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Dead Infants and Taking the Fifth

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Introduction:

I am honored that Professor Michael Dorf and the conference organizers invited me to participate in this symposium celebrating the life and scholarship of Professor Sherry Colb. Professor Colb was a brilliant legal scholar and admired teacher. For me, Sherry was a friend. As described below, Sherry and I first bonded over the fact that we both taught Constitutional Criminal Procedure. But as the years passed, Sherry and I grew closer because of our mutual love of animals. Most importantly, Sherry reinforced my love of animals, showed me ways that I could help animals, and heightened my awareness of how most humans horribly treat animals. I will be forever grateful that Sherry shared with me her love of all animals.

I first met Professor Colb almost three decades ago at an American Association of Law Schools conference either in Orlando or Miami, Florida. I cannot recall the year or city, but I know I was in Florida because of the wonderfully warm and sunny January weather. I was part of a panel discussion on Constitutional Criminal Procedure that also included Professors Yale Kamisar, Joe

Grano and Bill Stuntz. The panel should have been billed "Ali v. Frazier IV"[1] because most of the discussion involved Yale Kamisar and Joe Grano vehemently arguing with each other about the Supreme Court's *Miranda* and Fourth Amendments cases. The Kamisar v. Grano debate was highly informative, loud, and entertaining. Bill Stuntz and I sat in our chairs, remaining mostly quiet, and watched two giants in the field of Constitutional Criminal Procedure slug it out in a room full of law professors that flowed out of the door.

After the panel ended and people were schmoozing with Professors Kamisar and Grano, Professor Colb introduced herself to me and we started talking about the panel discussion. She asked questions and offered insights about the cases and topics discussed by the panel that had not occurred to me. I was extremely impressed. Professor Colb's analysis and observations were astute and penetrating. Equally impressive, unlike some law professors, Professor Colb offered her comments in an unpretentious manner. Ever since that first encounter in Florida, Professor Colb has encouraged me, through her scholarship and during our many phone conversations, to address the Supreme Court's constitutional criminal procedure doctrine bluntly and with a focus that recognizes the realities and flaws

[1] Muhammad Ali and Joe Frazier fought three iconic and legendary heavyweight boxing matches in the 1970s: The Fight of the Century in 1971; Super Fight II in 1974 and the Thrilla in Mania in 1975.

of how constitutional rights are interpreted and enforced (and more often unenforced) in America.

This essay offers tribute to Professor Colb's teachings and insights expressed in her writings on the Court's *Miranda* and Self-Incrimination Clause rulings. Since the start of the twenty-first century, Professor Colb wrote many blogs on the Court's *Miranda* doctrine. *Miranda v. Arizona*[2] famously held that persons under arrest must be warned of their right to silence and to have counsel's advice before being subject to interrogation. Generally speaking, Professor Colb was critical of the Court's results and reasoning—for good reason.

The modern Court's *Miranda* doctrine is disgraceful. A majority purports to adhere to *Miranda*, but the results announced by the Court show otherwise. Professor Colb wrote several blogs explaining why the Rehnquist and Roberts Court's *Miranda* rulings were inconsistent with the original *Miranda*.[3] In this

[2] 384 U.S. 436 (1966).

[3] I found the following blogs particularly thought provoking. Sherry F. Colb, Vega v. Tekoh *and the Supreme Court's Conceptual Confusion*, JUSTIA: VERDICT (May 4, 2022) https://verdict.justia.com/2022/05/04/vega-v-tekoh-and-the-supreme-courts-conceptual-confusion (noting "We call *Miranda* 'constitutional' and therefore not subject to repeal by Congress, but the violation of it has fewer consequences than unadorned violations of the Fifth Amendment."); Sherry F. Colb, *The Supreme Court Rules on How Clear* Miranda *Warnings Must Be*, FINDLAW (Mar. 15, 2010), https://supreme.findlaw.com/legal-commentary/the-supreme-court-rules-on-how-clear-miranda-warnings-must-be.html (stating that courts are ambivalent about interrogation, and thus, about the *Miranda* rights as well, and society is conflicted about interrogation too; "[T]he consequence of this tension between competing goals could be a sort of '*Miranda*-washing,' in which we give suspects just enough information to satisfy ourselves of commitment to civil liberties but not quite enough for the suspect to realize the extent of what she is entitled to do."); Sherry F. Colb, *Why Interrogation in Jail May Not Count as "Custodial": The Supreme Court Makes New Law in* Howes v. Fields *Part Two in a Two-Part Series of Columns*, JUSTIA: VERDICT (Mar. 28, 2012), https://verdict.justia.com/2012/03/28/why-interrogation-in-jail-may-not-count-as-custodial-the-supreme-court-makes-new-law-in-howes-v-fields-2 (criticizing the Court's view of prisoners' rights under *Miranda*: "Prisoners in the presence of interrogating officers could be described as comparable to free people voluntarily answering an officer's questions only by judges exhibiting either a stunning level of ignorance, or a major failure or empathy.").

tribute to Professor Colb, however, I will not be discussing *Miranda* and its progeny. Rather, I will begin my discussion by considering the final paragraph of a 2013 blog by Professor Colb. At the end of her essay, Professor Colb seemed to offer a general theory on the purpose of the Self-Incrimination Clause of the Fifth Amendment.[4] She stated:

> If there were a way to avoid brutality and false confessions, I think the rationale for giving people the right to refuse to provide truthful information about their own actions in open court would diminish substantially. Though defenses of the Fifth Amendment right often invoke broad notions of an adversarial versus inquisitorial system of justice, we do in fact compel criminal suspects and defendants to participate in their own prosecution in assorted ways (for example, by appearing in lineups and submitting to searches and seizures, including those required to get blood samples and fingerprints). What's left to the right, I think, has more to do with protecting against brutalization and false convictions than it does about anything unique about being required to utter self-incriminating facts. I understand that this is not everyone's view . . . but it seems most in line with the shape of our

In a blog on *Salinas v. Texas,* 570 U.S. 178 (2013), which held that a person's silence when confronted with a potentially incriminating question during a voluntary interview with detectives could be used as substantive evidence of guilt by a prosecutor during closing argument to the jury without violating the Fifth Amendment, Professor Colb thought that silence in this context was "incriminating," though not itself "dispositive of guilt." Sherry F. Colb, Salinas v. Texas *in the U.S. Supreme Court: Does the Fifth Amendment Protect the Right to Remain Silent?* JUSTIA: VERDICT (Feb. 13, 2013), https://verdict.justia.com/2013/02/06/salinas-v-texas-in-the-u-s-supreme-court-does-the-fifth-amendment-protect-the-right-to-remain-silent. And she also opined: "Why would we want to penalize the police, by suppressing this incriminating evidence, when they did nothing wrong?" *Id.* Even assuming that the police in *Salinas* in "did nothing wrong," Salinas' constitutional complaint was not directed against what the police did, but rather against the prosecutor's use of his silence as evidence of guilt. *Id.* In my view, *Salinas* was a terrible ruling and "demonstrates that the Fifth Amendment does not protect all persons during their interactions or confrontations with police and does not always protect silence." Tracey Maclin, *The Right to Silence v. The Fifth Amendment*, 2016 U. CHI. LEGAL. F. 255, 262 (2016).

Finally, Professor Colb's call to overrule *Massiah v. United States*, 377 U.S. 201 (1964), in her 2001 blog, *Why the Supreme Court Should Overrule the* Massiah *Doctrine and Permit* Miranda *Alone to Govern Interrogations*, FINDLAW (Mar. 9, 2001), https://supreme.findlaw.com/legal-commentary/why-the-supreme-court-should-overrule-the.html, has received a lot of attention, and deservedly so. I disagree with Professor Colb's reasons for overruling *Massiah*, but this is not the place to air that debate.

[4] The clause states: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. In this essay, I will often refer to the Self-Incrimination Clause as the "privilege" to describe the right guaranteed by the Fifth Amendment.

existing Fifth Amendment doctrine and other criminal procedure doctrine. I think it also makes sense.[5]

Professor Colb's view of the limited purpose of the Fifth is not unique,[6] and her description of the modern Court's narrow interpretation of the amendment, permitting compelled lineups and forcible extraction of blood, to name only two examples, is accurate. Although there have been times when prominent and respected critics argued the Court was obsessed the Fifth Amendment,[7] no one makes that charge today. Over thirty years ago, Professor Schulhofer wrote: "It is

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[5] Sherry F. Colb, *The Right to Remain Silent and the Act/Omission Distinction*, DORF ON LAW (Feb. 13, 2013), https://www.dorfonlaw.org/2013/02/the-right-to-remain-silent-and.html?m=1.

