

Jurisprudence as a social science

Science



The fields of social sciences and the legal system have become inextricably linked in response to the development of system processes to aid in problem solving. Each of the fields informs the other, utilizing their respective extensive expertise and knowledge-based literature to address the prevailing challenges in the society. In the desire to address the complex criminality and societal problems that beset the nation, the legal system and the practitioners of social sciences are inevitably linked so that the knowledge base and expertise of one can collaborate with the other and vice versa.

The development of therapeutic jurisprudence became an imperative, each field having an impact on the other towards the creation of systemic processes to solve society's problems. The civil liberties accorded under the Bill of Rights are safeguards against the vast powers of government. Their existence and observance ensure individuals from the undue governmental interference and intervention. One of these privileges is the right against self-incrimination. In the cases of *U. S. v. Doe*, (465 U. S. 605) and *Doe v. U. S.* [487 U. S.

201, 209 (1988)], the Court enumerated the three (3) requisites that should be present for the Fifth Amendment to apply, namely: a) " that the statement be testimonial; b) incriminating; and, c) compelled. " However, in the case of *Baltimore City Department of Social Services v Bouknight*, the defendant was ordered incarcerated for refusing to disclose the whereabouts of her child who was believed to be abused. The Court ruled that the privilege is inapplicable considering that what was demanded of Bouknight was not testimonial in character.

Moreover, assuming that it was, the Court ruled that as between the individual right and public interest; the latter should prevail. The safety and well being of a child is a matter of public interest and therefore Bouknight can be compelled to disclose the necessary information. In the case of *Tarasoff v. Regents of University of California*, the Court ruled that a therapist/physician can breach his duty of confidentiality with respect to matters disclosed by his patient in the course of treatment by warning the readily identifiable person of the peril or harm to his life.

This duty to warn is countenanced by law or by the code of ethics of physicians. This ruling also serves as an exception to American negligence cases where special relationship of parties must be held to exist. *Baltimore City Department of Social Services v Bouknight*, 488 U. S. 1301 (1988) A three month old infant was admitted for treatment in a hospital. It became apparent that the mother, Jackie Bouknight may have maltreated the infant.

Consequently, the Department of Social Services (DSS) petitioned the Court to declare the child as a " child in need of assistance" and grant it the power to put the child under foster care (*Baltimore City Department of Social Services v Bouknight*, 488 U. S. 1301 (1988)). The Court granted relief and it was agreed upon by the parties that Bouknight shall have the custody of the child subject to the conditions of supervised parenting and an undertaking of non-infliction of bodily harm and punishment on the child. At first, Bouknight complied with the conditions but later on she became uncooperative and refused to produce her son to the DSS.

The DSS in fear for the safety and well being of the child filed a case before the Court to compel Bouknight to produce her son. She failed to appear

before the Court but was later on arrested. On her refusal to disclose the whereabouts of her son, she was found guilty of contempt and was ordered to be incarcerated until compliance with the order [In re Maurice, No. 50 (Dec. 19, 1988). 314 Md. 391, 550 A. 2d 1135]. On certiorari, the Court of Appeals of Maryland ruled that the incarceration of Bouknight was an infringement of her Fifth Amendment right against self incrimination.

According to the Court, the production of the son is testimonial in nature because by doing so, it only proves Bouknight's " continuing control" over her son which may be utilized in a criminal proceeding. It ruled that there are acts of production deemed to have testimonial value citing the case of U. S. vs. Doe (Baltimore City Department of Social Services v Bouknight, 488 U. S. 1301 (1988)). The U. S. Supreme Court granted the stay of DSS pending the filing of the requisite petition for certiorari.

The grant of stay was based on the fact that even assuming that the act of production of the child is testimonial in character, many line of decisions of the Court are clear that as between the public need vis-a-vis a single claim of an individual on constitutional privilege, the former is upheld. In this particular case, the safety and interests of the abused child must be upheld over Bouknight's assertion considering that, in the hierarchy of values, the safety and welfare of the child takes precedence over other concerns (Baltimore City Department of Social Services v Bouknight, 488 U.

S. 1301 (1988)). Moreover, the information sought which is the whereabouts of the child is for the contempt charge and therefore civil in nature (Baltimore City Department of Social Services v Bouknight, 488 U. S. 1301 (1988)). The Fifth Amendment: Right against Self-Incrimination The Fifth

Amendment originated from England and derived from the Latin maxim “ nemo tenetur seipsum accusare” meaning “ no man is bound to accuse himself” (Levy, 1968). It was used in both the accusatorial and inquisitorial legal systems of England (Levy, 1968). In the U.

