxpayers.[80] Justice White further held that compliance with the documentary summons did not involve testimonial communication. He wrote:

> [a] subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony, nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents. Therefore the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer . . . .[81]

Following this line of reasoning, the privacy argument has not fared particularly well in the fifth amendment arena.[82] The Court has interpreted the historical purpose of the privilege to protect against compelled testimony; therefore, as long as the production of the document does not require oral testimony, the privilege is not infringed.[83] The problem arises in the theory that "one who produces documents (or other matter) described in the subpoena duces tecum represents . . . that the documents produced are in fact the documents described in the subpoena. This representation is a testimonial action and [possibly should be] within the protection of the privilege."[84]

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77 M. BERGER, *supra* note 39, at 175.

78 *Fisher*, 425 U.S. at 392.

79 *Id.* at 391.

80 *Id.* at 397. Justice White wrote:

> The taxpayer's privilege under this Amendment is not violated by enforcement of the summonses involved in these cases because enforcement against a taxpayer's lawyer would not 'compel' the taxpayer to do anything—and certainly would not compel him to be a 'witness' against himself.

Id.

81 *Id.* at 409.

82 M. BERGER, *supra* note 39, at 178.

83 *Id.*

84 C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 126, at 268 (2d ed. 1972).

IV. SUPREME COURT OPINIONS

A. MAJORITY OPINION

Writing for the majority, Justice O'Connor[85] held that Jacqueline Bouknight could not invoke the fifth amendment privilege against self-incrimination to circumvent the Maryland court order to produce her child.[86]

Justice O'Connor began by noting that "the Fifth Amendment protection 'applies only when the accused is compelled to make a *testimonial* communication that is incriminating.' "[87] The majority focused on the fact that the order to produce the child was not testimonial, since the order only compelled production of an item.[88] While the fifth amendment may be implicated if the act of production testifies to the existence, authenticity, or possession of things produced,[89] it does protect against any incrimination that may result from the contents of the thing produced.[90] The Court thus ruled that even though complying with the government demand would constitute testimony as to the existence of Maurice, Bouknight could not use the privilege to protect herself from any incrimination that may result from an examination of Maurice.[91]

The majority conceded that, despite the state's ability to introduce evidence of Bouknight's control of Maurice, her act of production would amount to an implicit communication of control, which might aid the state's prosecution. Justice O'Connor countered, however, that the limited testimonial assertion in Bouknight's production was insufficient to recognize the fifth amendment privilege. O'Connor further stated that even if "this limited testimonial assertion [was] sufficiently incriminating and 'sufficiently testimonial for purposes of the privilege,' "[92] Bouknight "may not invoke the privilege to resist the production order because she [had] assumed custodial duties related to production and because production [was] required as part of a noncriminal regulatory regime."[93]

Justice O'Connor first focused on the implications of the definition of a "regulatory regime." Relying on past decisions, Justice

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85 Chief Justice Rehnquist and Justices White, Blackmun, Stevens, Scalia, and Kennedy joined in Justice O'Connor's majority opinion.

86 Baltimore City Dep't of Social Services v. Bouknight, 110 S. Ct. 900 (1990).

87 *Id.* at 904 (quoting Fisher v. United States, 425 U.S. 391 (1976) (emphasis added)).

88 *Id.* at 905 (citing *Fisher*, 425 U.S. at 410).

89 *Id.* (citing Doe v. United States, 487 U.S. 201, 209 (1988)).

90 *Id.* *See* United States v. Doe, 465 U.S. 605, 612 (1984).

91 *Id.*

92 *Id.* (quoting *Fisher*, 425 U.S. at 411).

93 *Id.*

O'Connor stated that the fifth amendment could not be used to resist compliance with a regulation "constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws."[94] The Court then cited *Shapiro v. United States* for the proposition that the fifth amendment does not attach to the production of *required* records kept for the benefit of the public and open for public inspection.[95] Although the *Shapiro* Court stated that the Constitution limits the government's ability to require recordkeeping which later may be used by the government against the recordkeeper,[96] Justice O'Connor noted that these limits have been modified. The government may access information vested with public character in "essentially non-criminal and regulatory areas of inquiry;"[97] however, access to records via *Shapiro* is limited when the order for production is directed at a "selective group inherently suspect of criminal activities."[98]

To further clarify the distinction between the production of records and information pursuant to a "non-criminal regulatory scheme" and statutory schemes focusing on criminal activities, Justice O'Connor cited *California v. Byers*.[99] Based on *Shapiro* and *Byers*, the majority concluded that the "ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable civil regulatory requirement."[100]

Justice O'Connor then addressed the fifth amendment implications of being a recordkeeping custodian in a civil regulatory scheme. She noted that "[w]hen a person assumes control over items that are the legitimate object of the government's non-crimi-

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94 *Id.*

95 *Id.* (citing *Shapiro*, 335 U.S. at 17-18).

