

CONSTITUTIONAL LAW—A Natural Mother Who Is the Physical Custodian of Her Infant Child Pursuant to a Court Order May Not Invoke the Fifth Amendment Privilege Against Self-incrimination to Resist a Court Order to Produce the Child—*Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990).

I. INTRODUCTION

On January 23, 1987, respondent Jacqueline Bouknight took her three-month-old son, Maurice M., to the hospital where doctors diagnosed the child as suffering from a broken leg.¹ Other indications of physical abuse were discovered, including healed fractures of several other bones.² The doctors admitted Maurice to the hospital where nurses later observed Bouknight shake her son and drop him into his crib.³ Because of Bouknight's conduct and the nature of Maurice's injuries, the hospital notified the Baltimore City Department of Social Services ("BCDSS") of suspected child abuse.⁴ The BCDSS obtained a court order authorizing removal of Maurice from the care of his mother and his placement in foster care.⁵

In a hearing shortly after, the juvenile court declared Maurice to be a "child in need of assistance"⁶ and placed him under the care of the BCDSS.⁷ The BCDSS allowed Bouknight to retain physical custody of Maurice provided she adhere to the provisions of the court's protective supervision order.⁸ Bouknight's attorney signed this order signaling Bouknight's agreement to its terms.⁹

During the next few months, Bouknight refused to cooperate with the BCDSS caseworkers, and violated virtually every term of the protective order.¹⁰ On April 20, 1988, after reviewing the evidence that Bouknight had violated the terms of the protective order, the court granted the BCDSS's petition requesting Maurice be removed from his natural mother and placed in foster care.¹¹

1. *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. 549, 551 (1990).

2. *Id.*

3. *Id.*

4. *In re Maurice M.*, 550 A.2d 1135, 1136 (Md. 1988).

5. *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. at 552.

6. *Id.* A child is determined to be in need of assistance if "[h]e is mentally handicapped or is not receiving ordinary and proper care and attention, and . . . [h]is parents . . . are unable or unwilling to give proper care and attention to the child and his problems." *Id.* at 570-71 (quoting MD. CTS. & JUD. PROC. CODE ANN. § 3-801(e) (Supp. 1989)).

7. *Id.* at 552.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

The BCDSS further petitioned that Bouknight be required to disclose the location of Maurice.¹² Bouknight refused on two separate occasions to reveal the child's whereabouts and then told officials that Maurice was with a relative in Dallas, Texas.¹³ The relative, however, told police she had not seen Maurice.¹⁴ Fearing Maurice was in severe danger or even dead, the BCDSS officials filed a missing persons report and requested the police begin a homicide investigation.¹⁵

The juvenile court issued its order requiring Bouknight to produce the child or be held in civil contempt.¹⁶ After she failed to comply, the juvenile court found Bouknight in contempt and ordered she "be imprisoned until she 'purge herself of contempt by either producing [Maurice] before the court or revealing to the court his exact whereabouts.'" ¹⁷ Bouknight asserted the contempt order violated her Fifth Amendment freedom against self-incrimination.¹⁸ The juvenile court rejected this claim, stating Bouknight could purge the contempt only by producing Maurice or by revealing his exact whereabouts to the court.¹⁹ "[T]he contempt is issued not because she refuse[d] to testify in any proceeding . . . [but] because she has failed to abide by the Order of this Court, mainly [for] the production of Maurice M."²⁰

The Maryland Court of Appeals held the contempt order to be unconstitutional because it compelled Bouknight "to admit through the act of production 'a measure of continuing control and dominion over Maurice's person' [under] circumstances in which 'Bouknight ha[d] a reasonable apprehension that she [would] be prosecuted.'" ²¹ The court of appeals vacated the juvenile court's order holding Bouknight in contempt.²²

The United States Supreme Court granted certiorari and *held*, reversed.²³ A natural mother who is the physical custodian of her infant child pursuant to a court order may not invoke the Fifth Amendment privilege against self-incrimination to resist a court order to produce the child. *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990).

12. *Id.* at 553.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* (quoting app. to Petition for Certiorari at 82a).

18. *Id.* The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

19. *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. at 553.

20. *Id.* at 553-54 (quoting app. at 50).

21. *Id.* at 554 (quoting *In re Maurice M.*, 550 A.2d 1135, 1141 (Md. 1988)).

