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Questions Unanswered: The Fifth Amendment and Innocent Witnesses

Angela Roxas

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QUESTIONS UNANSWERED: THE FIFTH AMENDMENT AND INNOCENT WITNESSES

Ohio v. Reiner, 532 U.S. 17 (2001).

I. INTRODUCTION

In *Ohio v. Reiner*,[1] the United States Supreme Court examined whether a witness who denies all culpability in a child's death may still exercise a valid Fifth Amendment privilege against self-incrimination.[2] The Supreme Court previously held that the Fifth Amendment privilege protects only those witnesses who have "reasonable cause to apprehend danger from a direct answer."[3] *Reiner* extends the application of this standard, questioning whether a witness who claims innocence to a crime could nonetheless have "reasonable cause" to fear that her testimony would expose her to a criminal charge.[4] The validity of the Fifth Amendment privilege was pertinent to the case, since the legitimacy of the prosecution's grant of witness immunity depended on whether the witness had the right to assert the privilege.[5] The United States Supreme Court reversed the Supreme Court of Ohio, concluding that a witness who asserts innocence may not be deprived the privilege against self-incrimination.[6] The Supreme Court based its holding, in part, on the notion that "one of the Fifth Amendment's 'basic functions . . . is to protect innocent men.'"[7]

This Note first argues that the Supreme Court provided inadequate analysis in its conclusion that an innocent witness may validly claim the Fifth Amendment privilege against self-incrimination. On the one hand, the Court expands the privilege, continuing the modern

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[1] 532 U.S. 17 (2001).
[2] *Id.*
[3] Mason v. United States, 244 U.S. 362, 365 (1917).
[4] 532 U.S. at 17.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 20 (quoting Grunewald v. United States, 353 U.S. 391, 424 (1957)).

trend in Fifth Amendment cases.[8] On the other hand, the Court relies principally on a policy rationale that the privilege against self–incrimination is to protect innocent men, a justification that scholars now believe is tenuous at best.[9] Not only is the Supreme Court's analysis ambiguous, the Court passed on the opportunity to address the more significant issue: how to justify the grant of immunity to an innocent witness.[10] Ultimately, the *Reiner* court provided a weak decision that leaves questions unanswered regarding the complexities of the Fifth Amendment in the context of innocent, non–defendant witnesses.

II. BACKGROUND – HISTORY OF THE FIFTH AMENDMENT

The Fifth Amendment of the United States Constitution provides, in pertinent part, that "no person . . . shall be compelled in any criminal case to be a witness against himself."[11] The First Congress proposed this language in the Bill of Rights to ensure that the new federal government would not interfere with a privilege against self–incrimination.[12] The establishment of an American privilege against self–incrimination, however, was the effect of an Anglo–American legal tradition traced back to the thirteenth century.[13]

The privilege first developed in English common law courts as a response to the inquisitorial modes of procedure used by the ecclesiastical courts, the Court of High Commission, and the Star Chamber.[14] These courts used the "oath ex officio" in prosecuting heretics who failed to conform their beliefs to the Church of England.[15] The oath forced heretics to swear before God to truthfully answer all

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[8] *See* MARK BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF–INCRIMINATION 88 (1980); *see also* LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 236 (1959).

[9] *See, e.g.*, BERGER, *supra* note 8, at 27–29; MAYERS, *supra* note 8, at 60–67; Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 27 U. CIN. L. REV. 671, 684–87 (1968); Robert B. McKay, *Self–Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 206–08 (1967); C. Dickerman Williams, *Problems of the Fifth Amendment*, 24 FORDHAM L. REV. 19, 26–30 (1955).

[10] The Court expressly stated that they did not "address the question whether immunity from suit under § 2945.44 was appropriate." *Reiner*, 532 U.S. at 17.

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

[12] BERGER, *supra* note 8, at 1.

[13] *Id.*

[14] Charles R. Nesson & Michael J. Leotta, *The Fifth Amendment Privilege Against Cross–Examination*, 85 GEO. L.J. 1627, 1632 (1997).