S. , after the revolution the states ratified the Constitution with the inclusion of the privilege in the bill of rights. The original version of Madison was amended by the House to include “ in any criminal case” (Schwartz, 1971). Thus, as it now stands, the Fifth Amendment provides, “. . . nor shall be compelled in any criminal case to be a witness against himself . . . ” (U. S. Constitution, Bill of Rights). The primary purpose of its inclusion in the Bill of Rights is “ to protect the innocent and to further the search for truth” [Ullmann v.

United States, 350 U. S. 422 (1956)]. However, in subsequent line of decisions, the Court ruled that other privileges stated in the bill of Rights are more in the nature of adjuncts to the determination of truth such as the right to counsel or the safeguards afforded by the Fourth Amendment while the privilege against self-incrimination is primarily for “ the preservation of the accusatorial system of criminal justice. ” This maintains the integrity of the judicial system and protects the privacy of the individuals from government intrusion [Miranda v.

Arizona, 384 U. S. 436, 460 (1966); Schmerber v. California, 384 U. S. 757, 760-765 (1966); California v. Byers, 402 U. S. 424, 448-58 (1971)]. The privilege is a guarantee against compulsion for testimonial evidence which consequently will result in the imposition of criminal penalty on such person making testimony. The Court laid down the requirements necessary before a
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party can successfully invoke the protection of the privilege against self-incrimination. In the cases of *U. S. v. Doe*, (465 U. S. 605) and *Doe v. U. S.* [487 U. S.

201, 209 (1988)], the Court enumerated the three (3) requisites that should be present for the Fifth Amendment to apply, namely: a) “ that the statement be testimonial; b) incriminating; and, c) compelled. ” According to the court, ‘ testimonial’ refers to all communications whether express or implied which “ relate to a factual assertion or disclose information” (Ashby, J. , 2006 citing *Doe v. U. S.* , 487 U. S. 201). The statements or communications made whether verbally or in writing fall within the privilege (Ashby, J. , 2006) and is not limited by the forum where it was elicited, i. e.

before the court, administrative proceedings or before the law enforcement office [*Lefkowitz v. Turley*, 414 U. S. 70 (1973)]. The second requirement, ‘ incriminating’ refers to statements that can be used as a basis for a finding of criminal liability under a penal law or “ provides a link to the chain of evidence for prosecution under a criminal statute” [*United States v. Hubbell*, 530 U. S. 27 (2000)]. The third requisite is the compulsion to give a statement. The Court explained that this requisite refers to “ circumstances that deny the individual a free choice to admit, to deny, or to refuse to answer” (Ashby, J.

, 2006). Additionally, the Court ruled in the case of *Fisher v. United States* that these three requisites should all concur and be present so that the privilege can be successfully invoked [425 U. S. 391(1976)]. Legal and Ethical Issues and their Impact on Social Work Practice The main legal issue in the case of Baltimore is whether the circumstances surrounding it would

fall within the ambit of the privilege against self incrimination and consequently, Bouknight may successfully invoke it and prevent her from being compelled to produce or furnish the whereabouts of her son lest be incarcerated for contempt.

The Supreme Court allowed the stay of the decision of the appellate court for overturning the ruling of the juvenile court and in finding that the compulsion for Bouknight to produce her son squarely fell within the privilege and therefore ordered her release (Alderman and Kennedy, 1992). The appellate court found that the act of production is testimonial and therefore its compulsion, is a violation of the privilege. Furthermore, the interest of the government in the safety of the son cannot outweigh the observance and respect for the privilege against self incrimination as provided in the Bill of Rights (Alderman and Kennedy, 1992).

In other words, the three requisites concurred, i. e. the act of production or of furnishing information as to the whereabouts of her son are incriminating and testimonial in character; and, there was also compulsion because if she failed to disclose information sought she would be incarcerated for contempt as what had happened. The Supreme Court through Chief Justice Rehnquist predicated his discussion on three major points, namely: a) The Court of Appeals passed upon a controversy concerning the federal Constitution which logically can be properly resolved by the U. S.

Supreme Court (California v. Riegler, 449 U. S. 1319); b) The act of production does not fall within the ambit of the privilege citing the cases of U. S. v. Doe, Fisher v. U. S. and Schmerber v. California. In these cases, the court ruled that the act of production of the documents is not ' testimonial'

and therefore does not infringe upon the privilege considering that their existence and location are already known to the Government. In fact, responding to a subpoena have been considered legal and acceptable even if compulsion is present [Fisher v. United States, 425 U.