96 It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the recordkeeper himself.

Id. (quoting *Shapiro*, 335 U.S. at 32).

These constitutional limits were not infringed in *Shapiro*, because "there [was] a sufficient relation between the activity sought to be regulated and the public concern so that the Government [could] constitutionally regulate or forbid the basic activity concerned." *Id.*

97 *Id.* (quoting Marchetti v. United States, 390 U.S. 39, 57 (1968)). *Marchetti* in turn quoted Albertson v. Subversive Activities Control Board, 382 U.S. 70, 79 (1965).

98 *Id.* (quoting *Marchetti*, 390 U.S. at 57). *See also* Grosso v. United States, 390 U.S. 62, 68 (1968) (defendant was prosecuted for willful failure to pay excise tax imposed on wagering by federal law; *Shapiro* was not applicable because "the statutory obligations [were] directed almost exclusively to individuals inherently suspect of criminal activities").

99 402 U.S. 424 (1971). For a discussion of *Byers*, see *supra* notes 64-66.

100 *Bouknight*, 110 S. Ct. at 906.

nal regulatory powers, the ability to invoke the privilege is reduced."[101] When these conditions are satisfied, Justice O'Connor concluded that the "custodian has no privilege to refuse production although [the record's] contents [may] tend to incriminate him. In assuming their custody, [the custodian] has accepted the incident obligation to permit inspection."[102]

Applying these principles, the majority declared that the intent of the court order was to compel the production of Maurice, not to prosecute Bouknight criminally; therefore, Bouknight could not invoke her fifth amendment privilege.[103] To substantiate this conclusion, Justice O'Connor began by reviewing the regulatory aspects of the case. Justice O'Connor also declared that since Bouknight had assumed custody of Maurice, she was subject to the regulations of a custodian.[104]

Justice O'Connor stated that Maurice was the particular object of the State's regulatory interest,[105] because he had been adjudicated a Child in Need of Assistance. Maryland had "entrusted responsibility for Maurice's care to Bouknight."[106] Thus, "by accepting care of Maurice subject to the custodial order's conditions . . . Bouknight submitted to the routine operation of the regulatory system and agreed to hold Maurice in a manner consonant with the State's regulatory interest and subject to inspection by the BCDSS."[107] Moreover, by "assuming the obligations attending custody, Bouknight '[had] accepted the incident obligation to permit inspection.' "[108]

The majority then stated that Bouknight's obligations were derived from a "broadly directed, noncriminal regulatory regime governing children cared for pursuant to custodial orders."[109] Justice O'Connor further concluded that the request for the production of Maurice was pursuant to a noncriminal regulation directed at a group that was not " 'inherently suspect of criminal activities.' "[110]

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101 *Id.*

102 *Id.* (quoting Wilson v. United States, 221 U.S. 361, 382 (1911)). Justice O'Connor also cited to Braswell v. United States, 487 U.S. 99, 109-13 (1988), and Curcio v. United States, 354 U.S. 118, 123-24 (1957).

103 *Bouknight*, 110 S. Ct at 906.

104 *Id.* at 907. "These included requirements that Bouknight cooperate with the BCDSS, follow a prescribed training program and be subject to further court orders." *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.* (quoting Wilson v. United States, 221 U.S. 361, 382 (1911)).

109 *Id.* (citing MD. CTS. OF JUD. PROC. § 3-820(b) (1984)).

110 *Id.* at 908 (quoting *Marchetti*, 390 U.S. at 57). Justice O'Connor reasoned that the

Yet, Justice O'Connor also argued that "[e]ven when criminal conduct may exist, the court [may] properly require production and return of the child, and enforce that request through the exercise of its contempt power, for reasons related entirely to the child's well-being and through measures unrelated to criminal law enforcement or investigations."[111]

Nor could the order to produce Maurice be characterized as an effort to gain some testimonial component from the act of production.[112] The majority concluded that concern for Maurice's protection was the focal point of the protective order and that the demand for production of Maurice was unrelated to criminal law enforcement.[113] Therefore, Bouknight could not invoke her fifth amendment right against self-incrimination to avoid complying with the court order.