[15] *Id.*

questions before they even knew the crime of which they were accused or the identity of the accusers.[16] Since these non–conformists were helpless in redefining the substantive law that classified their activities as criminal, they looked to the common law courts for self–defense.[17] Common law lawyers found the oath "repugnant to their political values,"[18] and sought to prohibit the use of the oath by relying on the Latin maxim *nemo tenetur sepisum prodere* ("no man is bound to accuse himself").[19]

One of the most famous cases regarding the legality of the oath occurred in England in 1637.[20] John Lilburne was arrested for importing seditious books into England.[21] Upon questioning by the chief clerk to the attorney general about his knowledge of the seditious books, Lilburne ceased to cooperate.[22] Two weeks later, Lilburne was brought before the Star Chamber office and refused to take the oath ex officio.[23] He was held in contempt of court and imprisoned for two years.[24] In 1640, however, Parliament reconvened and Lilburne saw the opportunity to petition for his release.[25] Both houses of Parliament found that the Star Chamber illegally sentenced Lilburne.[26] In addition, a 1641 statute abolished the Court of High Commission and the Star Chamber altogether.[27] This statute finally abolished the oath ex officio, and the "right against compulsory self–incrimination was established" in the ecclesiastical courts.[28]

Lilburne was subsequently put on trial for treason, and again argued that there was no requirement that he answer questions about himself.[29] The court agreed, and as a result of this trial, "courts uniformly honored such refusals."[30] Moreover, a 1662 statute provided

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[16] *Id.*

[17] *Id.*

[18] Vincent Martin Bonventre, *Article: An Alternative to the Constitutional Privilege Against Self–Incrimination*, 49 BROOK. L. REV. 31, 36 (1982).

[19] Nesson & Leotta, *supra* note 14, at 1632–33.

[20] BERGER, *supra* note 8, at 14.

[21] *Id.* at 15.

[22] *Id.*

[23] *Id.* at 17.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 18.

[27] *Id.*

[28] LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 282 (1968).

[29] Bonventre, *supra* note 18, at 38.

[30] *Id.*

that "no one shall administer to any person whatsoever the oath usually called ex–officio, or any other oath, whereby such persons may be charged or compelled to confess any criminal matter."[31] Thus, the prohibition of the oath ex officio finally extended to the courts of law.[32]

It is unsurprising that English legal traditions were followed in America, as British subjects primarily settled most of the colonies.[33] Since the colonists felt they were subjected to British violations of common law, they determined that written constitutions were necessary to ensure their fundamental rights after the Revolutionary War.[34] Based on the resistance to the oath ex officio in England and the use of inquisitorial procedures in America, the privilege against self–incrimination was one issue recognized in the new constitutions.[35]

The constitutional convention in 1787 did not establish a bill of rights, and the convention adjourned prior to ratifying written protection for fundamental liberties.[36] Yet it became clear that a bill of rights was necessary to alleviate suspicions about the newly formed federal government.[37] After Congress assembled in 1789, James Madison took responsibility for such a document.[38] His first proposal regarding the right to silence "provided that no person 'shall be compelled to be a witness against himself.'"[39] An amendment in the House, however, limited the right to criminal matters and was then left unchanged by the Senate.[40] With relatively little debate, Congress included the self–incrimination privilege in the Bill of Rights.[41]

Almost twenty years later, Chief Justice Marshall wrote one of

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[31] *Id.*

[32] *Id.*

[33] BERGER, *supra* note 8, at 20.

[34] *Id.* at 22.

[35] The privilege against self–incrimination was included before 1789 in the constitutions or bill of rights of the following seven states: Virginia, Pennsylvania, Maryland, North Carolina, Vermont, Massachusetts and New Hampshire. Although New York, New Jersey, Georgia and South Carolina did not enact a separate bill of rights, freedom from self–incrimination recognized by the English common law was kept in force. Furthermore, the lack of a written constitution in Rhode Island and Connecticut did not necessarily imply that these states accepted compulsory self–incrimination. *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 23.