[6] *See, e.g.*, Ullmann v. United States, 350 U.S. 422, 426–29 (1956) (explaining the privilege is intended to prevent "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality"); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2651–52 (1996) (as understood by the Framers, the "Self-Incrimination Clause neither mandated an accusatorial system nor afforded defendants a right to remain silent. It focused upon improper methods of gaining information from criminal suspects."); Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 898 (1995) (describing modern Fifth Amendment doctrine as a "quagmire," and offering a solution that would allow the government to compel to testimony in a variety of proceedings before the start of, or outside, a formal criminal trial); David Dolinko, *Is There A Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1147–48 (1986) (arguing that "the role of the privilege in American law can be explained by specific historical development but cannot be justified either functionally or conceptually" and observing that a court that shared this view "would likely interpret it narrowly rather than giving it the broad construction the Supreme Court has traditionally endorsed," which is how the modern Court has read the amendment—narrowly); Mickey Kaus, *The Fifth Is Now Obsolete*, N.Y. TIMES (Dec. 30, 1986), https://www.nytimes.com/1986/12/30/opinion/the-fifth-is-now-obsolete.html ("[T]he privilege] once served important purposes. But subsequent advances in jurisprudence have rendered it obsolete. All of its original purposes can be, and already are, achieved by other, far less destructive constitutional rules.").

[7] *See, e.g.*, Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 681 (1968) ("Obsession with the fifth amendment is not a novelty introduced by the Warren Court, although that Court has pressed the amendment far beyond anything that went before.").

In fact, the Court – even the Warren Court, was not obsessed with the privilege nor "steadfast" in its commitment to broadly interpret the privilege, despite Judge Friendly's charge. Cases like *Shapiro v. United States*, 335 U.S. 1 (1948) (announcing the required records exception to the privilege); the collective entity doctrine (holding representatives of collective entities have are not protected by the privilege when subpoenaed to disclose entity documents that are personally incriminating); and *Byers v. California*, 402 U.S. 424 (1971) (upholding law that required motorists involved in accidents causing property damage to stop and identify themselves), show the opposite. "On the contrary, th[e]se cases made it clear that that 'commitment' was, in some situations, to be qualified in order to promote the ends of regulatory programs." Bernard D. Meltzer, *Privileges Against Self-Incrimination and the Hit-and-Run Opinions*, 1971 Sup. Ct. Rev. 1, 26.

hard to find anyone these days who is willing to justify and defend the privilege against self-incrimination."[8] Things are no different today. As someone who supports a broad interpretation of the Fifth, I offer a counterview of Professor Colb's conception of the privilege by analyzing a case that supports her thesis. I hope to demonstrate that the goal of the Fifth Amendment is more than deterring official brutality and false confessions. I offer a straightforward conception of the privilege: "The object of the [Fifth] Amendment 'was to insure that a person should not be compelled when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.'"[9] My view of the amendment is harmonious with its text and history. Relying on this understanding of the privilege, this tribute contends that an important segment of the modern Court's Fifth Amendment doctrine is inconsistent with a basic purpose of the privilege, namely, conferring an *individual* right that can be invoked whenever official compulsion threatens a substantial risk of self-incrimination.

I. *Baltimore City Department of Social Services v. Bouknight*

If common sense and decency were the controlling criteria for judging Fifth Amendment cases, the result in *Baltimore City Department of Social Services v.*

[8] Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 311 (1991).
[9] Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (quoting Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)).

Bouknight[10] makes perfect sense. The facts are hideous. Jacqueline Bouknight's infant son, Maurice M., was horribly abused by his mother.[11] An initial court order removed Maurice from Bouknight's custody and was then "inexplicably modified to return Maurice to Bouknight's custody temporarily."[12] Later, a juvenile court declared Maurice to be a "'child in need of assistance,'" which placed Maurice under the court's jurisdiction and under the continuing care of the Department of Social Services.[13] Under the order, the Department agreed that Bouknight could retain custody of Maurice subject to extensive conditions, including that Bouknight not harm Maurice and cooperate with Department personnel.[14] Bouknight's counsel signed the order and Bouknight "in a separate form set forth her agreement to each term."[15]

After Bouknight violated the order by refusing to cooperate with the Department, the juvenile court ordered Maurice removed from Bouknight's custody and placed in foster care.[16] Bouknight, however, refused to produce Maurice or reveal his location.[17] The Department notified police officials and the

[10] 493 U.S. 549 (1990).
[11] *Id.* at 551–52. The Court's opinion summarizes the terrible abuses suffered by Maurice: "When he was three months old, he was hospitalized with a fractured left femur, and examination revealed several partially healed bone fractures and other indications of severe abuse. In the hospital, [Bouknight] was observed shaking Maurice, dropping him in his crib despite his spica cast, and otherwise handling him in a manner inconsistent with his recovery and continued health." *Id.*
[12] *Id.* at 552.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 553.
[17] *Id.*

case was referred to homicide detectives.[18] After several more hearings and orders demanding that Bouknight produce Maurice, the juvenile court held Bouknight in civil contempt and ordered her jailed until she produced the child or revealed his location.[19] The juvenile court rejected Bouknight's claim the contempt order violated the Fifth Amendment, noting that production of Maurice would purge the contempt and that the contempt was based not on Bouknight's failure to testify, but her refusal to produce Maurice.[20] Maryland's highest court, the Court of Appeals, found the contempt order violated the Fifth Amendment because compelled production of Maurice would indicate her continuing control of the child under circumstances where Bouknight reasonably believed she faced criminal prosecution.[21] The Supreme Court, in an opinion by Justice O'Connor, joined by six other Justices, reversed, and ruled that the contempt order did not violate the Fifth.[22]

The result in *Bouknight* was viewed positively by many legal commentators[23] and the press. And why not? "It is not easy to champion the

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[18] *Id.*
[19] *Id.*
[20] *Id.* at 553–54.
[21] *See* In re Maurice M., 314 Md. 391, 404–05 (1988), *rev'd sub nom*. Baltimore City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549 (1990).
[22] 493 U.S. at 562. Chief Justice Rehnquist and Justices White, Blackmun, Stevens, Scalia and Kennedy joined Justice O'Connor's opinion. Justice Marshall filed a dissent, joined by Justice Brennan.
[23] *See The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 183 (1990) [hereinafter *The Supreme Court, 1989 Term*] (stating that the Court reached the correct result but criticizing its "expansive definition of the 'civil regulatory scheme' exception potentially undermines the foundation of fifth amendment protection for parties in civil proceedings"); *see also* Gregory J. English, *Child Abuse and the Fifth Amendment*, 13 HARV J.L. & PUB. POL'Y 1017, 1026 (1990) (describing the "immediate result [a]s praiseworthy, the effects of the positive decision

constitutional rights of a mother suspected of harming her child."[24] Putting aside for a moment the nuances and intricacies of Fifth Amendment law, what compassionate person would not want Jacqueline Bouknight to produce Maurice, assuming he was alive?[25] Requiring the production of Maurice when there was good reason to fear for his safety and life, to paraphrase Professor Colb, made good sense.[26] But Bouknight had a compelling Fifth Amendment claim, and she was entitled to assert her right notwithstanding her horrible behavior. As described below, a straightforward application of the privilege would have invalidated the

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will likely be minimal"); *see also* Elizabeth J. Ruffing, *Fifth Amendment—Preventing An Abusive Parent From Hiding Behind the Self-Incrimination Privilege*, 81 J. CRIM. L. & CRIMINOLOGY 926 (1991) (approving of the result while noting "the Court does not clearly express how attenuated Bouknight's fifth amendment claim is compared to previous precedent"); *cf.* Lynn Marie Rowe, Note, Constitutional Law—Baltimore City Department of Social Services v. Bouknight: *When Silence is Not Golden—A Parent's Fifth Amendment Right To Refuse A Juvenile Court's Order To Produce,* 25 WAKE FOREST L. REV. 885 (1990).

[24] Rowe, *supra* note 23, at 885; *see also* Amar & Lettow, *supra* note 6, at 872 ("The Court is understandably reluctant to apply the privilege in a heinous crime such as child abuse."); *cf.* LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 19 (1983) (explaining that the Fifth Amendment right is not viewed as a "respectable" freedom like the right to a free press, right to religion and right to assembly; "Few men have rushed to uphold the constitutional prohibition[] against . . . compelled self-incrimination when it was . . . a confession forced from a father accused of bludgeoning his daughter to death.").