S. 391 (1976)]. Moreover, when an accused is required to furnish his handwriting sample, this had been held not to violate the privilege because it is not 'testimonial' but merely evidentiary United States v. Flanagan, 34 F. 3d 949 [10th Cir. 1994]). The third point c) is by using the balancing of interests test or balancing the public need vis-a-vis ensuring the individual's constitutional civil liberties, public need prevailed considering that the disclosure of information was non-criminal and not directed at a particular group as was held in the case of California v.

Byers, 402 U. S. 424 (1971) where the validity of a law requiring disclosure of the name and address at the scene of a vehicular accident. Similarly in the case of New York v. Quarles where the Fifth Amendment rights have to give way to a public safety exception and therefore in the case of Bouknight, "the public safety exception to the Fifth Amendment was justified because its interest was in protecting children like Maurice, not in prosecuting" (Alderman and Kennedy, 1992).

In sum, the privilege against self-incrimination is not an absolute right. Albeit the civil liberties accorded under the Bill of Rights safeguards undue government intervention and restraint to its power, there are instances when these rights would have to give way to compelling interests of the society that would warrant Government intervention and intrusion such in the case

of protecting and ensuring the safety of infants or children from physical abuse.

Once it has been established that a child is abused, it becomes the duty of the State to take over and protect. The judicial pronouncement in the case of Bouknight has a pervading and far reaching implication on social work practice. This gives the social workers a great burden and responsibility to follow up sharply abused children in foster care or those released under an order of protective supervision. Admittedly, there is an apparent lack of strict protocols in the present system of child welfare agencies (Parks, 2005).

A set of guidelines must be crafted to govern exigencies of missing children from foster care like supervised visits and court orders in cases of abduction like what have occurred in Maryland with " Ariel" who had been abducted by his mother Teresa B (Parks, 2005). Guidelines should also be drawn to address the coordinated efforts both with the law enforcement and child welfare personnel. *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425 A graduate student from India, Prosenjit Poddar went to the University of California Berkeley to study naval architecture.

It was there that he met Tatiana Tarasoff. A few kisses made him believe that they have a special relationship until Tarasoff bragged about her many relationships with other men. Poddar suffered depression until he sought professional help from Dr. Moore, a psychologist of the University Health Service. He confided to the doctor that he intended to secure a gun and to kill Tarasoff. On the strength of a letter request of Dr. Moore, Poddar was taken by the campus police, however upon assurance that Poddar was reasonable he was released.

Upon the return of the University Health psychiatrist from his vacation, he ordered the destruction of Dr. Moore's letter and did not recommend any further action on Poddar's case. When Tarasoff returned from her vacation, she was stabbed and killed by Poddar who at that time moved in with her brother already. The parents of Tarasoff sued the Regents of the University, its health personnel namely, Gold, Moore, Powelson, Yandell and the campus police namely, Atkinson, Beall, Brownrigg, Hallernan, and Teel for "failing to warn their daughter of an impending danger" (Tarasoff v.

Regents of University of California, 17 Cal. 3d 425). At the lower court, the complaint was dismissed because there was no cause of action. According to the lower court, the defendants only had the duty to the patient and not to a third party. The dismissal was appealed to the Appeals Court but which only sustained the dismissal. Thus, it was elevated to the Supreme Court of California. The appealed decision in so far as the university police officers, Atkinson, Beall, Brownrigg, Hallernan, and Teel finding them not liable to the plaintiffs was affirmed.

However, in so far as the therapists and the Regents of the university, the appealed decision was overturned for reception of evidence in accordance with the pronouncements of the Supreme Court (Tarasoff v. Regents of University of California, 17 Cal. 3d 425). In fine, the complainants averred four (4) causes of action, namely: a) "Failure to detain a dangerous patient; b) failure to warn on a dangerous patient; c) abandonment of a dangerous patient; and, d) breach of primary duty to patient and the public" (Tarasoff v.

Regents of University of California, 17 Cal. 3d 425). Asent the first and fourth causes of action, the Supreme Court ruled that the defendants cannot be

held liable because of a specific provision of the Government Code or Section 856 thereof which grants immunity to public employees from any resultant damage or injury from deciding whether or not to confine a person with mental ailment. This provision is also applicable to the therapists because the law also refers to those who are capable of recommending confinement.