[39] *Id.*

[40] *Id.*

[41] *Id.*

the earliest interpretations of the Fifth Amendment during the trial of Aaron Burr.[42] In this case, Aaron Burr was tried for treason and a misdemeanor in preparing for a military mission against Mexico, a Spanish territory at peace with America.[43] Before the grand jury, Burr's secretary, Mr. Willie, was asked whether Aaron Burr instructed him to copy a certain paper.[44] He refused to answer, fearing his testimony would incriminate him.[45] The Chief Justice stated that if a direct answer may incriminate a witness, the witness must be the sole judge of what his answer would be.[46] He went on to find that the court could not participate with him in the judgment, because the court could not decide the effect of an answer without knowing what it would be.[47] This disclosure of the fact to the court would strip the witness of the privilege that the law allows.[48]

This literal explanation of the Fifth Amendment was unsatisfactory to many of the states and the federal government.[49] In the century after Burr's trial, many jurisdictions passed statutes providing witnesses immunity from prosecution in exchange for compelled testimony.[50] These statutes were based on the view that a witness could not be incriminating himself if given immunity from prosecution in connection to his testimony.[51] The Court first considered the constitutionality of one of these statutes in 1892.[52] In *Counselman v. Hitchcock*, the Court struck down an immunity statute, since the statute did not prevent the use of the witness's testimony "to search out other testimony to be used in evidence against him or his property."[53] Thus, the statute left the witness open to prosecution after answering incriminating questions, and therefore did not "supply a complete protection from all of the perils against which the constitutional prohibition was designed to guard."[54]

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[42] U.S. v. Burr, 25 F. Cas. 38, 40 (1807).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] RONALD J. ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 620 (2001).
[50] *Id.*
[51] *Id.*
[52] *See* Counselman v. Hitchcock, 142 U.S. 547 (1892).
[53] *Id.* at 564.
[54] *Id.* at 585–86.

When the Supreme Court reconsidered the issue, however, a sharply divided Court upheld a new statute compelling testimony in exchange for an immunity grant.[55] Although the holding of *Brown v. Walker* concerned the constitutionality of the immunity statute, the Court stated in dicta that the Fifth Amendment privilege against self–incrimination did not apply in certain classes of cases; therefore an immunity grant was not always necessary to compel testimony.[56] The Court explained that "[w]hen examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply."[57] The Court recognized that the protection afforded by the Fifth Amendment was confined to real danger.[58] Since *Brown*, the Fifth Amendment privilege is generally unavailable unless the witness's testimony could result in punishment.[59]

Two early twentieth–century United States Supreme Court decisions elaborate on this more restrictive view of the Fifth Amendment privilege.[60] In *Heike v. United States*,[61] a witness claimed that his grant of transactional immunity for prior testimony in an antitrust investigation of the sugar industry also covered allegations of revenue offenses against him for fraudulently weighing sugar.[62] The Court found that providing information in the antitrust case did not sufficiently risk incrimination regarding the fraud prosecution in order to be protected by the immunity grant.[63] Four years later, the Supreme Court continued to find exception to the privilege in *Mason v. United States*.[64] The Court adopted the language from an 1861 English case,[65] announcing that the privilege against self–incrimination was confined to circumstances where the witness had "reasonable cause to apprehend danger" from a direct answer in testifying.[66] Moreover,

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[55] *See* Brown v. Walker, 161 U.S. 591 (1896); ALLEN ET AL., *supra* note 49, at 622.
[56] *Brown*, 161 U.S. at 597.
[57] *Id.*
[58] *Id.* at 599–600.
[59] ALLEN ET AL., *supra* note 49, at 622.
[60] BERGER, *supra* note 8, at 86.
[61] 227 U.S. 131 (1913).
[62] *Id.* at 139–40.
[63] *Id.* at 143–44.
[64] 244 U.S. 362 (1917).
[65] Regina v. Boyes, 121 Eng. Rep. 730 (1861).
[66] *Mason*, 244 U.S. at 365–66.

the danger had to be "real and appreciable," rather than "a danger of an imaginary and unsubstantial character . . . so improbable that no reasonable man would suffer it to influence his conduct."[67]