[25] After spending seven-and-a-half years in jail, Bouknight was released, and her civil contempt was lifted by the same judge who had imposed it on April 28, 1988. *See* Paul W. Valentine, *Woman, Jailed for Contempt, Freed After 7 Years*, WASH. POST (Nov. 1, 1995), https://www.washingtonpost.com/archive/local/1995/11/01/woman-jailed-for-contempt-freed-after-7-years/907afe21-e797-4e35-baab-6c6975154a95/. Bouknight never revealed the location of Maurice. *Id.* At the release hearing, the "judge sternly ordered Bouknight not to attempt to contact Maurice," but he also acknowledged the belief of law enforcement officials that Maurice is dead. He stated: "We earnestly hope Maurice is alive. Our fear is that he is dead." *Id.* As Professor Alschuler observed, Bouknight's confinement does not promote the claim that our legal system is an accusatorial process: Bouknight "served more time for failing to produce evidence of the suspected but unproven killing than she would have served if she had been convicted of manslaughter. Alschuler, *supra* note 6 at 2636 n. 43.

[26] The facts in *Bouknight* undoubtedly reminded the Justices of the facts in *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), which was decided a year before *Bouknight*. Joshua DeShaney was repeatedly beaten and abused by his father, but county officials who were told of the abuse did not remove him from his father's custody. *Id.* at 191.The beatings eventually left Joshua with severe brain injuries and confined to an institution for life. *Id.* at 193. The Court ruled that the officials' failure to protect Joshua did not violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 203. During oral argument in *Bouknight*, Justice Blackmun asked counsel for Maryland: "This is another 'Poor Joshua' case, isn't it?" Transcript of Oral Argument at 5, Balt. City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549 (1990) (No. 88-1182).

contempt order. The *Bouknight* Court was able to avoid that result by utilizing two judge-made exceptions—the required records doctrine and the artificial entity doctrine—to the Fifth Amendment that have been subject to harsh criticism over the years. But even accepting the validity of these exceptions to the Fifth, applying these exceptions in *Bouknight* was a significant and unjustified expansion of these rules, which not only denied Jacqueline's constitutional right, but also eroded the substantive scope of the privilege for everyone.

II. *Traditional Application of the Fifth Amendment*:

The text of the Fifth Amendment states: "No person … shall be compelled in any criminal case to be a witness against himself."[27] Under the Court's precedents, a person must demonstrate three elements to trigger the privilege's protection: (1) official compulsion to produce, (2) testimonial evidence, (3) that is incriminating.[28] Jacqueline Bouknight satisfied these criteria because she was ordered by a court to produce Maurice, which would have proven her physical custody of Maurice, in circumstances that threatened her with criminal prosecution. Rather than directly addressing these criteria, Justice O'Connor takes her readers on short, but

[27] U.S. CONST. amend. V.
[28] *See, e.g.*, Fisher v. United States, 425 U.S. 391, 408 (1976); Schmerber v. California, 384 U.S. 757, 760–61 (1966); Doe v. United States, 487 U.S. 201, 207 (1988).

confusing roller-coaster ride through Fifth Amendment law intimating that Bouknight's constitutional claim is worthless—but maybe not.

A.) Production of a Child Is Not Testimonial:

Justice O'Connor started by suggesting that compelled production of Maurice would not satisfy the testimonial component of the privilege.[29] Acknowledging that the testimonial element is met when an act of production attests to the existence, possession, or authenticity of the items produced, O'Connor opined that "a person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded."[30] Thus, Bouknight could not assert the "privilege based upon anything that examination of Maurice might reveal."[31] Further, O'Connor explained Bouknight could not assert the privilege because compliance with the court order

[29] Balt. City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 555 (1990).

[30] *Id.* While space constraints preclude a full explanation, the reasoning and logic of *United States v. Hubbell*, 530 U.S. 27 (2000), casted doubt on this dictum from *Bouknight*. In response to a federal subpoena from Independent Counsel Kenneth Starr for a variety of documents, Webster Hubbell invoked the privilege. *Id.* at 31. He received a grant of immunity and then disclosed 13,120 pages of documents. *Id.* The Independent Counsel's review of those documents led to an indictment of Hubbell for tax-related crimes and mail and wire fraud charges. *Id.* The Court explained that the Independent Counsel needed Hubbell's act of production "to identify potential sources of information and to produce those sources." *Id.* at 41. In other words, it was "abundantly clear that the testimonial aspect of [Hubbell's] act of producing subpoenaed documents was the first step in a chain of evidence that led to [his] prosecution." *Id.* at 42.

Professor H. Richard Uviller believed that *Hubbell*

> comes close to saying outright that the contents of Hubbell's documents were protected by immunity and hence by the Fifth Amendment against the [Independent Counsel's] use to enlighten himself. In other words, the telltale contents of the freely recorded documents, such as inculpatory testimony, cannot be forcibly pried from the hands of its custodian. This reading of the [*Hubbell*] message, which is hopefully erroneous, implies a substantial doctrinal shift.

H. Richard Uviller, *Foreword:* Fisher *Goes on the Quintessential Fishing Expedition and* Hubbell *Is off the Hook*, 91 J. CRIM. L. & CRIMINOLOGY 331, 333 (2001).

[31] 493 U.S. at 555.

would show that the child produced is in fact Maurice.[32] This claim was precluded because state officials could easily identify whether the child Bouknight produced was Maurice.[33] Put differently, because officials could already prove that Bouknight had custody of Maurice and easily identify whether the person produced by Bouknight was Maurice, Bouknight's act of production was neither testimonial nor sufficiently incriminating to trigger the privilege.

In plain English, Bouknight had no Fifth Amendment protection because officials already knew what Maurice looked like and that she had custody of Maurice. Producing Maurice added nothing to the knowledge that officials already possessed; Bouknight's control over Maurice was a "foregone conclusion."[34] Thus, producing Maurice was not testimonial under the Fifth Amendment.

B.) Production of a Child Is Testimonial:

After seemingly rejecting the basis for Bouknight's constitutional claim, O'Connor reversed direction by noting that while officials could produce abundant evidence of Bouknight's continuing control over Maurice, the implicit communication of control "at the moment of production" "might" help officials prosecute Bouknight.[35] In other words, Bouknight's act of production was not only testimonial, but also incriminating.

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[32] *Id.*
[33] *Id.*
[34] *See* Fisher v. United States, 425 U.S. 391, 411 (1976).
[35] 493 U.S. at 555.

This back-and-forth on whether compelled production of Maurice triggered the Fifth was unnecessary considering Justice O'Connor's ultimate holding; it was *obiter dicta*. More importantly, this portion of Justice O'Connor's opinion was both "baffling"[36] and unsound constitutional analysis. First, from the perspective of state officials, the reasons given by O'Connor for concluding that compelled production of Maurice triggered the Fifth made no sense.

For example, O'Connor suggested that producing Maurice "might" be testimonial due to the inference of "implicit communication of control" at the "moment of production."[37] But that conclusion, the State argued, ignored the "foregone conclusion" exception to the Fifth Amendment, which eliminates Fifth Amendment protection when the act of production adds nothing to the knowledge of information officials already possess.[38] As explained above, long before Bouknight refused to comply with court orders, officials could identify Maurice and knew Bouknight had control of the child for a substantial period time.[39] Accordingly, the existence, possession and identification of Maurice were foregone conclusions.

Moreover, O'Connor's emphasis on the custody of Maurice "at the moment of production" as a basis for satisfying the testimonial element, "fails to explain

[36] English, *supra* note 23, at 1025.
[37] 493 U.S. at 555.
[38] Brief for Petitioner at 19, Balt. City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549 (1990) (No. 88-1182).
[39] 493 U.S. at 555.

why this moment of control is more significant than control at all times prior to production."[40] Finally, O'Connor noted that producing Maurice "might aid the State in prosecuting Bouknight."[41] But state officials could rightly retort that that possibility does not mean that production is testimonial. Compulsory production of "almost anything, be it blood samples or documents, can aid the state in its prosecution,"[42] but helping the state prove its case is not determinative of what is testimony for Fifth Amendment purposes.