As regards the third cause of action, the government immunity includes the “award of exemplary damages resulting from a wrongful death” and therefore, defendants cannot be held liable (*Tarasoff v. Regents of University of California*, 17 Cal. 3d 425). Anent the second cause of action, the Supreme Court found defendants therapists and Regents of the University to have failed to comply with their duty to warn Tarasoff of the peril to her life.

Albeit, the therapists had no direct relations with Tarasoff, they could have reasonably foreseen the danger and threat to her life as confided by their patient, Poddar. This is the point where the law establishes the duty of care on their part to warn Tarasoff. Their failure to warn her may reasonably be concluded as a proximate cause of her death. The duty of confidentiality between patient and psychotherapist and the right to privacy of the patient cannot prevail over public interest or public safety. Moreover, there are clear provisions of laws, i.

e. Section 1024 of the Evidence Code and Section 9 of the Principles of Medical Ethics of the American Medical Association which allows the physician to divulge matters confided to him in confidence when it is necessary for public welfare (*Tarasoff v. Regents of University of California*, 17 Cal. 3d 425). Confidentiality The effective therapeutic relationship between physician/psychiatrist and patient rests largely on trust that matters

confided by the patient during the treatment are kept in strictest confidence by the physician/psychiatrist.

It is the ethical duty of the physician to observe privacy and confidentiality of his patients (Corbin, 2007). While it is also of public interest to ensure that treatment of those who are mentally ill by maintaining an atmosphere whereby they can have an open dialogue with their therapist and of safeguarding its confidential character; the same public interest calls for an imperative recognition of instances whereby disclosure of the confidential communications be revealed and be made to safeguard public safety and avert the threatened peril.

In the instances, where the public safety is at risk, the therapist must disclose confidential information discreetly with due regard to protecting the privacy of his patient (Tarasoff v. Regents of University of California, 17 Cal. 3d 425). The parameters of confidentiality are defined by law and by the ethical code of conduct for practitioners in the territorial jurisdiction. In the case of Tarasoff, the Evidence Code and the Principles of Medical Ethics of the American Medical Association provided specific and limited exceptions under which the confidentiality privilege can be breached, i.

e. " if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger; unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community" (Tarasoff v. Regents of University of California, 17 Cal. 3d 425).

It would be wise for the practitioners to familiarize themselves of the limits of confidentiality as provided under the laws considering that it may differ from state to state. The Tarasoff case provided a basis to guide a practitioner in his professional dealings relative to the duty to warn others in cases of a specific threat of harm by his patient against others/another. Subsequent cases followed the consistent pattern of the jurisprudence laid down by the Supreme Court. In the case of David v.

Lhim (1983), the plaintiff-administrator of the estate sued the psychiatrist who treated the son who killed his mother after he was released from the hospital. There was failure on the part of the psychiatrist who treated the son to warn the mother of the potential danger after her son confided his intentions of killing her (Corbin, 2007). In another case, Chrite v. U. S. (2003), the Veterans Administration was held liable for having failed to warn the intended victim of a patient of a threatened harm.

Subsequent rulings of the court clarified and defined what constituted 'threat' as "imminent threat of serious danger to a readily identifiable victim" and "specific" (Corbin, 2007). When there are no specific provisions of the law, Dickson (1998) proposes that the therapist/practitioner may be protected against lawsuits if he would consult and keenly document the case of the patient or comply with the "mandated reporting guidelines" required by some states.

Reamer (2003) on the other hand, suggests that the therapist must have evidence that the patient is a threat to the safety of another; evidence of that the threat can be foreseen; threat is imminent and that the potential victim is identifiable. Legal and Ethical Implications and their Impact on

Social Work Practice The duty of reasonable care to assist others in danger is a legal duty as well as a moral duty. However, American negligence law only recognizes it as a moral duty except when there exists a relationship between parties.

In the case of Tarasoff, no special relationship existed between the therapist and Tarasoff; however the court has made an exception to this general rule (Bickel, 2001). It declared that the therapist has the duty to care and to warn Tarasoff of the imminent harm on her life. This also includes the duty to control the conduct of his patient, Poddar. In the same breath, a doctor has the duty to warn his patient if he has a contagious disease (Saltzman and Furman, 1999).