Beginning in 1950, however, a series of cases construing the incrimination danger requirement resulted in a marked change from the Supreme Court's earlier decisions.[68] Indeed, in this period, the Court "expanded the privilege beyond all previous precedent."[69] In *Blau v. United States*,[70] a witness refused to answer questions about the Communist party. In finding a valid claim to the privilege, the Court recognized that the Fifth Amendment protects responses which would "furnish a link in the chain of evidence needed" to prosecute the witness.[71] The next year in *Hoffman v. United States*,[72] the Court again upheld the assertion of the privilege by a witness called before a federal grand jury investigating frauds against the government, including violations of customs, narcotics, and liquor laws. The questions posed to Hoffman involved his relationship to another witness who had failed to appear before the grand jury.[73] Hoffman asserted his privilege against self–incrimination.[74] In finding that Hoffman validly claimed the privilege, the Court concluded that Hoffman could reasonably fear danger of prosecution of federal offenses.[75] The facts that Hoffman had a twenty–year police record, that he was publicly declared an "underworld character and racketeer," and that the government had placed his name on a list of known gangsters were pertinent to the Court's decision.[76] The Court stated that the lower courts should have recognized that "the chief occupation of some persons involves evasion of criminal laws," and that "one person with a police record summoned to testify before a grand jury investigating the rackets might be hiding or helping to hide another person of questionable repute sought as a witness."[77] Based on Hoffman's history of crime and reputation, the Court found his responses could "forge

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[67] *Id.*
[68] BERGER, *supra* note 8, at 87.
[69] MAYERS, *supra* note 8, at 236.
[70] 340 U.S. 159 (1950).
[71] *Id.* at 161.
[72] 341 U.S. 479, 481, 490 (1951).
[73] *Id.* at 481.
[74] *Id.* at 482.
[75] *Id.* at 490.
[76] *Id.* at 489.
[77] *Id.* at 487–88.

links in a chain of facts" that could lead to conviction.[78]

Shortly thereafter, a second witness was called before the same grand jury, and claimed the Fifth Amendment in refusing to name the business in which he used a certain telephone number or disclose his acquaintance with individuals in the numbers racket.[79] The only danger of self–incrimination the witness's attorney could suggest was that his answers could lead to subsequent investigations that in turn could reveal that he was a business owner who employed individuals in the numbers business, and that he willfully failed to withhold part of their wages for income and social security tax purposes, which could lead to federal criminal prosecution.[80] The appellate court believed the relationship between the questions by the grand jury and violations of income tax and security laws were too remote to find a reasonable danger of conviction.[81] The Supreme Court, nevertheless, found that the witness correctly asserted his Fifth Amendment privilege, merely referring to its decision in *Hoffman*.[82]

The Supreme Court further extended the protections of the Fifth Amendment in *Malloy v. Hogan*.[83] In this case, police arrested Malloy in the course of a gambling raid.[84] He pled guilty to "the crime of pool selling," and was sentenced to a year in jail and fined $500.[85] Sixteen months later, Malloy was called to testify before the Superior Court of Hartford County for his knowledge about gambling, activities of which he was already tried and could not risk further incrimination.[86] He asserted his Fifth Amendment privilege on the grounds that his answers to questions would tend to incriminate him.[87] The Court cited the standard articulated in *Hoffmann*: "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."[88] The Court held that Malloy

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[78] *Id.* at 488.
[79] Greenberg v. United States, 343 U.S. 918 (1951).
[80] *Id.*
[81] United States v. Greenberg, 187 F.2d 35, 40 (1951).
[82] *Greenberg*, 343 U.S. at 918.
[83] 378 U.S. 1 (1964).
[84] *Id.* at 3.
[85] *Id.*
[86] *Id.* at 12–13.
[87] *Id.* at 3.
[88] *Id.* (citing Hoffman v. United States, 341 U.S. 479, 486–87 (1951)).

properly invoked the privilege, and noted that the lower courts failed to "take sufficient account of the setting in which the questions were asked."[89] The setting involved the county's search for the identity of the person who ran the pool–selling operation for which Malloy was arrested.[90] Malloy's answers could not tend to incriminate him due to the defense of double jeopardy.[91] However, the Court found that if the identity of the gambling operator was revealed, Malloy's answers could connect Malloy to a "more recent crime for which he might still be prosecuted."[92] The result was practically a reversal of the stance taken in *Mason* and *Heike*.[93]

III. FACTUAL AND PROCEDURAL HISTORY

A. STATEMENT OF THE FACTS

On June 15, 1995, Matthew Reiner, the respondent, and his wife Deborah became parents to healthy twin boys, Alex and Derek.[94] After the birth of the twins, both parents took a leave of absence from work to care for their children.[95] The couple then hired a twenty–four year old nanny, Susan Batt, who began working under Deborah's supervision while Batt became acclimated to the family.[96] Deborah spent the majority of her time at home throughout the first week of Batt's employment.[97] In the last two weeks, prior to going back to work, however, Deborah left Batt alone with the twins.[98] By August 14, 1995, Batt became the exclusive childcare provider.[99]