On the other hand, one can persuasively argue the order demanding the production of Maurice easily satisfies the elements of the privilege. When assessing Bouknight's claim of privilege, one should recall the seminal case of *Hoffman v. United States*.[43] *Hoffman* explained that to uphold a claim of privilege, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[44] And *Hoffman* instructed that judges should accept Fifth Amendment assertions unless it is "'*perfectly clear* . . . that the witness is mistaken, and that the answer(s) *cannot possibly* have such tendency' to incriminate."[45]

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[40] English, *supra* note 23, at 1025.
[41] 493 U.S. at 555.
[42] English, *supra* note 23, at 1025.
[43] 341 U.S. 479 (1951).
[44] *Id.* at 486–87.
[45] *Id.* at 488 (quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881)).

With *Hoffman*'s instructions in mind, Bouknight proffered a strong Fifth Amendment claim. Obviously, the order to produce was state compulsion. Second, the State conceded that compliance with the order would be incriminating.[46] That was a wise concession because the Court's precedents establish that the privilege "protects against any disclosures that the witness reasonably believes may be used in a criminal prosecution or could lead to other evidence that might be so used."[47] Further, the incrimination element is met not only when compelled disclosures would themselves support a conviction, but also where such disclosures "furnish a link in the chain of evidence" needed to prosecute the person.[48] If compliance with the order meant that Bouknight produced a bruised and battered child or, worse, a dead infant, then Bouknight faced a "'real and appreciable'" threat of prosecution.[49]

Regarding the testimonial prong, producing Maurice would conclusively show Bouknight's physical possession and control over the child. The State's "foregone conclusion" argument is a chimera. During oral argument, Counsel for Maurice told the Justices that Maurice's "whereabouts have been unknown for the

[46] Brief for Petitioner, *supra* note 38, at 12 ("The State recognizes that she may have a reasonable fear of incrimination.") (footnote omitted); Transcript of Oral Argument, *supra* note 26, at 11 ("[T]he potential incrimination of producing the child when in fact that is only [part of] the test and that we do not dispute that it may have some incriminating effect.").
[47] Kastigar v. United States, 406 U.S. 441, 445 (1972).
[48] Hoffman v. United States, 341 U.S. 479, 486 (1951).
[49] *See* Marchetti v. United States, 390 U.S. 39, 48 (1968) (quoting Reg. v. Boyes, 1 Best & S. 311, 330).

past 18 months."[50] Obviously, if state officials, including homicide detectives, knew Maurice's location, they would have seized him. Bouknight's producing the child would conclusively establish her physical custody over Maurice, a fact that the state could only speculate about before actual production.[51] Justice O'Connor's statement that the privilege does not protect "anything that examination of Maurice might reveal" is a red herring.[52] Bouknight's act of producing Maurice was testimonial not because it would reveal Maurice's appearance (although the appearance of bruises and other evidence of physical harm would furnish a link in the chain of evidence needed for assault and child abuse charges); rather, the act of production would prove her actual and present physical control over him, which would be necessary if the State filed criminal charges of assault or child abuse.

But there is another more fundamental reason why compliance with the order to produce would result in testimony and violate Bouknight's Fifth Amendment right. It is long established, even under a broad view of the collective entity and required records exceptions, *oral* testimony cannot be coerced—unless

[50] Transcript of Oral Argument, *supra* note 26, at 13.
[51] The editors of the Harvard Law Review argued that the three factors that normally control whether document production is testimonial – existence, possession and authentication, were not controlling in *Bouknight*. *The Supreme Court, 1989 Term*, *supra* note 23, at 187. These "generally do not exist in the context of a parent who is withholding a production of her child" because "when a parent known to have custody of her child is directed to produce the child, the danger of self-incrimination through an implicit admission of existence, possession, or authenticity is *slight*." *Id.* (emphasis added). Because officials did not know the whereabouts of Maurice for eighteen months, Transcript of Oral Argument, *supra* note 25, at 13, the testimonial information revealed by compelled production of Maurice would have been significant. Because police officials were treating the case as a possible homicide, *id.* at 22, production of Maurice would have confirmed Bouknight's physical possession and control of a possible murder or assault victim, hardly a "slight" piece of evidence.
[52] Balt. City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 555 (1990).

immunity is provided.[53] Thus, Bouknight could not have been compelled, either by court order or grand jury subpoena, to answer orally whether she had physical custody of Maurice or to identify his location. If Bouknight would not have to answer such questions, "there is no reason why [s]he should be compelled to answer such questions implicitly by producing [Maurice]."[54] For Jacqueline Bouknight, producing Maurice was the equivalent of orally testifying that she had physical custody of and control of Maurice. "[T]estimony and production are indistinguishable" where knowledge of Maurice's existence and location "is the incriminating fact, since both require the witness to reveal the same knowledge from within h[er] own mind."[55]

In sum, Justice O'Connor was on firm constitutional ground when she assumed that the order demanding Bouknight produce Maurice triggered the privilege because it compelled incriminating testimony from Bouknight.[56] But why

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[53] *See* Curcio v. United States, 354 U.S. 118, 124 (1957) (noting that a custodian cannot be compelled, without a grant of immunity, "to condemn himself by his own oral testimony"); Wilson v. United States, 221 U.S. 361, 385 (1911) (noting that corporate officers "may decline to utter upon the witness stand a single self-incrimination word"); Shapiro v. United States, 335 U.S. 1, 27 (1948) ("Of course all *oral* testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege.") (footnote omitted). While the Court has repeatedly stated that oral testimony cannot be compelled from representatives of collective entities and persons subject to required records regulation, it has not explained why testimony can be compelled from these same individuals through compliance with a subpoena. "Admissions implicit in producing records do not lose their testimonial quality if the records belong to a corporation rather than to an individual." Nancy J. King, Note, *Fifth Amendment Privilege for Producing Corporate Documents*, 84 MICH. L. REV. 1544, 1556 (1986). The text of the privilege, which states that no person shall "be a witness against himself," U.S. CONST. amend. V., recognizes no distinction between oral and other types of testimony.

[54] Stephen A. Saltzburg, *Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. CHI. L. REV. 6, 41 n.179 (1986).

[55] H. Robert Fiebach, Note, *The Constitutional Rights of Associations to Assert the Privilege Against Self-Incrimination*, 112 U. PA. L. REV. 394, 406 (1964).

[56] Bouknight, 493 U.S. at 555.

only *assume* Bouknight proffered a meritorious constitutional claim? If a majority of the Court believed that Bouknight's Fifth Amendment challenge lacked merit, O'Connor should have said so directly. On the other hand, if Bouknight's argument was constitutionally sound, as I believe it was, casting doubt on her argument, as O'Connor's opinion does, promotes uncertainty in the lower courts and deters the recognition of similar claims in future cases. In the final analysis, the refusal to acknowledge the legitimacy of Bouknight's constitutional argument is motivated by the Court's hostility toward the Fifth Amendment generally and Bouknight's claim specifically.

III. *Rejecting a Valid Fifth Amendment*

"The Court is understandably reluctant to apply the privilege in a heinous crime such as child abuse."[57]

Child abuse is a heinous crime, but so are murder and rape. But the Court has not yet created a murder or rape exception to the privilege. Bouknight was held in civil contempt because she refused to comply with a court order to produce Maurice.[58] But as the above discussion demonstrates, that order violated the Fifth Amendment because it compelled incriminating testimony without providing immunity to Bouknight. That was enough to decide the case—in Bouknight's

[57] Amar & Lettow, *supra* note 6, at 872.
[58] 493 U.S. at 553.

favor. But considering the horrible facts, there was no way a majority of the Court would rule for Bouknight. Rather than create a new "child abuse" exception, Justice O'Connor turned to two judge-made "loop-holes"[59] to the privilege: the required records and the collective entity exceptions to the Fifth Amendment.