Finally, the majority stated that while the Court was "not called upon to define the precise limitations that [might] exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings,"[114] the custodial role that limited Bouknight's resistance to the production order might likewise limit the use of any "testimony" in future criminal prosecution.[115] The majority succinctly concluded that:

> these orders to produce children cannot be characterized as efforts to gain some testimonial component of the act of production. The government demands production of the very public charge entrusted to a custodian and makes this demand for compelling reasons unrelated to criminal law enforcement and as part of a broadly applied regulatory regime. In these circumstances, Bouknight cannot invoke the privilege to resist the order to produce Maurice.[116]

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provision that authorized the juvenile court's efforts to gain production of Maurice had the same broad applicability as other provisions governing juvenile custody orders, which focus not on the parent as a criminal, but on the parent's ability to provide for his or her child. *Id.* She further concluded that "BCDSS's efforts to gain access to children, as well as judicial efforts to the same, do not 'focus almost exclusively on conduct which was criminal.' Many orders will arise in circumstances entirely devoid of criminal conduct." *Id.* (citation omitted).

111 *Id.* Justice O'Connor believed that this case satisfied these standards; she wrote, "[t]his case provides an illustration: concern for the child's safety underlay the efforts to gain access to and then compel production of Maurice." *Id.*

112 *Id.* Justice O'Connor reasoned that even if a particular act of production would incriminate the custodian, "production in the vast majority of cases [would] embody no incriminating testimony." *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.*

B. THE DISSENTING OPINION

Writing the dissent, Justice Marshall[117] protested that neither the nontestimonial aspects of production nor the regulatory scheme analysis articulated by the majority satisfactorily supported the holding that Bouknight could not invoke the fifth amendment privilege to resist production of Maurice.[118] Justice Marshall stated that he "would not hesitate to hold explicitly that Bouknight's admission of control presented a 'real and appreciable threat of self incrimination.' "[119] Specifically, he argued that production in this case would be testimonial and that Bouknight did not fall within the definition of custodian.[120] According to Justice Marshall, the production of Maurice would be testimonial, because it would establish Bouknight's control over him and "thus might prove a significant 'link in a chain of evidence' tending to establish her guilt."[121]

Justice Marshall was baffled by the majority's analogy of Bouknight's obligation to those of a custodian of records.[122] He contended that "a finding that a child [was] in need of assistance does not by itself divest a parent of legal or physical custody."[123] When custody was returned to Bouknight, it was returned to her as the child's parent, not because the state delegated that responsibility to her out of its own interest. Justice Marshall emphasized that Bouknight was not the agent for an artificial entity.[124] She was an individual acting in a personal capacity, rather than acting on behalf of the state.[125]

The dissent further argued that the custodial rights and obliga-

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117 Justice Brennan joined Justice Marshall in the dissent.

118 *Id.* at 909 (Marshall, J., dissenting).

119 *Id.* (Marshall, J., dissenting) (quoting Marchetti v. United States, 390 U.S. 39, 48 (1968)). In *Marchetti*, the Court held that the fifth amendment was a valid defense in a prosecution for failure to register to pay the occupation tax under the federal wagering tax statutes. If the defendant had complied with the statute, he would have indicated that future illegal acts may take place, thereby incriminating himself. 390 U.S. at 49.

120 *Bouknight*, 110 S. Ct. at 909 (Marshall, J., dissenting).

121 *Id.* at 909 (Marshall, J., dissenting) (quoting *Marchetti*, 390 U.S. at 48). Justice Marshall asserted that Bouknight faced a real threat of criminal charges, including child abuse and possibly murder. *Id.* at 910 (Marshall, J., dissenting).

122 *Id.* (Marshall, J., dissenting). Justice Marshall asserted that this characterization contradicted the facts of the case and that the Court had never relied on this type of characterization to override the fifth amendment privilege except in the context of a claim of privilege by an agent of a collective entity. *Id.*

123 *Id.* (Marshall, J., dissenting). Justice Marshall discussed that under the statute that declared Maurice a CINA, Bouknight did not act as a custodian on behalf of the state; rather, she continued to exercise parental custody with additional obligations imposed upon her by the state.

124 *Id.* (Marshall, J., dissenting).

125 *Id.* (Marshall, J., dissenting).

tions placed on Bouknight were not the same obligations as those faced by a corporate agent.[126] Unlike a natural person, a custodian of corporate rights represented a "collective entity" and therefore had no fifth amendment privilege against self-incrimination.[127] Justice Marshall concluded that he was "unwilling to extend the collective entity doctrine into a context where it [denied] individuals, acting in their personal rather than representative capacities, their constitutional privilege against self-incrimination."[128]

Justice Marshall then attacked the majority's analysis and application of the civil regulatory regime to deny Bouknight fifth amendment protection.[129] The dissent argued that the Court's "characterization of Maryland's system is dubious and highlights the flaws inherent in the Court's formulation of the appropriate Fifth Amendment inquiry."[130] The dissent claimed that "[v]irtually any civil regulatory scheme could be characterized as essentially noncriminal by looking narrowly at it."[131] Instead, Justice Marshall advocated looking at the practical effects of the statute, since the regulations embodied in the juvenile welfare statutes were intimately related to the enforcement of criminal statutes prohibiting child abuse.[132] He argued that it was difficult to separate the two interests, since the state's goal of protecting children from an abusive environment targets conduct that is subject to criminal sanction.[133] Therefore, Justice Marshall argued that the "Court's test [would] never be used to find a relationship between the civil scheme and law enforcement goals significant enough to implicate the Fifth Amendment."[134] He declared that "[a] civil scheme that *inevitably* intersects with criminal sanctions may not be used to coerce a potential criminal defendant to furnish evidence crucial to the success

126 *Id.* (Marshall, J., dissenting).