During the week of August 20th, Deborah took Alex to a doctor for an illness.[100] He remained sick throughout the week.[101] When Deborah returned home from work the following Monday, Batt re-

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[89] *Id.* at 13.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] BERGER, *supra* note 8, at 88.
[94] Ohio v. Reiner, No. L–97–1002, 1998 Ohio App. LEXIS 6025, at *1.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*

ported that Alex had eaten well and slept for two five–hour periods.[102] Batt then left the Reiner household.[103] Concerned that Alex had slept so long, Deborah called a physician.[104] The physician directed her to examine Alex and the examination revealed nothing unusual.[105]

The respondent came home that night after Batt had already left the Reiner home.[106] Alex again vomited before the respondent put both twins to bed.[107] According to the respondent, Alex was whimpering when the respondent was going to bed.[108] Volunteering to comfort the child, the respondent took Alex to a downstairs room and put Alex face down on his chest.[109] About thirty minutes later, Alex's breathing became strained and he became unresponsive.[110] The respondent then took the child upstairs, awakened his wife and called 911.[111]

When the EMTs arrived at the Reiner home, they found Alex without a pulse or respiration and with blue skin.[112] They took him to a nearby hospital and placed him on a respirator.[113] Two days later, Alex was declared brain dead and removed from life support.[114]

An autopsy showed retinal hemorrhages in both eyes, extensive sub–dural and sub–arachnoid bleeding, and massive brain swelling.[115] The coroner also discovered evidence of an earlier cerebral hemorrhage.[116] The doctor concluded that Alex suffered from "shaken baby syndrome" – the result of child abuse.[117] He set the time of injury as the evening of Monday, August 28, 1995.[118] He also estimated that Alex was shaken within no more than three hours of his respiratory arrest and, in all likelihood, within minutes of the onset of the ar-

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[102] *Id.* at *2.
[103] *Id.*
[104] *Id.* at *3.
[105] *Id.*
[106] Ohio v. Reiner, 731 N.E.2d 662, 667 (Ohio, 2000).
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] Ohio v. Reiner, No. L–97–1002, 1998 Ohio App. LEXIS 6025, at *5.
[116] *Id.*
[117] *Id.*
[118] *Id.*

rest.[119]

On the coroner's testimony and the respondent's admission, the respondent was alone with Alex during the critical time.[120] A Lucas County Grand Jury indicted the respondent on a single count of involuntary manslaughter.[121] The respondent pled not guilty and the matter proceeded to a jury trial.[122]

B. PROCEDURAL HISTORY

1. Trial

At trial, the defense theory was that Susan Batt, rather than the respondent, was the culpable party.[123] The defense relied on medical testimony contradicting the coroner's opinion concerning the timing of the injury, indicating that the injury could have occurred while Alex was in the care of Batt.[124] Furthermore, the defense presented evidence that the Reiner children were all healthy from birth until August 11, 1995, after Batt became their nanny.[125] X–rays taken on August 29, 1995 indicated that Alex had a broken rib and a broken leg.[126] X–rays of Derek showed that he suffered from three broken ribs.[127] In addition, Deborah Reiner testified that her other child- had no medical problems from the time of Alex's death until the trial, after Batt left the Reiner household.[128]

Batt's attorney told the court in advance of her testifying that she intended to assert her Fifth Amendment privilege against self–incrimination, and that she would refuse to answer questions.[129] She had previously declined to testify at prior related juvenile hearings on grounds that she might incriminate herself.[130] Batt's attorney explained that, although Batt was not the target of a criminal investigation, "she had been with the victim within the potential time frame of

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[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] Ohio v. Reiner, 731 N.E.2d 662, 667 (Ohio, 2000).
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.* at 674.
[130] *Id.*

the fatal trauma, she was the focus of the defense, and she did not know the identity of defense witnesses who may be called to inculpate her."[131] Batt would only testify if granted "complete and absolute immunity."[132]