Initially, Justice O'Connor cited the required records doctrine to dismiss Bouknight's otherwise valid Fifth Amendment challenge.[60] According to O'Connor, the required records exception recognized that the privilege "may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws."[61]

Then, O'Connor turned to the collective entity exception to the Fifth Amendment for the proposition that when a person "assumes control over items that are the legitimate object of the government's noncriminal regulatory powers, the ability to invoke the privilege is reduced."[62] Based on the precedents applying the required records and collective entity exceptions, Justice O'Connor identified four "principles" that trumped Bouknight's Fifth Amendment challenge. First, after Maurice was adjudicated a child in need of assistance, his care and safety became

[59] Schulhofer, *supra* note 8, at 316.
[60] 493 U.S. at 554.
[61] *Id.* at 556.
[62] *Id.* at 558. Under the collective entity exception, the ability to invoke the privilege is not "reduced"; it is eliminated entirely. *See, e.g.*, Braswell v. United States, 487 U.S. 99, 117–18 (1988) (finding no violation of the Fifth Amendment, even though the government submitted the case on the assumption that the subpoena required acts of testimonial self-incrimination from the president of two corporations). That's why the rule is an exception to the Fifth. *See* discussion *infra* notes 72–74 and accompanying text.

the particular object of the State's regulatory interests.[63] Second, parents subject to a court order "are hardly a 'selective group inherently suspect of criminal activities.'"[64] Third, state officials' efforts to gain access to children "do not 'focus almost exclusively on conduct which was criminal.'"[65] Lastly, compelled production in most cases will not involve incriminating testimony, "even if in particular cases the act of production may incriminate the custodian through an assertion of possession or the existence, or the identity, of the child."[66]

After proffering these four "principles" justifying overriding Bouknight's Fifth Amendment right, Justice O'Connor offered meaningless dictum that sowed more questions and confusion. She stated: "We are not called upon 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."[67]

In sum, while assuming Bouknight presented a valid Fifth Amendment challenge to the order to produce her child, Justice O'Connor rejected Bouknight's claim on the basis of two judge-made exceptions to the Fifth Amendment.

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[63] 493 U.S. at 559 (citation omitted). Justice Marshall's dissent notes that a finding that a child is in need of assistance does not by itself divest a parent of legal or physical custody, nor does it transform such custody to something conferred by the State. *Id.* at 565 (Marshall, J., dissenting). He explained that "Jacqueline Bouknight is Maurice's mother; she is not, and in fact, could not be, his 'custodian' whose rights and duties are determined solely by the Maryland juvenile protection law," *id.* at 565, and that "Jacqueline Bouknight is not the agent for an artificial entity that possesses no Fifth Amendment privilege,"*id.* at 567.

[64] *Id.* at 559 (quoting Marchetti v. United States, 390 U.S. 39, 57 (1968)).

[65] *Id.* at 560 (quoting California v. Byers, 402 U.S. 424, 454 (1971)).

[66] *Id.* at 561..

[67] *Id.* (emphasis added).

Accordingly, O'Connor summarized: "Bouknight may not invoke the privilege to resist the production order because she has assumed custodial duties related to production and because production is required as a part of a noncriminal regulatory regime."[68]

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Although Jacqueline Bouknight was "the first mother to assert her fifth amendment right when ordered by the court to produce her child,"[69] the result in *Bouknight* was no surprise. Bouknight was presenting her claim to a Court famously opposed to the privilege. A decade before *Bouknight* was announced, a discerning observer of the Court's Fifth Amendment doctrine noted that the Court had been consistently hostile to Fifth Amendment challenges: "Its thinking has been heavily weighted in favor of the state on almost every privilege question, with the result that the Fifth Amendment has taken on the character of an obstacle to information acquisition to be circumvented when at all possible."[70] In light of the its evident hostility to the privilege, there was no way the Court was going to uphold an abusive mother's right to withhold production of a child she has mostly likely severely assaulted or killed, notwithstanding the fact the order compelling production was a straightforward violation of the Fifth Amendment. Nevertheless,

[68] *Id.* at 555–56
[69] Rowe, *supra* note 23, at 886.
[70] MARK BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION 233 (1980).

using the required records and collective entity rules to defeat Bouknight's claim is curious because both doctrines originated in cases involving compelled production of documents in order promote prosecution of white-collar crime and business offenses. Bouknight's case—essentially a murder investigation at the time she was jailed for contempt—was far afield from the contexts that prompted the Court to create the exceptions recognized in the required records and collective entity rules.

A.) Collective Entity Exception

The collective entity exception to the privilege traces its origins to the start of the twentieth century.[71] The rule has two parts: An artificial entity is not protected by the Fifth Amendment, and a representative of the entity may not refuse to disclose entity documents even if disclosure would be personally incriminating.[72] Because corporations or unions cannot be sentenced to prison terms, practically speaking, the second part of the collective entity exception is the most important part. Under the collective or artificial entity rule, a person who works for or joins an organization, like a corporation, union, political organization, family partnership or charity, is not protected by the Fifth Amendment when compelled to produce incriminating records that the government asserts belong to or relate to the functions of the organization. The Justices have candidly admitted

[71] *See, e.*g., Hale v. Henkel, 201 U.S. 34, 74 (1906) (explaining that a corporate officer could not resist a subpoena to produce and testify to certain corporate records under the Fifth Amendment).
[72] *See* Braswell v. United States, 487 U.S. 99, 105, 117 (1988).

that the motivation for this exception to the privilege is the need for effective law enforcement. "[A] Fifth Amendment privilege on behalf of the records custodian of collective entities would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities."[73] The constitutional flaws with the artificial entity exception are numerous.[74] Most relevant here is that, like the required records exception, the artificial entity exception ignores the text of the Fifth Amendment and eliminates a personal right in order to promote law enforcement goals. How so?

When a custodian or representative of an organization is subpoenaed to produce entity records that incriminate him personally, the Court disregards that a natural person—not a fictional entity—satisfies the three elements required to invoke the privilege: the person is subject to (1) official compulsion to disclose, (2) incriminating, (3) testimony. Put simply, under the Court's precedents applying the artificial entity rule, law enforcement interests prevail over the right of the individual not to be compelled to produce self-incriminating testimony. Again, the Court has candidly expressed that promoting law enforcement is the motivation behind the rule.

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[73] *Id.* at 115 (1988).

[74] *See, e.g.*, Tracey Maclin, *Long Overdue: Fifth Amendment Protection for Corporate Officers*, 101 B.U.L. REV. 1523 (2021); *cf.* Harrison A. Meyer, Note, *The Corporate Privilege Against Self-Incrimination*, 78 N.Y.U. ANN. SURV. AM. L. 393, 395 (2023) (arguing corporations should be permitted to invoke the privilege).

B.) Required Records Exception

The required records rule was created in *Shapiro v. United States*.[75] William Shapiro sold fruit and produce in New York City and was subject to federal regulation under the Emergency Price Control Act.[76] He received a subpoena from the federal Price Administrator to produce all invoices, books, records, and contracts related to the sale of commodities and also records that he customarily kept relating to the prices of fruits and vegetables.[77] The law authorized the Administrator to require the making and keeping of records by persons subject to the Act and to compel oral testimony and document production.[78] Accompanied by counsel, Shapiro asserted his Fifth Amendment privilege but also disclosed the records demanded in the subpoena.[79] He was later convicted of conducting illegal tie-in sales.[80]

Writing for a 5-4 majority, Chief Justice Vinson rejected Shapiro's argument the Act violated the Fifth Amendment.[81] Like Jacqueline Bouknight's case, the facts and result in *Shapiro* cannot be reconciled with the text of the privilege, which states: "No person . . . shall be compelled in any criminal case to be a

[75] 335 U.S. 1 (1948).
[76] *Id.* at 4.
[77] *Id.*
[78] *Id.* at 15.
[79] *Id.* at 4–5.
[80] *Id.* at 3.
[81] *Id.* at 34.

witness against himself."[82] William Shapiro was undeniably compelled to provide testimonial evidence that led to his own conviction. As a matter of plain meaning, Shapiro's conviction cannot be squared with the words of the Fifth Amendment, and Chief Justice Vinson made no effort to do so. Although unstated at the time *Shapiro* was announced, the required records exception was motivated by an expediency, namely, the need for documentary evidence to prosecute individuals who violate regulatory laws.[83] What a commentator said by about the collective entity rule is apropos to the required-records rule: "[D]ocumentary evidence often supplies the only physical evidence for the government's case, so a blanket privilege would thwart the enforcement of many economic regulations."[84] Put differently, allowing someone in Shapiro's shoes to invoke the Fifth would severely hamper the government's ability to prosecute that person for economic crimes. Thus, *Shapiro* was a blatant effort to avoid applying the privilege; no neutral principle—other than promoting law enforcement—justified the result.

Shapiro, decided in 1948, was immediately controversial. Justice Frankfurter wrote a devasting dissent. Justice Jackson, nobody's liberal, presciently observed

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

[83] John H. Mansfield, *The* Albertson *Case: Conflict between the Privilege against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 149 (1966) ("[I]t is clear that the principal purpose of the record keeping requirement was to deter violations of price regulations and to provide evidence of such violations if they occurred."); Bernard D. Meltzer, *Required Records, the McCarran Act, and the Privilege Against Self-Incrimination*, 18 CHI. L. REV. 687, 703 (1951) (noting that the Court's rulings in the collective entity rulings were "moved by the same considerations of expediency which . . . are behind the required-records doctrine").