127 *Id.* (Marshall, J., dissenting). Justice Marshall relied on the collective entity doctrine articulated in United States v. White, 322 U.S. 694 (1944). In *White*, the Court held that a labor union did not have a fifth amendment privilege, because when individuals act as representatives of a collective group, they "cannot be said to be exercising their personal rights and duties not to be entitled to their purely personal privileges." *Bouknight*, 110 S. Ct. at 910 (Marshall, J., dissenting) (quoting *White*, 322 U.S. at 699).

128 *Id.* (Marshall, J., dissenting).

129 *Id.* at 912 (Marshall, J., dissenting). Justice Marshall pointed out that the regulations cited by the majority had two common features that were erroneously applied to the facts of Bouknight's case. First, they concerned civil regulations that were not primarily intended to facilitate criminal investigations. Second, they targeted the general public.

130 *Id.* (Marshall, J., dissenting).

131 *Id.* (Marshall, J., dissenting).

132 *Id.* at 913 (Marshall, J., dissenting).

133 *Id.* (Marshall, J., dissenting).

134 *Id.* at 912 (Marshall, J., dissenting).

of her own prosecution."[135]

Finally, Justice Marshall advocated an analytical approach that would "target the respondent's particular claim of privilege, the precise nature of the testimony sought and the likelihood of self-incrimination caused by this respondent's compliance."[136] The privilege would then revolve around the concrete facts of each case, rather than around abstract notions concerning the nature of a regulatory scheme.[137]

Justice Marshall argued that when the state demands testimony from its citizen, it should do so under a grant of immunity.[138] Justice Marshall further attacked the majority's assertion that Maryland's juvenile welfare scheme is "broadly directed,"[139] contending instead that it was actually narrowly targeted at parents who have abused or neglected their children to the point that the state must lend assistance.[140] Justice Marshall proffered that these parents are a " 'selective group inherently suspect of criminal activities.' "[141]

Justice Marshall concluded that the majority rode roughshod over Bouknight's privilege against self-incrimination, because she was neither a traditional "custodian" nor a state agent.[142] More important, the regulatory scheme was too closely intertwined with criminal statutes prohibiting child abuse to define it as a civil regulatory scheme.[143] Though Justice Marshall was encouraged that the court admitted that Bouknight's testimony might be inadmissable,[144] he emphasized, "I am not content to deny her the constitutional protection required by the Fifth Amendment *now* in the hope that she will not be convicted *later* on the basis of her own testimony."[145]

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135 *Id.* (Marshall, J., dissenting) (emphasis in original).

136 *Id.* at 913 (Marshall, J., dissenting). To sustain the privilege under Justice Marshall's analysis, "it need only be evident from the implications of the question, in the setting in which it was asked, that a responsive answer to the question . . . might be dangerous because injurious disclosure could result." *Id.* (Marshall, J., dissenting) (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)).

137 *Id.* (Marshall, J., dissenting).

138 *Id.* (Marshall, J., dissenting).

139 *Id.* at 907.

140 *Id.* at 913 (Marshall, J., dissenting).

141 *Id.* (Marshall, J., dissenting) (quoting Albertson v. Subversive Activities Control Board, 382 U.S. 70, 79 (1965)).

142 *Id.* at 914 (Marshall, J., dissenting).

143 *Id.* (Marshall, J., dissenting).

144 *Id.* (Marshall, J., dissenting).

145 *Id.* (Marshall, J., dissenting) (emphasis in original).

V. ANALYSIS

A. INTRODUCTION: HAS JUSTICE PREVAILED?

This case exemplifies Justice William O'Douglas' concern that "[a]s an original matter it might be debatable whether the provision of the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself' serves the ends of justice."[146] The Court correctly decided *Bouknight*, because it did not allow Bouknight to manipulate the privilege against self-incrimination provided in the fifth amendment. A decision in Bouknight's favor would have corrupted the purpose of the amendment, since the privilege was intended to be a "shield against inquisitorial and unfair government practice, [not a] sword to carve a path through the laws of the land."[147]