The prosecution was initially confused as to why Batt refused to testify.[133] Batt had explained to the Children's Services Board that she had no involvement with the victim's injuries, and her counsel did not indicate that her testimony would incriminate her.[134] The prosecution notified the trial court that it had no intention of prosecuting Batt.[135] They were not investigating her and there was insufficient evidence to present to the grand jury.[136] The prosecution informed the court, "I don't know how in the interest of justice I can request immunity for this witness because it doesn't seem to me that she in any way has anything to assert the Fifth Amendment privilege to protect herself, or I'm unaware of anything."[137] When it became clear that Batt would not testify, however, the prosecution agreed to consider a request that the court grant Batt "transactional immunity, rather than request that the court use its contempt powers to force a reluctant witness to testify."[138]

After Batt invoked her Fifth Amendment privilege at trial, the prosecution requested that the court grant her transactional immunity pursuant to the Ohio Revised Code 2945.44.[139] The court subse-

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[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* A trial court's authority to grant immunity in Ohio is "derived solely from statute." State *ex rel.* Leis v. Outcalt, 438 N.E.2d 443, 446 (Ohio, 1982).

[139] Section 2945.44 of the Ohio Revised Code provides, in pertinent part:

> (A) If a witness refuses to answer or produce information on the basis of his privilege against self-incrimination, the court of common pleas of the county in which the proceeding is being held, unless it finds that to do so would not further the administration of justice, shall compel the witness to answer or produce the information, if both of the following apply:
>
> (1) The prosecuting attorney of the county in which the proceedings are being held makes a written request to the court of common pleas to order the witness to answer or produce the information, notwithstanding his claim of privilege;
>
> (2) The court of common pleas informs the witness that by answering, or producing the information he will receive immunity under division (B) of this section.
>
> (B) If, but for this section, the witness would have been privileged to withhold an answer or any

quently conducted a hearing to determine whether the grant of immunity would "further the administration of justice."[140] The court failed to address the prosecution's earlier remarks that Batt had no reason to assert the Fifth Amendment privilege, other than her fear of Mr. Reiner's defense.[141] The court nonetheless decided that it would be in the "interests of justice" to compel Batt to testify, and it granted her immunity.[142]

Under such immunity, Batt denied any involvement with Alex Reiner's death.[143] She also stated that she had initially refused to testify without immunity based on advice of counsel, even though she did nothing wrong.[144] Furthermore, she attested to the fact that she had never shaken Alex or Derek, and more specifically, never shook Alex on the day he suffered respiratory arrest.[145] She finally remarked that she was unaware of and had no involvement with the other injuries to either child.[146]

The jury found the respondent guilty as charged.[147] The trial court denied the defense's motion for judgment of acquittal or a new trial.[148] The court sentenced the respondent to incarceration of five to twenty–five years.[149] However, the court suspended the sentence and placed the respondent on five years probation.[150]

2. *Ohio Court of Appeals*

The respondent appealed his conviction, setting forth nine as-

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information given in any criminal proceeding, and he complies with an order under division (A) of this section compelling him to give an answer or produce any information, he shall not be prosecuted or subjected to any criminal penalty in the courts of this state for or on account of any transaction or matter concerning which, in compliance with the order he gave an answer or produced any information.

OHIO REV. CODE ANN. § 2945.44 (Anderson 2003).

[140] *Reiner*, 731 N.E.2d at 674.

[141] *Id.*

[142] *Id.*

[143] Ohio v. Reiner, 532 U.S. 17 (2001).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] Ohio v. Reiner, No. L–97–1002, 1998 Ohio App. LEXIS 6025, at *6.

[148] *Id.*

[149] *Id.*

[150] *Id.*

signments of error, including the fact that: "the trial court committed prejudicial error by granting immunity to a witness who had no claim of Fifth Amendment privilege because her self–exonerating testimony would not tend to incriminate her."[152]

The court of appeals initially agreed with the respondent that under section 2945.44 of the Ohio Revised Code, a grant of immunity first demands a threshold determination as to whether the claim of a Fifth Amendment privilege against self–incrimination is valid.[153] The court also agreed that a trial court must make some determination of the validity of the privilege, since the witness's claim alone is not adequate.[154] However, the defense argued that no valid privilege existed at all for Batt because a privilege was only available if the "witness ha[d] a real and appreciable fear of incrimination and prosecution."[155] The court disagreed that the determination of the validity of the privilege had to result from a formal procedure.[156]