22. *Id.*

23. *Id.*

II. MAJORITY OPINION

Justice O'Connor, writing the majority opinion, began her analysis by reviewing Fifth Amendment principles established in prior cases.²⁴ In *Fisher v. United States*,²⁵ the Court held the protection of the Fifth Amendment only applies "when the accused is compelled to make a Testimonial Communication that is incriminating."²⁶ *Fisher* established that "when the government demands that an item be produced, 'the only thing compelled is the act of producing the [item].'"²⁷ In such a situation, however, the protection of the Fifth Amendment may be asserted because the act of producing the item demands one testify to the existence, possession, or authenticity of the item produced.²⁸ Nevertheless, according to *Doe v. United States (Doe I)*,²⁹ a person may not invoke the Fifth Amendment privilege to avoid any incrimination that "may result from the contents or nature of the thing demanded."³⁰

Justice O'Connor reasoned that under *Doe I*, Bouknight could not assert freedom from self-incrimination as to any physical abuse possibly revealed from examination of Maurice.³¹ One cannot invoke the Fifth Amendment to evade incrimination from "the contents or nature of the thing demanded."³²

Bouknight, however, claimed she had asserted that she be allowed to invoke the Fifth Amendment privilege because producing Maurice required that she testify to her control over and possession of the child.³³ Bouknight further alleged "her implicit communication of control over Maurice at the moment of production might aid the State in [her] prosecution[ion]."³⁴

The Court conceded the production order might compel incriminating testimonial assertions.³⁵ Despite the possibility that the production order was "sufficiently testimonial for purposes of the privilege," the Court refused to allow Bouknight to assert the right against self-incrimination.³⁶ Justice O'Connor reasoned that Bouknight could not "invoke the privilege to resist because she assumed custodial duties related to production and

24. *Id.*

25. *Fisher v. United States*, 425 U.S. 391 (1976).

26. *Id.* at 408.

27. *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. at 554-55 (quoting *Fisher v. United States*, 425 U.S. at 410 n.10).

28. *Id.* at 555.

29. *Doe v. United States*, 465 U.S. 605 (1984).

30. *Id.* at 612.

31. *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. at 555.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

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

because production is required as part of a noncriminal regulatory regime."³⁷

In *Shapiro v. United States*,³⁸ the Court established the Fifth Amendment may not be invoked to resist compliance with a state regulatory regime that pursues public purposes unrelated to enforcement of criminal laws.³⁹ *Shapiro* involved regulations under the Emergency Price Control Act,⁴⁰ which in part required businesses to keep records and produce them on request to administrators for inspection.⁴¹

The *Shapiro* Court insisted the privilege against self-incrimination that "exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions.'" ⁴² *Shapiro* was later restricted to situations involving "essentially non-criminal and regulatory area[s] of inquiry" so as to avoid violating Fifth Amendment rights of a "selective group inherently suspect[ed] of criminal activities."⁴³

The *Bouknight* Court analogized the custodian of the business records in *Shapiro* to Bouknight, the custodian of a child, and interpreted the *Shapiro* analysis as extending beyond the corporate context.⁴⁴ In *Shapiro*, the businesses were required to produce records as a means of enforcing a regulatory statute.⁴⁵ In *Bouknight*, the BCDSS required Bouknight to produce Maurice as a means of protecting his safety and welfare.⁴⁶ Both cases involved the custody of items having a public nature.⁴⁷ The Court asserted both instances were appropriate subjects for governmental regulation justifying any compelled self-incrimination that might incidentally result.⁴⁸

Justice O'Connor noted the ability to assert the constitutional right against self-incrimination is also greatly diminished if it interferes with

37. *Id.* at 555-56.

38. *Shapiro v. United States*, 335 U.S. 1 (1948).

39. *Id.* at 17-18.

40. Emergency Price Control Act of 1942, Pub. L. No. 77-729, 56 Stat. 765 (1942) (codified as amended at 50 U.S.C. app. § 901-946 (1946)) *repealed by* Pub. L. No. 97-258, § 5(b), 96 Stat. 1068, 1077 (1982).

41. *Shapiro v. United States*, 335 U.S. at 3-4. In *Shapiro*, the Price Administrator served the petitioner, a wholesaler of fruit, with a subpoena directing him to appear before officials of the Office of Price Administration with all books and records from his business. *Id.* at 4. The fruit wholesaler claimed that being forced to produce such books and records violated his Fifth Amendment privilege against self-incrimination. *Id.* at 5.

42. *Id.* at 33 (quoting *Davis v. United States*, 328 U.S. 582, 589-90 (1946)).

43. *Marchetti v. United States*, 390 U.S. 39, 57 (1968) (quoting *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79 (1965)).

44. *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. at 558-59.

45. *Shapiro v. United States*, 335 U.S. 1, 8 (1948).

46. *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. at 559.

47. *Id.*

48. *Id.* at 558-60.