First, the Court's reasoning properly focused on the testimonial aspects of producing Maurice and the noncriminal nature of the regulatory scheme of the juvenile welfare system. The Court arrived at this logical conclusion by analyzing and applying the two requirements needed for fifth amendment protection. Following the precedent that "[t]he Fifth Amendment protection 'applies only when the accused is compelled to make a *testimonial* communication that is incriminating,' "[148] the Court concluded that Bouknight could not claim the privilege based upon anything that examination of Maurice might reveal.[149]

Second, the Court discussed at length the fact that Bouknight may not invoke the privilege to resist the production order, because she had assumed custodial duties related to production, and be-

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146 L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT vii (1959). It should be noted that a survey of existing case law reveals no clear guidance to determine how a particular statute will be categorized—*i.e.*, as part of a generally applicable civil regulatory scheme, or as part of a regulatory scheme established to enforce criminal laws. The Court has failed to delineate the relevant factors for analyzing regulatory obligations that are potentially self-incriminating, thereby creating the risk that "the scope of the Fifth Amendment protection will now depend on what a majority of nine justices chooses to place on this explicit constitutional guarantee as opposed to the government interest in convincing a [person] by compelling self-incriminating testimony." California v. Byers, 402 U.S. 424, 463 (1971) (Black, J., dissenting).

147 United States v. Flores, 753 F.2d 1499 (9th Cir. 1985) (en banc). In *Flores*, the court rejected a fifth amendment challenge to a Federal Gun Control Act requirement that a person shipping firearms must give notice to the carrier. Since the legislation was enacted for the purpose of protecting citizens, and not for prosecutorial ends, the defendant's claim was not within the scope of the privilege. *Id.*

148 *Bouknight*, 110 S. Ct. at 904 (quoting Fisher v. United States, 425 U.S. 391, 408 (1976)).

149 *Id.* at 905.

cause production was part of a noncriminal regulatory regime.[150] The Court correctly relied upon previous case law, which recognized that the fifth amendment privilege cannot be used to resist compliance with a regulation that is construed to "effect the State's public purpose unrelated to the enforcement of its criminal laws."[151] In concluding that the purpose of the court order to produce Maurice was part of a noncriminal regulatory scheme, Bouknight was precluded from invoking the privilege.

However, in order to create a stronger opinion, the Court could have more clearly articulated three points. First, the Court should have concluded that the testimonial aspects of Bouknight's production of Maurice were too slight to be relevant. Second, the Court might have focused more stringently on the production of Maurice to show the noncriminal goal of the regulatory scheme. Finally, a more persuasive opinion would have explained in greater detail the balancing process relied on by the majority to reach its decision. Weighing the interests of Bouknight against the interests of Maurice is inherent in this case; the Court should have focused on this balancing process to emphasize the limited scope of Bouknight's fifth amendment rights and the importance of the rights of Maurice.

B. THE ISSUE OF TESTIMONIAL PRODUCTION

The fifth amendment privilege against self-incrimination applies only if the accused is compelled to make a testimonial communication that may be incriminating.[152] The Court grappled with deciding whether Bouknight's compliance with the court order would testify to the existence, possession, or authenticity of the thing produced.[153] Unfortunately, the Court did not clearly answer this question; instead, it vacillated on the possibility that the production may be "sufficiently testimonial for purposes of the privilege."[154] Ultimately, the Court sidestepped the issue entirely by asserting that the distinction was irrelevant, because Bouknight had assumed custodial duties in a noncriminal regulatory regime.[155] The Court failed to make a definitive statement on the issue of testimonial communication; this failure could have been avoided by fo-

150 *Id.*

151 *Id.*

152 *Id.* at 904.

153 *Id.* at 905. *See* United States v. Doe, 487 U.S. 201, 209 (1988).

154 *Id.* (quoting Fisher v. United States, 425 U.S. 391, 411 (1976)).

155 *Id.*

cusing on Supreme Court precedent.[156]

First, the privilege against self-incrimination does not shield individuals from compulsory disclosure of incriminating information; it merely shields individuals when the state compels testimony. Here, the state was not requiring Bouknight to "utter a sound."[157] The Court literally interpreted the privilege to protect the accused only from being compelled to testify against herself.[158] The majority ruled that when the government demands that an item be produced, "the only thing compelled is the act of producing the [item]."[159] Following this reasoning, Bouknight could have purged her contempt via several silent methods without compromising her privilege. An anonymous phone call to police, a confidential instruction to her attorney, or a call to the child's caretaker could have led to Maurice's discovery without an incriminating statement or act by his mother.[160] None of these methods would have constituted a testimonial statement by Bouknight concerning Maurice. By producing Maurice in this manner, Bouknight would have complied with the court order without admitting guilt.