[84] *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1283 (1979) [hereinafter *Corporate Crime*].

that while *Shapiro* only eliminates the Fifth Amendment rights of "business men and their records," the Court should not forget "the tendency of such a principle, once approved, to expand itself in practice 'to the limits of its logic.'"[85] And *Shapiro*'s reasoning has been widely condemned by legal academics.[86] But the modern Court has not disavowed it. Indeed, in a rare and important Fifth Amendment ruling in favor of a criminal defendant, the Court approvingly cited *Shapiro* and its progeny.[87] Concededly, the Warren and Burger Courts have rewritten the required records exception to limit its scope; currently, the exception cannot be utilized where a regulatory regime compels testimony from a select group inherently suspected of criminality who operate in an area permeated with criminal liability.[88] But the Court has not explained, however, why the ability to invoke the privilege should turn on such considerations, rather than on whether official compulsion creates a substantial and real risk of incrimination to the individual. "As traditionally developed," the privilege "is an *individual* right to be asserted by the individual to any demand made upon him which may reasonably

[85] 335 U.S. at 70 (Jackson, J., dissenting). Five years later, Justice Jackson was still not reconciled with *Shapiro*: "Strangely enough, Fifth Amendment protection against self-incrimination has been refused to business as against inquisition by the regulatory power . . . in what seemed to me a flagrant violation of it." United States v. Kahriger, 345 U.S. 22, 35 (1953) (Jackson, J., concurring). What remains unexplained is why Justices Black and Douglas, who were acknowledged then and later friends of the privilege and liberal Justices, joined *Shapiro*.

[86] Justice Robert Jackson, no liberal, also dissented in *Shapiro* and five years later opined: "Strangely enough, Fifth Amendment protection against self-incrimination has been refused to business as against inquisition by the regulatory power, *Shapiro v. United States*, 335 U.S. 1 (1948), in what seemed to me a flagrant violation of it." United States v. Kahriger, 345 U.S. 22, 35 (1953) (Jackson, J., concurring).

[87] *See* United States v. Hubbell, 530 U.S. 27, 35 (2000).

[88] *See* Marchetti v. United States, 390 U.S. 39, 52 (1968); California v. Byers, 402 U.S. 424, 430 (1971).

involve the risk of specific criminal prosecution."[89] The Court has adopted this approach because it limits the scope of the privilege to authorize prosecutors to use compelled testimony in criminal cases under the façade of enforcing regulatory laws.

IV. *What's so bad about* Bouknight?

Let's start by conceding that from a civil liberties perspective, the result and reasoning in *Bouknight* could have been much worse. Justice O'Connor did not embrace the State's and its *amici* plea for a new exception to the Fifth Amendment. They contended Bouknight's Fifth Amendment right was outweighed by society's interest in protecting children at risk of serious injury.[90] The State's position would not only cover a parent like Bouknight, whose child was declared to be in need of assistance and placed under the jurisdiction of a court, but potentially any parent or guardian suspected of child abuse. Under such a "public need" exception, the state's interest in protecting children outweighs the Fifth Amendment interest of a

[89] Toxey H. Sewell, *The Self-Incrimination Clause and Administrative Law*, 39 TENN. L. REV. 207, 242 (1972). The author explained that the privilege "should insulate against any governmental demand, whatever the source and whatever the denomination of the particular program. The emphasis rightly should be on the individual and his precise circumstance and not upon his class or the purpose of the statute." *Id.* at 244.

[90] Brief for Petitioner, *supra* note 38, at 11 ("Bouknight's privilege claim is overcome by society's overwhelming interest in protecting children at risk of serious injury.").

The *Bouknight* Court also declined to grant certiorari on Maryland's claim that Bouknight had waived her Fifth Amendment by agreeing to supervised custody of Maurice. *See* Irene Merker Rosenberg, Essay, Bouknight: *Of Abused Children and the Parental Privilege Against Self-Incrimination*, 76 IOWA L. REV. 535, 549–50 (1991). But as Professor Rosenberg perceptively observes, employing a waiver analysis "presupposes that there is a right that can be waived." *Id.* at 550. The core of *Bouknight*, however, is that Bouknight had no privilege under the circumstances, which makes a waiver analysis incoherent.

parent or guardian suspected of abuse.[91] Because O'Connor's opinion emphasized Bouknight's acceptance of Maurice subject to certain conditions and her submission to the operation of a regulatory scheme, "the decision applies only to those parents from whom a court has taken, and then returned, a child."[92] *Bouknight* does not preclude a parent from invoking the Fifth "to avoid an initial court order to produce their child."[93] According to some, this "narrow" application means that *Bouknight* "will do little to protect most abused children."[94]

Although the Court resisted Maryland's call for a broad new exception to the Fifth Amendment, *Bouknight* was still a significant expansion of the government's power to compel self-incriminating testimony. O'Connor's opinion reads as if *Bouknight* was a routine application of the collective entity and required records exceptions to the Fifth. *Bouknight* is anything but.

First, Justice O'Connor's reliance on the collective entity exception shows the lengths to which the Court will go to reject a valid Fifth Amendment claim.

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[91] *See, The Supreme Court, 1989 Term*, *supra* note 23, at 184–85 (arguing that such a public need exception is analogous to the "public safety" exception adopted in *New York v. Quarles*, 467 U.S. 649 (1984), where an individual suspected of criminal conduct was nonetheless denied protection under the Fifth Amendment in light of the public safety concerns that confronted the arresting officers); *see also* Ruffing, *supra* note 23, at 947–48 (contending that the Court should have adopted a balancing test and found that Bouknight's claim was clearly outweighed by the state's interest to protect the life of an abused child).

[92] English, *supra* note 23, at 1025; Lisa J. Jacobs, Case Comment, Baltimore City Department of Social Services v. Bouknight*: Limiting a Mother's Right to Invoke the Fifth Amendment*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 423, 438 (1991) (explaining *Bouknight* "does not apply to all requests for production of children in court, but only to requests for children who are held pursuant to a custody order and a protective supervision arrangement") (footnote omitted).

[93] English, *supra* note 23, at 1025.

[94] *Id.*

O'Connor reasoned that because Bouknight agreed to certain custodial requirements to retain physical custody of Maurice, her case falls under the collective entity rule.[95]

But applying the collective entity exception in *Bouknight* distorts law and reality. The theory and goal behind the exception are straightforward: representatives of collective entities are denied Fifth Amendment protection "in order to vindicate the rule that a collective entity which employs him has no such privilege itself."[96] The exception arises from the view that corporate officers and the corporation they serve are coalesced for Fifth Amendment purposes.[97] And the "agency rationale" of the most recent collective entity precedent, *Braswell v. United States*,[98] rests on the logic that when a corporate representative discloses incriminating documents in his possession, it is not the representative but the corporation providing the incriminating testimony.[99] And "[a]ny claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation, which, of course, possesses no such privilege."[100]

The differences, legally and factually, between Jacqueline Bouknight's case and the typical representative of a collective entity are obvious. First, there was no

[95] Balt. City Dep't of Soc. Servs., 493 U.S. 549, 560 (1990).
[96] Braswell v. United States, 487 U.S. 99, 119 (1988) (Kennedy, J., dissenting).
[97] *See Corporate Crime, supra* note 84, at 1278 (noting that under the collective entity cases the Court "has assimilated the position of company officials to that of the corporation they serve.").
[98] 487 U.S. 99 (1988).
[99] *Id.* at 117–18.
[100] *Id.* at 110.

reason to deny Bouknight's privilege to uphold the rule that an artificial entity has no privilege. There was neither a collective entity in her case nor was she a representative of the juvenile court or the Department of Social Services. Further, unlike the case where a corporate officer and corporation, who may have mutual interests opposing the disclosure of subpoenaed documents, and thus, have been melded together for Fifth Amendment purposes, Bouknight and the juvenile court occupied opposing positions and were adversaries *ab initio*. The same was true regarding Bouknight's stance vis-à-vis the Department of Social Services. There is no reason for fusing Bouknight and the juvenile court or the Department together to demonstrate that neither the court nor the Department can invoke the privilege. A contrary position is ludicrous.