"the effective operation of a generally applicable, civil regulatory requirement."⁴⁹ For example, in *California v. Byers*⁵⁰ the Court held California's "hit and run" statute, which required drivers of motor vehicles involved in accidents to stop at the scene of the accident and report their names and addresses, did not violate the Fifth Amendment protection against compulsory self-incrimination.⁵¹ The *Byers* Court determined that, in deciding questions which involve compelled incriminating disclosure, the public need should be balanced against the individual's claim to constitutional protections.⁵²

The Court in *Bouknight* reasoned that because "Maurice was adjudicated [to be] a child in need of assistance, his care and safety became the particular object of the State's regulatory interests."⁵³ Using the *Byers* balancing approach, the Court found the state's regulatory interest in ensuring the safety and well-being of Maurice outweighed Bouknight's claim of constitutional protection.⁵⁴ Moreover, when Bouknight assumed custodial obligations, she also "accepted the incident obligation to permit inspection."⁵⁵

In short, the Court determined *Bouknight* involved a "noncriminal regulatory regime"⁵⁶ rather than a "selective group inherently suspect of criminal activities."⁵⁷ Therefore, the Court denied Bouknight the right to invoke the Fifth Amendment because it interfered with the state's compelling regulatory interests.⁵⁸

III. DISSENT

Justice Marshall, with whom Justice Brennan joined, argued the precedent cited by the Court did not justify denying Bouknight the ability to assert the Fifth Amendment privilege against self-incrimination.⁵⁹ The dissent found the analogy of Bouknight's obligations as custodian of her son to the obligations of a custodian of corporate records absolutely "baffling."⁶⁰ According to the dissenters, such a characterization was contrary to the facts of the case.⁶¹ Furthermore, the Court had never allowed

49. *Id.* at 557 (citing *California v. Byers*, 402 U.S. 424 (1971)).

50. *California v. Byers*, 402 U.S. 424 (1971).

51. *Id.* at 427.

52. *Id.*

53. *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. at 559; see *In re Maurice M.*, 550 A.2d 1135, 1141 (Md. 1988); MD. CTS. & JUD. PROC. CODE ANN. § 3-804(a) (Supp. 1989).

54. *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. at 560-61.

55. *Id.* at 559 (quoting *Wilson v. United States*, 221 U.S. 361, 382 (1911)).

56. *Id.*

57. *Id.* (quoting *Marchetti v. United States*, 390 U.S. 57, 57 (1968)).

58. *Id.* at 561.

59. *Id.* at 563 (Marshall, J., dissenting).

60. *Id.* at 564 (Marshall, J., dissenting).

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

"such a characterization to override the privilege against self-incrimination except in the context of a claim of privilege by an agent of a collective entity."⁶² Therefore, the dissent refused to extend *Shapiro* beyond the corporate context.⁶³

Justices Marshall and Brennan agreed with the majority's assessment that production of Bouknight's son would be testimonial and that such production would create a "real and appreciable" threat of self-incrimination.⁶⁴ The dissent, however, asserted that the "stakes for Bouknight were much greater" than the Court acknowledged.⁶⁵ Justice Marshall emphasized Bouknight could face "criminal abuse and neglect charges for her alleged mistreatment of Maurice" as well as charges for his death.⁶⁶

Justice Marshall further submitted that, under the Maryland Code definition of "custodian," a parent cannot be a custodian.⁶⁷ Because Bouknight was Maurice's natural 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."⁶⁸ Furthermore, simply because a child is determined to be 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."⁶⁹

Justice Marshall also disputed the applicability of *Byers*.⁷⁰ He argued that, in practical terms, Maryland's juvenile protection scheme was not noncriminal and thus did not present an issue of interference with a civil regulatory requirement.⁷¹ The juvenile welfare regulations are "intimately related to the enforcement of state criminal statutes prohibiting child abuse."⁷² Marshall noted many criminal decisions suggest that civil

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

63. *Id.* at 564 n.1 (Marshall, J., dissenting).

64. *Id.* at 563 (quoting *Marchetti v. United States*, 390 U.S. 39, 48 (1968)) (Marshall, J., dissenting).

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

66. *Id.* (Marshall, J., dissenting). As of September 17, 1990, Jacqueline Bouknight was still incarcerated and Maurice's whereabouts remained a mystery. Paul Duggan, *Baltimore Missing Child Case Unresolved*, WASH. POST, Sept. 17, 1990, at D3. However, homicide detectives suspected the child was dead. *Id.*

67. *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. at 565 (Marshall, J., dissenting); see MD. CTS. & JUD. PROC. CODE ANN. § 3-801(j) (Supp. 1989) (defining "custodian" as a "person or agency to whom legal custody of a child has been given by order of the court, other than the child's parent or legal guardian").

68. *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. at 565 (Marshall, J., dissenting); see, e.g., *In re Jertrude O.*, 466 A.2d 885, 893 (Md. 1983).

69. *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. at 565 (Marshall, J., dissenting).