Second, Maurice was real evidence, not testimonial or communicative evidence. Real or physical items which do not convey the thoughts of an individual are not protected under the fifth amendment.[161] Production of Maurice would not have revealed any information concerning Bouknight that the Court did not already know; the only information that production would have revealed was that Maurice was alive.[162]

These two arguments alone could have supported a stronger assertion that production of Maurice did not involve any testimonial implications. In addition, comparing the facts of the instant case to the facts of prior precedents, the Court's decision to deny

156 *See, e.g.*, *Doe*, 487 U.S. at 201; *Fisher*, 425 U.S. at 391; Schmerber v. California, 384 U.S. 757 (1966).

157 *In re* Maurice M., 314 Md. 391, 404, 550 A. 2d 1136, 1142 (1988).

158 *Bouknight*, 110 S. Ct. at 905.

159 *Id.* (quoting *Fisher*, 425 U.S. at 410).

160 Brief on the Merits of Petitioner Maurice M. at 14, Baltimore City Dep't of Social Services v. Bouknight, 110 S. Ct. 900 (1990) (Nos. 88-1182, 88-6651).

161 Schmerber v. California, 384 U.S. 757, 764 (1966).

162 Some feared that Bouknight's rights would be trammeled if the production of Maurice revealed severe abuse or his death, and that based on these revelations Bouknight would be criminally prosecuted for these crime. This fear, however, is not within the scope of the fifth amendment protection, as the privilege does not protect an individual from any incrimination that may result from the contents or nature of the thing demanded. Therefore, if Maurice had been severely abused or killed, a cursory examination of the child would reveal this fact, and the privilege does not extend to facts that can be ascertained without Bouknight's intervention.

Bouknight her fifth amendment privilege could have been strengthened by showing that the purpose and focus of production was not Bouknight, but Maurice.

The Court relied on decisions where a "suspect" was compelled to furnish inanimate objects as evidence against his or her case. For example, in *Schmerber v. California*, the Court demanded that the accused furnish a blood sample after an automobile accident to determine whether the accused was intoxicated.[163] In *Doe v. United States*, the Court compelled the suspect to execute a consent form authorizing the release of bank records necessary to establish his fraud.[164] In these two cases, the Court demanded the production of an item that necessarily would be used against the individual. In fact, the reason for compulsion was to aid in establishing proof for the case against the suspect.

The Court's reliance on these two cases was not completely sound, because Bouknight was not a criminal suspect in the same sense as a drunken driver or a tax evader. The Court did not want her to produce Maurice to aid them in establishing testimony for a criminal case against her. Instead, the Court's only goal was to guarantee Maurice's safety.

The Court correctly focused on the noncriminal aspects of the court order but failed to emphasize the fundamental differences between the compelled productions in *Schmerber* and *Doe* and the compelled production of Maurice. The production of Maurice was an end in itself, not a contrived step to further prosecution. The Court already knew that Bouknight exercised control over Maurice due to the custody order, testimony of relatives and her own admissions;[165] thus, the sole reason for this production order was to guarantee the safety of Maurice. Accordingly, the majority failed to fully explore the differences between compelling production of Maurice and compelling production of "incriminating documents."

The Court did not comment on the possibility of further prosecution, except to say that it was not the Court's responsibility "to define the precise limitations that may exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings."[166] The opinion hinted at the

163 384 U.S. 757 (1966).

164 487 U.S. 201 (1988). In *Doe*, a court order compelled the defendant to execute consent forms authorizing foreign banks to disclose records of his accounts. The Court ruled that the privilege was not implicated, because the defendant was not required to disclose any knowledge he may have had regarding the documents. *Id.*

165 Baltimore City Dep't of Social Services v. Bouknight, 110 S. Ct. 900, 905 (1990).

166 *Id.* at 908.

possibility that Bouknight may be protected because the "same custodial role that limited the ability to resist the production order may give rise to corresponding limitations upon the direct and indirect use of that testimony."[167]

C. THE INTERESTS OF MAURICE VERSUS THE INTERESTS OF BOUKNIGHT

The Court should have directly addressed the tension between the possibility of self-incrimination and the safety of the child. First, the Court recognized that at its best, Bouknight's claim was at the outer fringe of the constitutional guarantee. Second, the Court declared the government's purpose to be plainly nonprosecutorial.[168] After accepting these two facts, the Court should have focused on the state's strong interest in protecting an abused child. Instead, the Court exhaustively dissected the meaning of a "noncriminal regulatory regime." While the Court may have properly grounded its decision in the language of prior cases, it should have expanded the previously established parameters to create a stronger opinion. A more complete articulation of the balancing process employed by the Court in deciding between the state's regulatory interest and Bouknight's claim to constitutional protection would have produced such an opinion.