The court relied on *Hoffman*, which held that it is "sufficient if the record contains information by which the trial court could conclude that it did not clearly appear that the witness was mistaken in claiming the Fifth Amendment privilege."[157] Under this test, the trial court determined that the following facts were relevant in the analy-

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[152] *Id.* The respondent's other assignments of error included the following:

> 1) The verdict is contrary to the evidence's manifest weight . . . 3) The trial court committed prejudicial error by not granting defendant's motion for new trial on the ground of prosecutorial misconduct involving the State's improper request for immunity for Susan Batt to procure her testimony, despite the prosecutor's knowledge that Batt was not entitled to such immunity, 4) The trial court committed prejudicial error by refusing to strike the opinions about axonal shearing being the mechanism that caused the respiratory arrest and eventual death of Alex Reiner, 5) The trial court committed prejudicial [sic] failing to permit the defendant to prove the fact and content of the prior inconsistent statement of the Lucas County Coroner during his grand jury testimony, 6) The trial court committed prejudicial error in refusing to strike the opinion of the State's expert witness Dr. Elizabeth K. Balraj M.D. whose opinion regarding a causative event was expressed in terms of mere possibility, no probability, 7) The court committed reversible error in refusing to give the instruction proposed by the defense on the permissible inference to be drawn from Susan Batt's silence in the face of an accusation of guilt, 8) The trial court committed prejudicial error in refusing to grant defendant's motion for judgment of acquittal at the close of the State's case–in–chief, and 9) The trial court committed prejudicial error by not granting defendant's motion for a new trial on the ground of juror misconduct.

Id. at *6–8.

[153] *Id.* at *10–11.

[154] *Id.*

[155] *Id.* at *10.

[156] *Id.* at *11.

[157] *Id.* (quoting Hoffman v. United States, 341 U.S. 479, 490 (1951)).

sis: the defense theory blamed Batt for Alex's death, the court had no knowledge of what evidence the defense would present implicating Batt, and it was uncertain what inculpatory statements Batt would make under cross–examination.[158] Based on these circumstances, the court of appeals concluded that at the time of the trial court's decision, it did not clearly appear that Batt's assertion of the privilege against self–incrimination was mistaken.[159] Thus, the court of appeals affirmed the trial court's decision with respect to this issue.[160] However, the appellate court ultimately reversed the district court based on a matter involving allegations of juror misconduct.[161]

3. Supreme Court of Ohio

The State of Ohio appealed the decision of the court of appeals to reverse the trial court on the juror misconduct issue.[162] The respondent cross–appealed to, among other things, challenge the validity of the transactional immunity granted to Batt.[163]

The Supreme Court of Ohio reversed the appellate court decision to grant Batt transactional immunity.[164] The court asserted that a grant of immunity is not necessary when a witness disclaims all culpability.[165] It further stated that "in situations where an admission of guilt by one person would completely exonerate any possible guilt of another person, as is the case here, a grant of immunity is unnecessary and improper."[166] The court reasoned that granting immunity in such a situation may allow the guilty party to go free, which would not "further the administration of justice."[167]

The Supreme Court of Ohio found that the trial judge improperly granted immunity.[168] Since the prosecution admitted that it had no intention of prosecuting Batt, the court then believed that the trial judge had a duty to inquire into Batt's assertion of the privilege and

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[158] *Id.* at *12.
[159] *Id.*
[160] *Id.*
[161] *Id.* at *34.
[162] Ohio v. Reiner, 731 N.E.2d 662, 670 (Ohio, 2000).
[163] *Id.*
[164] *Id.*
[165] *Id.* at 674.
[166] *Id.*
[167] *Id.*
[168] *Id.* at 676.

whether her testimony would be self–incriminating.[169] Instead, the court concluded that the trial judge relied only on Batt's claim of privilege and disregarded the questions and concerns voiced by the prosecution.[170]