There is an affirmative duty for the therapist to advise and warn Tarasoff of the threat to her life although this meant breach of confidentiality with his patient Poddar. This finds basis both legally and ethically considering that the law and the code of ethics for doctors have recognized and provided specifically that doctors are bound to disclose relevant facts to others even if this violates confidentiality with their patients provided they are required by law or if it is required for public safety (Saltzman and Furman, 1999).

This legal duty to warn applies when the threat is specific and imminent and where the victim is "readily identifiable" (Bickel, 2001). The courts also have recognized the difficulty in assessing and predicting circumstances that may lead to harm or violence and consequently, adhered to the 'professional judgment rule' whereby the therapist is not held liable for errors of judgments. Liability attaches only upon showing that the conduct of the

therapist was not in accordance with the “ accepted professional standards” (Bickel, 2001).

There is an ambivalence that was created by the Tarasoff protective disclosure ruling with the practitioners (Kachigian and Felthous, 2004). Analogous cases and protective disclosure statutes in the different states were analyzed and it was discovered that there are no clear defined parameters of these duties. The therapist is required to a certain way betray his patient by disclosing matters which are protected by confidentiality.

Considering the uncertainty brought about by the legal doctrine and court decisions, the undesirable consequence of which was deterrence for therapists to accept “ treatment potentially violent patients” (Merton, 1982). Moreover, therapists are more inclined to have their patients committed in an institution so that threats to the safety of potential victims can be averted. The Tarasoff protective disclosure was even extended recently to include even “ communications made from a patient’sfamilymember” as pronounced by the Court in the case of Ewing v. Goldstein (May and Ohlschlager, 2008).

The dubious jurisprudential precedents by the courts in interpreting the protective disclosure statutes or its resort to common law instead of interpreting the statute left a vacuum in the definition of the duty to protect (Kachigian and Felthous, 2004). As a result, “ clinicians must continue to rely on their clinical and ethical judgment, rather than statutory guidance, when considering potential protective disclosures or future drafts of protective disclosure statutes” (Kachigian and Felthous, 2004). References Alderman, E. and Kennedy, C. (1992). In our defense: the bill of rights in action.

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First Avon Books edition. Ashby, J. (February 2006). Note declining to state a name in consideration of the fifth amendment's self-incrimination clause and law enforcement databases after Hiibel. *Michigan Law Review*, No. 4, Vol. 104: 779. *Baltimore City Department of Social Services v Bouknight*, 488 U. S. 1301 (1988). Bickel, R. Revisiting *Tarasoff v. Regents of University of California*: the scope of the psychotherapist's duty to control dangerous students. Presented before the 22nd Annual Law and higherEducationconference in Clearwater, Florida on 18-20 February 2001.

California v. Byers, 402 U. S. 424, 448-58 (1971). Corbin, J. (Fall 2007). Confidentiality and the duty to warn: Ethical and legal implications for the therapeutic relationship. *The New Social Worker*, Vol. 14, No. 4. Dickson, D. T. (1998). Confidentiality and privacy in social work. New York: The Free Press *Doe v. U. S.* , 487 U. S. 201, 209 (1988). *Fisher v. United States*, 425 U. S. 391 (1976). Kachigian, C. and Felthous, A. (September 2004). Court responses to *Tarasoff* statutes. *Journal of American Academy of Psychiatry and Law Online*, Vol. 23: 263-273.

Levy, L. (1968). Origins of the fifth amendment: The right against self-incrimination. May, S. and Ohlschlager, J. (2008). California alert! *Tarasoff* ruling expanded for clients who ' go off. ' *ECounseling*. American Association of Christian Counselors. Merton, V. (1982). Confidentiality and the dangerous patient: Implications of *Tarasoff* for Psychiatrists and lawyers. *Emory Law Journal*, Vol. 31: 265. *New York v. Quarles*, 476 U. S. 649 (1984). Parks, A. (2008). Unless the Court of Appeals decision is reversed, MD children may not be. *Daily Record The Baltimore*.

Reamer, F. (2003). *Social work malpractice and liability*. New York: Columbia University Press, 2nd ed. Saltzman, A. and Furman, D. (1999). *Law in social work practice*. Brooks Cole, 2nd edition. *Schmerber v. California*, 384 U. S. 757 (1966). Schwartz, B (December 1971). *The bill of rights: A documentary history*. Chelsea House Publishers with McGraw-Hill Education. *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425. *Ullmann v. United States*, 350 U. S. 422 (1956). *U. S. v. Doe*, 465 U. S. 605. *United States v. Hubbell*, 530 U. S. 27 (2000).