For example, the majority should have applied the balancing approach articulated in *California v. Byers*[169] to the facts of this case. In *Byers*, the Court resolved the tension between the state's need for information and the individual's right against self-incrimination by balancing these two interests. The *Byers* Court, after determining that the request for production occurred pursuant to a generally applicable civil regulatory scheme, balanced the degree of incrimination produced through compliance with the statute against the state's regulatory interests. The Court found that an insubstantial amount of incrimination existed[170] but that important state interests remained. The *Byers* Court therefore concluded that compliance with the "hit and run" statute did not violate the fifth amendment.[171]

By subjecting the facts of *Bouknight* to the *Byers* balancing ap-

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167 *Id.*

168 *Bouknight*, 110 S. Ct. at 907.

169 *See supra* notes 64-66 for further discussion of the *Byers* decision.

170 The Court concluded first that producing one's name and address was a neutral act, California v. Byers, 402 U.S. 424, 432 (1971), and second, that stopping one's car involved only a minor degree of incrimination. *Id.* at 433.

171 *Id.*

proach, the tenuous nature of Bouknight's claim is glaringly apparent. The public purpose of the statute in *Byers* was to facilitate the assessment of civil liabilities in traffic accidents. In *Bouknight*, the purpose of the production order was to protect the life of an abused child.

Additionally, the production order was not directed at a group "inherently suspect of criminal activities."[172] Instead, it implemented the statutory requirement that a parent, guardian or custodian must, on pain of contempt, bring a child before the court when requested.[173] The vast majority of cases in which a state requires production of a child do not involve suspicion of criminal activity; in fact, "although the state may suspect that the child has been neglected or abused, in only a small minority of the cases did it suspect that such neglect or abuse had been so severe as to trigger criminal liability, [studies show] less than ten percent of all child abuse cases go forward to prosecution."[174]

The dissent's concern that Bouknight may be subject to criminal liability is immaterial. Just as the reporting requirement in *Byers* will be imposed on some persons who may later face criminal liability, court orders requiring production of children will also be imposed on some parents who subsequently may be charged with child abuse. But, the "risk of prosecution" is not the issue where mandatory disclosures are requested to serve an important societal interest. The question is whether the "hazards of self-incrimination" were substantial.[175] In this case, the facts indicate that the hazards were not sufficiently substantial.

In accord with this standard, the majority could have stressed that although it is possible that the state will act upon physical evidence disclosed by the compelled production of Maurice and may even prosecute Bouknight for child abuse, "it cannot rationally be suggested that the motive . . . in seeking a court order for the production of Maurice was to gain evidence in a criminal prosecution."[176] The only purpose was to protect an abused child. By focusing on this balancing approach and comparing the facts of *By-*

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172 *Byers*, 402 U.S. at 430.

173 *See* MD. CTS. & JUD. PROC. § 3-814(c) (1984).

174 Brief of the United States Conference of Mayors *et al.* at 13, Baltimore City Dep't of Social Services v. Bouknight, 110 S. Ct. 900 (1990) (Nos. 88-1182 & 88-6651) (quoting Whitcomb, Shapiro & Stellwager, *When the Victim is a Child: Issues for Judges and Prosecutors* i (Nat'l Inst. of Just. 1985)).

175 *Byers*, 402 U.S. at 429.

176 *In re* Maurice M., 314 Md. 391, 419, 550 A. 2d 1136, 1149 (1988) (McAuliffe, J., dissenting).

ers to *Bouknight*, the Court could have presented a much more coherent, concise, and forceful opinion.

The Court should have looked to the framers' intent for the fifth amendment, which was to weigh and compare the state's and the individual's interests.[177] The framers' intent gives content to the language of the fifth amendment and determines the consequences of its application.[178] When the Court faces this issue again, it should carefully balance the competing interests of the parties involved to safeguard the fundamental values inherent in the privilege against self-incrimination.

D. CHILD ABUSE IN THE UNITED STATES

The balancing of interests approach logically indicates the importance of the rights of Maurice. This analysis is important because it is difficult to dissect reason from emotion when discussing this case, since the plight of child abuse has reached epidemic proportions in the United States.[179] The Court did analyze the reach of the fifth amendment logically and in accord with precedent. But the majority could have used this case as an opportunity to stress the importance of protecting children from child abuse. The Court has long recognized the State's paramount "parens patriae" interest in the welfare of children. In *Prince v. Massachusetts*,[180] the Court stated, "[i]t is the interest of youth itself, and of the whole commu-

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177 M. BERGER, *supra* note 39, at 225 (1980).