Finally, it disfigures Fifth Amendment law and the facts to apply *Braswell*'s agency rationale to *Bouknight*. The agency rationale rests upon the theory that where an individual produces incriminating documents as the agent of the artificial entity, it is the entity and not the individual who is disclosing the documents, and neither the individual nor the entity have a privilege.[101] But Bouknight is no "stand-in" for the juvenile court or Department. And if she produces Maurice no one would believe or imagine that the court or Department or any other artificial

[101] *See The Supreme Court, 1987 Term—Leading Cases*, 102 HARV. L. REV. 143, 176 (1988). The editors of the Harvard Law Review nicely summarized the logic of *Braswell*'s agency rationale: "Braswell, when producing the documents, is a stand-in for the corporation; the corporation has no privilege against itself; therefore, Braswell when producing the documents, has no privilege against incriminating himself." *Id.*

entity is producing Maurice. Production of Maurice would indisputably be Bouknight's endeavor. As Justice Marshall's dissent rightly noted, Jacqueline Bouknight remained the legal parent of Maurice and was never an agent for a collective entity.[102]

In sum, utilizing the collective entity exception to deny Bouknight's valid Fifth Amendment plea distorts the purpose of that exception and will inevitably lead to future cases where other legitimate privilege claims are denied in order avoid results that appear to reward guilty persons like Jacqueline Bouknight. But, however unappealing the facts were in *Bouknight*, applying the collective entity exception to a case that was essentially a murder investigation shows that the Court will contort Fifth Amendment doctrine when necessary to achieve a pre-determined result.

Second, applying the collective entity and required records exceptions to Bouknight's case also expands the scope of these rules. Supporters of the result in *Bouknight* acknowledge "the Court greatly expanded the civil regulatory scheme exception to fifth amendment protection."[103] It does so by authorizing officials to

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[102] Balt. City Dep't of Soc. Servs., 493 U.S. 549, 567 (1990) (Marshall, J., dissenting) ("Jacqueline Bouknight is not the agent for an artificial entity that possesses no Fifth Amendment privilege. Her role as Maurice's parent is very different from the role of a corporate custodian who is merely the instrumentality through whom the corporation acts.").

[103] *The Supreme Court, 1989 Term*, *supra* note 23, at 183. The authors explained that "[a]lthough the Court rightly declined to recognize a fifth amendment privilege, the Court's conception of a 'civil regulatory scheme' was overbroad." *Id.* at 179. They further noted: *Bouknight*'s "expansive definition of the 'civil regulatory scheme' exception potentially undermines the foundation of fifth amendment protection for parties in civil proceedings. *Id.* at 183. *Cf.* Amar & Lettow, *supra* note 6, at 872 ("The Court further stretched the required records doctrine in . . .

compel incriminating testimony different in form and in contexts not previously permitted.

Prior to *Bouknight*, the Court's willingness to allow officials to compel incriminating testimony had been confined to situations involving compelled production of documents or compelled disclosure of information relating to tax or business records and the licensing of motorists. What made *Bouknight* different from prior precedents was that it involved compelled production of physical evidence in a context where "the Maryland police were investigating the case as a possible homicide."[104] This is no minor matter.

Consider the breadth of the required records exception. Record disclosure can be ordered by statute, by an administrative agency relying on statutory authorization, by court order, or any other governmental entity acting within its constitutional proscribed authority.[105] If the required-records rule authorizes officials to compel the keeping and production of documents, which is a type of written testimony, why doesn't the rule authorize oral testimony? And if the legislative branch of government can utilize the rule, why not allow the executive

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Bouknight."); *see also* STEVEN M. SALKY, THE PRIVILEGE OF SILENCE: FIFTH AMENDMENT PROTECTIONS AGAINST SELF-INCRIMINATION 275 (3d ed. 2019) (stating that *Bouknight* "actually expanded the application of the required records doctrine").

[104] *The Supreme Court, 1989 Term*, *supra* note 23, at 183. Notwithstanding the facts and criminal implications for Bouknight, Maryland argued that the case was the equivalent of filing an income tax return. During oral arguments, Justice Scalia asked counsel for Maryland whether the order to produce Maurice was "the equivalent of the income tax statute, and the contempt for failure to obey it is the equivalent of the prosecution for not filing" an income return. Counsel answered: "Right." Transcript of Oral Argument, *supra* note 26, at 54.

[105] Mansfield, *supra* note 83, at 148–49.

branch to do so when exercising power within its sphere of authority? And why not allow licensing officials who regulate, for example, doctors, lawyers, and engineers, to use the required records rule? This understanding of the potential application of the required records exception prompted one scholar to noted that, as written, *Shapiro* is a blueprint for "entirely destroying the privilege."[106]

Bouknight expanded exceptions to the privilege that had been confined to the disclosure of subpoenaed documents in mostly business contexts and now applied them to the compelled disclosure of physical evidence in a combined criminal and civil investigation.[107] By doing so, *Bouknight* fulfilled Justice Jackson's prediction that the required records exception, once unleashed, "would expand itself in practice 'to the limits of its logic.'"[108] And by doing so, *Bouknight* applied exceptions to the privilege that were used to compel testimony from corporate representatives and others subject to regulatory laws, to an individual "far removed from the universal and benign regulatory regime implicated by the taxation of all

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[106] *Id.* at 149. More recently, another commentator observed:

> [the required records doctrine] bestows upon the government the power to render private documents unprotected by the Fifth Amendment simply by enacting a statute requiring their disclosure. Nothing in [*Shapiro*] prevents the government from enacting a reporting or record keeping statute dealing with ordinary private papers and thereby converting documents, once protected, into public and discoverable records.

Lisa Tarallo, Note, *The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to End Its Silence on the Rationale Behind the Contemporary Application of the Privilege*, 27 NEW. ENG. L. REV. 137, 155 (1992) (footnote omitted).

[107] *But cf.* Daniel M. Horowitz & Stephen K. Wirth, *The Death and Resurrection of the Required-Records Doctrine*, 86 MISS. L.J. 513, 542–44 (2017) (arguing that *Bouknight* is not a required-records case). To the authors, "[t]he only parallel *Bouknight* shares to the other required-records cases is that Bouknight was legally required to do *something*." *Id.* at 544. They contend that "*Bouknight* is an anomaly." *Id.*

[108] United States v. Shapiro, 335 U.S. 1, 70 (1948) (Jackson, J., dissenting).

citizens or the licensing of all drivers."[109] Jacqueline Bouknight was the target of a possible homicide investigation. To be sure, she was also the target of a concurrent civil investigation, but fact that should not diminish her right to plead the Fifth. No long ago, the federal government argued that the privilege does not apply in any civil proceeding. A unanimous Court rejected the argument and held the Fifth Amendment applies in civil proceedings.[110] If a witness in a civil bankruptcy proceeding can invoke the privilege, what neutral principle justifies denying Bouknight the right to invoke the privilege? If being the target of a joint civil-criminal investigation or being subject to civil regulatory authority *eliminates* the privilege, as *Bouknight* held, then many individuals will have their Fifth Amendment protection purged in future cases.[111]

V. *No Fifth Amendment Violation, But Immunity "May" Be Required?*

[109] *The Supreme Court, 1989 Term*, *supra* note 23, at 184.

[110] McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (while the government argued that the privilege was inapplicable in civil proceedings, the Court concluded otherwise: "The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or to be used. It applies alike to civil and criminal proceedings , wherever the answer might tend to subject to criminal responsibility him who gives it."). For an insightful analysis of the application of the privilege in civil cases, see Robert Heidt, *The Conjurer's Circle – The Fifth Amendment Privilege in Civil Cases*, 91 Yale L. J. 1062, 1065 (1982) ("The privilege may be used in a great range of civil cases. … More obviously, the privilege may be used in civil cases where conduct giving rise to civil liability also constitutes an element of a crime.").

[111] *Cf. The Supreme Court, 1989 Term*, *supra* note 23, at 184 ("By denying fifth amendment protection to an individual who has become the target of concurrent civil and criminal investigations, the Court has effectively restricted invocation of the privilege to a very narrow category of case.").

Legal scholars often complain Fifth Amendment law is confusing.[112] Sometimes the complaint is justified. *Bouknight* is an example.