70. See *id.* at 567 (Marshall, J., dissenting) (citing *California v. Byers*, 402 U.S. 424 (1971)).

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

72. *Id.* at 568 (Marshall, J., dissenting).

proceedings, and the subsequent protective oversight by the BCDSS, often provide information used to support criminal convictions.⁷³

Finally, Justice Marshall proposed an individualized inquiry into each case in which the Fifth Amendment was involved.⁷⁴ This inquiry would require the Fifth Amendment privilege to pivot on the "concrete facts of a particular case, rather than on abstract characterizations concerning the nature of a regulatory scheme."⁷⁵ The facts to be examined included the party's particular claim of privilege, the nature of the testimony sought, and the likelihood of self-incrimination.⁷⁶ Under such a test, Justice Marshall determined Bouknight's Fifth Amendment claim would have undoubtedly prevailed to protect her from the serious risk of self-incrimination.⁷⁷

IV. CONCLUSION

Many of the facts in *Bouknight* ironically resemble the facts surrounding Dr. Elizabeth Morgan.⁷⁸ Morgan received national attention and praise for essentially the same conduct, which the Court refused to tolerate from Bouknight. The outcomes of the two cases were at opposite

73. *Id.* (Marshall, J., dissenting); see, e.g., *Lee v. State*, 489 A.2d 87 (Md. 1985).

74. *Baltimore City Dep't of Social Servs. v. Bouknight*, 493 U.S. at 569-570 (Marshall, J., dissenting).

75. *Id.* at 570 (Marshall, J., dissenting).

76. *Id.* at 569 (Marshall, J., dissenting).

77. *Id.* at 570 (Marshall, J., dissenting).

78. Dr. Elizabeth Morgan was held in civil contempt and imprisoned for 25 months after refusing to disclose the whereabouts of her daughter, Hilary. Marlene Cimon, *Defies Judge in Dispute with Ex-Husband: Mother, Jailed Since '87, Says Child Safety Is Key*, L.A. TIMES, May 7, 1989, § 1, at 1, col. 5. Morgan accused Dr. Eric Foretich, her former husband and Hilary's father, of sexually abusing Hilary. *Id.* Foretich vehemently denied such abuse. *Id.* After hearing the evidence, a superior court judge of the District of Columbia found Morgan had not proved the alleged child abuse. *Id.* He then ordered Morgan to produce the child or to reveal her whereabouts because Foretich had visitation rights with the child. *Id.* To protect her daughter from further abuse by Foretich, Morgan refused to comply with the court's order. *Id.* Morgan was subsequently held in contempt and imprisoned until she agreed to produce the child or disclose Hilary's whereabouts. *Id.*

Morgan received national attention and many considered her today's "Joan of Arc." Marlene Cimon, *Mother Imprisoned 25 Months is Freed*, L.A. TIMES, Sept. 26, 1989, § 1, at 22, col. 1. "Morgan's imprisonment for contempt is believed to be one of the longest in history, and her case became a cause for celebre for women's rights groups and others . . ." *Id.* "Morgan has become a national symbol, a woman sacrificing her own freedom to protect her child. Further, many view her as the innocent victim of a judicial system that has failed in its responsibilities." Marlene Cimon, *Defies Judge In Dispute with Ex-Husband: Mother, Jailed Since '87, Says Child Safety Is Key*, L.A. TIMES, May 7, 1989, § 1, at 1, col. 5.

Eventually, even Congress and the President felt it was unjust for Morgan to be imprisoned for such an extensive period of time. Consequently, Congress passed a bill tailored specifically for Morgan which limited civil contempt imprisonments in child custody cases in the District of Columbia to 12 months. Marlene Cimon, *Mother Imprisoned 25 Months Is Freed*, L.A. TIMES, Sept. 26, 1989, § 1, at 22, col. 1. Morgan was released from jail soon after the law was enacted. *Id.*

ends of the spectrum: one mother was freed from prison without having to disclose the location of her daughter,⁷⁹ while the other mother must remain in prison until she discloses the whereabouts of her son.⁸⁰

Although the outcomes were extremely different, both cases emphasized the child's best interest and safety as the primary concern. In *Bouknight*, the Court feared Maurice's safety and believed his life would be threatened if the mother *was not forced* to reveal the location of her child. In contrast, Congress feared Morgan's daughter's safety and welfare would be threatened if Morgan *was forced* to reveal the location of her child.⁸¹

The Court's decision in *Bouknight* is significant because it illustrates the attitude prevalent in today's society of protecting a child's safety and welfare at all costs. The Court went to great lengths in attempting to ascertain the location of Maurice to protect him, including denying an individual her right to constitutional protection.

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79. Marlene Cmons, *Mother Imprisoned 25 Months Is Freed*, L.A. TIMES, Sept. 26, 1989, § 1, at 22, col. 1.

80. See *supra* text accompanying note 17.

81. See Marlene Cmons, *Defies Judge in Dispute with Ex-Husband: Mother Jailed Since '87, Says Child Safety Is Key*, L.A. TIMES, May 7, 1989, § 1, at 26, col. 3.