178 *Id.*

179 Reports of child abuse and neglect have soared, reaching an estimated 1.5 million reports nationwide against families in 1986, an increase of 66% from 1980. Among children less than one year old, homicide (often representing lethal cases of child abuse) is the leading cause of injury related deaths. In that same year (1986), 20 states, representing 50% of the nation's child population, reported that 556 children died as the result of child abuse or neglect. In 76.4% of the deaths, the perpetrator was the parent, step-parent, or foster-parent. Though these figures are daunting, they are undoubtedly an underestimate of the actual number of abuse and fatalities since they are only the cases which came to the public attention through an official report of child abuse or neglect. Studies show that only one-third of actual child abuse known to officials are officially reported, and the number of unreported abuse cases are even higher. *See* AMERICAN HUMANE ASSN., HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING—1986 (1988); R. GELLES & M. STRAUSS, INTIMATE VIOLENCE: THE DEFINITIVE STUDY OF CASES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY (1988); UNITED STATES DEP'T OF HEALTH & HUMAN SERVICES, STUDY OF THE NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988 (1988); Waller, Baker & Szocka, *Childhood Injury Deaths: National Analysis and Geographic Variations*, 79 AMER. J. PUB. HEALTH 310, 314 (1989).

180 321 U.S. 158 (1944). In *Prince*, the child's custodian was convicted under a provision of the state's child labor laws which prohibited a custodian from allowing children to sell newspapers on the street. The Court concluded that the state may limit parental freedom and authority in things affecting the child's welfare. *Id.* at 165.

nity, that children be both safeguarded from abuse and given opportunities for growth into free and independent well-developed men, [women] and citizens."[181] A similar comment certainly would have been permissible here. In *Prince*, the child was in no apparent danger of physical harm, whereas Maurice is known to have suffered extreme physical abuse and is most likely in great danger of further harm.

Recently, this Court issued a strong social commentary when the safety of a child was at stake.[182] In *Jehovah's Witnesses v. King County Hospital*, the Court reaffirmed the right of the state to intervene to protect children when their health or safety is threatened. There is no dispute that protection of children is a compelling state interest. Not unexpectedly, many courts have asserted that the child's interest outweigh the interests of an abusive parent.[183]

In *People v. Salinas*, the California Appellate Court balanced the interests of the child's well-being in an emergency situation where the child's life was at stake against the need to protect the alleged abuser's right against self-incrimination. The *Salinas* court held that "there [was] no question that the former interest outweighs the latter, any other policy would reflect an indifference to human life."[184] Since Maurice is still missing, it is impossible to know for certain if his life is at stake, but it is certain that the situation was one of emergency proportions and one of critical government interest.

Since child abuse in the United States has reached epidemic proportions,[185] the court should have focused more closely on Maurice's rights. The state's interest in protecting the health and safety of the millions of children like Maurice is unquestionable. These children are at the mercy of both their abusive parents and the court system; therefore, the Court should have made a strong statement to help protect children from being victimized by parents unjustly hiding behind the self-incrimination privilege offered by the fifth amendment.

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181 *Id.*

182 Jehovah's Witnesses v. King County Hosp., 390 U.S. 598 (1968). The Court declared that Jehovah's Witness parents did not have the power to object to the administration of blood transfusions to their children who needed such treatment for their physical safety. *Id.* at 598.

183 *See, e.g.*, People v. Salinas, 131 Cal. App. 3d 925, 182 Cal. Rptr. 683 (1982). In *Salinas*, the Court ruled that the mother was not able to sustain a fifth amendment privilege claim, because the allegedly incriminating information she held was needed to provide necessary care for her child. *Id.* at 943, 182 Cal. Rptr. at 693.

184 *Id.* at 942, 182 Cal. Rptr. at 692.

185 *See supra* note 179 for a discussion of child abuse in the United States.

V. CONCLUSION

This case is particularly disturbing, because even though the Court has declared that Bouknight must obey the production order, Maurice is still missing. Rather than produce him, she has chosen to remain in contempt of court and complete her jail sentence.[186] The Court reached the correct decision; the majority's reasoning properly focused on the nontestimonial aspects of producing Maurice and the noncriminal nature of the regulatory scheme of the juvenile welfare system. By literally interpreting the requirement that the fifth amendment protection only applied to incriminating testimonial communication, the Court precluded Bouknight from hiding behind the privilege.

However, the Court could have more strongly asserted that in no way was production of Maurice a testimonial communication. It also could have more clearly articulated the balancing test to show that the state's interest in protecting Maurice outweighed any attenuated fifth amendment claim. A stronger statement most likely would not have changed the present status of both Maurice and Jacqueline Bouknight. But, the Court could have used this opportunity to articulate clearly the reasoning behind the balancing inherent in their decision. By making a more powerful statement on the importance of the rights of abused children in the United States and the Court's hard-line adherence to a limited fifth amendment privilege, perhaps the Court could have prevented future cases like this, where there are no victors, only victims.

ELIZABETH J. RUFFING

[186] Interview with Andrew Baida, Counsel for the BCDSS (Sept. 12, 1990).