After explaining why the collective entity and required records exceptions precluded Bouknight from invoking the privilege to resist the order to produce Maurice, Justice O'Connor stated that the Court was not deciding what limitations "may" exist upon a prosecutor's ability to "use the testimonial aspects of Bouknight's act of production in subsequent criminal proceedings."[113]

This part of *Bouknight* is doubly baffling. First, if Bouknight had no privilege to invoke against the order to produce Maurice, notwithstanding the fact that her act of production compels testimonial evidence, then why might there exist "limitations upon the direct and indirect use of that testimony"?[114] Immunity is constitutionally required only when the Fifth Amendment has been violated. But if there is no constitutional violation, as *Bouknight* holds, there is no requirement for

[112] *See, e.g.*, Tarallo, *supra* note 106, at 187 (stating the Court "has created confusion regarding how the privilege should be interpreted and applied"); Kenworthey Bilz, *Self-Incrimination Doctrine Is Dead; Long Live Self-Incrimination Doctrine: Confessions, Scientific Evidence, and the Anxieties of the Liberal State*, 30 Cardoza L. Rev. 807, 840 (2008) ("On almost any reading, self-incrimination doctrine is a mess – a view shared by observers old and new.") (footnote omitted); Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. Crim. L. & Criminology 243, 243-44 (2004) (stating that "the Court has relied on stirring rhetoric [in its Fifth Amendment cases] that may move the heart but leaves the intellect unconvinced.").

[113] Balt. City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 561 (1990). One commentator worries that this passage could be read as requiring state officials "to grant some sort of immunity to parents in exchange for the production of their children." English, *supra* note 23, at 1026. The availability of immunity for may motivate an abusive parent "to hide their children once they have abused them" or delay the time in producing a child in need of critical care. *Id.*

[114] *Bouknight*, 493 U.S. at 561.

immunity.[115] A contrary suggestion sows confusion for prosecutors, defense lawyers and judges.[116] A straightforward application of Fifth Amendment law avoids this confusion. Because Bouknight possessed no privilege, immunity was not required. It really is that simple.

Second, even assuming the correctness of Justice O'Connor's conclusion that Bouknight could be compelled to produce Maurice in a *civil* proceeding, why leave open the possibility that a prosecutor could admit evidence of Bouknight's compelled production of Maurice in a *criminal* trial?[117] As Professor George Thomas rightly noted: "Once one concedes that production is both testimonial and compelled, no coherent argument exists to justify admission of the fact of

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[115] *See* Rosenberg, supra note 90, at 538 (1991) ("[*Bouknight*'s] determination that the mother could not invoke fifth amendment protection means that the state is not obligated to give immunity in connection with any subsequent criminal prosecution in return for production of a child previously adjudicated as neglected.") (footnote omitted).

[116] *See* Leonard R. Rosenblatt, *The Fifth Amendment and Production of Business Records: And* Braswell *Begat* Bouknight . . . , 68 TAXES 418, 423 (1990). Rosenblatt explained:

> [T]he evidentiary limitations imposed upon Bouknight's act of production are grounded in the Fifth Amendment created a host of subsidiary issues involving (1) the extent of the constitutional immunity afforded thereunder, and (2) the procedure whereunder such immunity would be obtained. For example, what is the extent of the protection by the Fifth Amendment under these circumstances? Would the limitations effectively shield the contents of the documents produced? Does a witness have to first assert the privilege and be ordered to comply by a judicial officer? Does a witness have to go into contempt in order to claim whatever protection the Fifth Amendment will later afford him or her?

Id. at 423.

[117] Two commentators write that Justice O'Connor "hinted" that the privilege might still be available to Bouknight in a criminal prosecution. *See* H. Bruce Dorsey, Note, Baltimore City Department of Social Services v. Bouknight*: The Required Records Doctrine—Logic and Beyond*, 50 MD. L. REV. 446, 462 (1991); *see also* Rosenberg, *supra* note 90, at 538 (noting that the Court left open whether the State could use the testimonial aspects of production in a criminal proceeding, "but hinted strongly that it could not."); *cf.* Channel P. Townsley, Comment, *Criminal Law: The Fifth Amendment Privilege Against Self-Incrimination: The Relationship Between State Regulatory Enforcement Authority and Compelled Testimonial Production* [Baltimore City Department of Social Services v. Bouknight*, 110 S.Ct. 900 (1990)]*, 30 WASHBURN L.J. 174, 188 (1990) (noting that the Court does "suggest" limitations on the use of act of production might entitle Bouknight "to some form of immunity; however, the Court is not specific in delineating what that immunity would be.") (footnote omitted).

production in a criminal case against Bouknight."[118] Justice O'Connor's suggestion that act of production testimony might be admissible in a future case incentivizes prosecutors to proffer act of production testimony with the hope that judges will view this part of *Bouknight* as silently approving the admission of such evidence.

Perhaps, Justice O'Connor felt leaving this issue undecided was necessary because someone in Bouknight's predicament retains some measure of Fifth Amendment protection. She stated: "When a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers, the ability to invoke the privilege is *reduced*."[119] If this statement was meant summarize the legal consequence of applying the collective entity and required records exceptions, the statement is wrong. These two exceptions are just that—they are *exceptions* to the privilege. They do not merely *reduce* the ability to invoke the privilege, they *eliminate* it when the exceptions apply.[120]

Any limitations on a prosecutor's direct and indirect use of testimony compelled by Bouknight's act of production must come from the Fifth Amendment. For example, in a subsequent murder trial, if a prosecutor cannot inform the jury that Bouknight produced the body of Maurice, it is because the

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[118] George C. Thomas III, *Justice O'Connor's Pragmatic View of Coerced Self-Incrimination*, 13 WOMEN'S RTS. L. REP. 117, 126 (1991).
[119] Balt. City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 558 (1990) (emphasis added).
[120] *Cf.* Rosenberg, *supra* note 90, at 544 ("The decision to treat the production order as part of the state's civil regulatory scheme inexorably led the *Bouknight* majority to adopt a per se rule denying fifth amendment protection even in a case with clear criminal overtones.").

Fifth Amendment protects her notwithstanding her agreement to cooperate with state officials.[121] But that legal position makes no sense if, as the Court ruled, Bouknight had no privilege to invoke under the collective entity and required records exceptions. The Court appeared to be unwilling to live with the logic of its holding. It concluded that Jacqueline Bouknight, who had temporary custody of her son pursuant to a court order, may not invoke the privilege to resist a court order to produce her son. But the Court left open the possibility that officials might have to provide her immunity for the actions that the Court ruled do not violate the Fifth Amendment. This strikes me as legal gobbledygook.[122]

Conclusion

Sherry Colb and I did not agree on the outcome of *every* Fourth Amendment or Fifth Amendment Self-Incrimination Clause case decided by the Court, but we agreed more often than we disagreed. Sherry and I never discussed *Bouknight*, but considering her comments on the Fifth Amendment in her 2013 blog, I suspect she would have supported (reluctantly) the result. Sherry took a measured approach on constitutional criminal procedure issues, and that approach, I'm guessing, would have led her to reject Jacqueline Bouknight's claim.

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[121] *Cf.* Thomas, *supra* note 117, at 127 (arguing that limitations on the prosecution's use of Bouknight's act of production testimony "would be a bar against the state's use of the compelled evidence against Bouknight in a criminal case, a bar precisely coextensive with that of the [Fifth Amendment's] immunity doctrine and one that avoids the unseemly result of pragmatism at odds with the language of the Constitution") (footnote omitted).

[122] Cf. Allen & Mace, *supra* note ____ at 282 (noting that *Bouknight* "concluded that the state was not required to grant immunity *ex ante* but implied that it might do so *ex post*. Thus, the state of the law was left unclear.") (footnote omitted).

The facts of *Bouknight* inevitably affect one's view of how the case should be resolved. Jacqueline Bouknight committed unspeakable acts against her infant son. If found guilty after a fair trial, she deserved punishment. But the Fifth Amendment is important too; indeed, protecting Bouknight's (or anyone else's) Fifth Amendment right is more important than punishing a guilty person through a legal process that eliminates the privilege. Under an honest, straightforward application of the Fifth Amendment, Jacqueline Bouknight's proffered a meritorious constitutional claim. She was compelled to produce testimonial evidence that was incriminating. The Court was able to reject her claim only by relying on judge-made exceptions to the privilege purposedly designed to promote law enforcement.

While Sherry Colb might not have shared all my criticism of *Bouknight*, I am confident that she would have encouraged my blunt critique of the Court's analysis. In the last conversations I had with her, Sherry was forthright about her illness and how much time she had to live. We never discussed Supreme Court decisions; there were more important matters to talk about. If Sherry were still alive, we might have discussed *Bouknight*. I would have benefitted from her insights, and this essay would be much better due to her input and suggestions. This tribute is my modest way of saying "thank you" to Sherry Colb for always urging me to be direct in my assessments about life and the Supreme Court.