In its analysis, the Ohio Supreme Court first agreed with the respondent that prior to a grant of immunity to a witness, it is implicit that the person validly asserted the privilege against self–incrimination.[171] The court dismissed the appellate court's focus on circumstances that would lead the trial court to believe that Batt was not clearly mistaken in asserting her Fifth Amendment right.[172] The court stated that again, these were merely Batt's assertions.[173] The court pointed out that the court of appeals failed to consider the prosecutors' statements or the fact that Batt denied any involvement in Alex's injuries when questioned by the Children's Services Board.[174]

The Supreme Court of Ohio's second point was that a "wrongful grant of immunity resulted in serious prejudice to the defendant."[175] Since the defense theory was that Batt caused Alex's death, the grant of immunity in effect told the jury that Batt was not responsible for Alex's injuries.[176] The court concluded that the jury should have heard and evaluated all the evidence to determine whether someone other than the respondent caused Alex's death.[177]

The court next dismissed the State's argument that a defendant lacks standing to challenge a grant of immunity since this assumed that the immunity met the statutory threshold of a valid Fifth Amendment privilege.[178] Finally, the court rejected the State's argument that the respondent did not preserve any error for appeal because of a failure to object to the grant of immunity.[179] The defense adequately objected at the trial court's hearing on whether the grant

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[169] *Id.* at 675.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.* at 675.

of immunity would "further the administration of justice."[180]

Justice Cook dissented in the majority's reversal of the grant of immunity to Batt.[181] He first argued that the majority applied an inapposite test for reasonable cause when it decided that Batt's testimony "did not incriminate her because she had denied any involvement in the abuse."[182] He also cited *Hoffman*, stating that the privilege also extends to answers that furnished a "link in the chain of evidence needed to prosecute the claimant."[183] He also disagreed with the majority's argument regarding prejudice to Mr. Reiner because a trial court's decision to grant or deny immunity is reviewable only for an abuse of discretion.[184]

The United States Supreme Court then granted the State of Ohio's petition for writ of certiorari to review the judgment of reversal by the Supreme Court of Ohio.[185]

IV. SUMMARY OF THE OPINION

In a per curiam decision, the United States Supreme Court reversed the Supreme Court of Ohio's holding that a witness who denies all culpability does not have a valid Fifth Amendment privilege against self–incrimination.[186] The Court first recalled the facts and procedural history of the case.[187] It then reiterated the Supreme Court of Ohio's reasoning in its decision, noting that the Supreme Court of Ohio recognized that the Fifth Amendment privilege applies where a witness's answer "could reasonably 'furnish a link in the chain of evidence' against him."[188] The Court further acknowledged that precedent requires the trial court to determine whether a witness may validly assert the privilege against self–incrimination, and to order the witness to answer questions if the witness is misguided regarding the danger of incrimination.[189] The Court next recalled that the Supreme Court of Ohio faulted the trial judge for his failure to question

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[180] *Id.* at 675–76.
[181] *Id.* at 679 (Cook, J., dissenting).
[182] *Id.* (Cook, J., dissenting).
[183] *Id.* (Cook, J., dissenting).
[184] *Id.* at 680 (Cook, J., dissenting).
[185] Ohio v. Reiner, 532 U.S. 17 (2001).
[186] *Id.* at 18.
[187] *Id.* at 18–20.
[188] *Id.* at 19 (quoting Ohio v. Reiner, 731 N.E.2d 662, 673 (Ohio, 2000)).
[189] *Id.*

sufficiently Batt's assertion of the Fifth Amendment privilege.[190] The Court noted the facts the Supreme Court of Ohio relied upon, including the prosecutor's statement that Batt's testimony would not incriminate her, and Batt's denial of any role in Alex's abuse when questioned by the Children's Services.[191] Finally, the Court restated the Supreme Court of Ohio's holding, that Batt's "testimony did not incriminate her, because she denied *any* involvement in the abuse. Thus she did not have a valid Fifth Amendment privilege."[192]

Before rejecting the Supreme Court of Ohio's conclusion, the United States Supreme Court addressed the issue of its jurisdiction over the case.[193] Based on prior Supreme Court precedent, the Court has "jurisdiction over a state–court judgment that rests, as a threshold matter, on a determination of federal law."[194]

The Court next analyzed the Fifth Amendment privilege against self–incrimination.[195] It agreed with the Supreme Court of Ohio that the privilege extends not only "to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant."[196] The Court also acknowledged that in past cases it had held that the privilege extends only to witnesses who have "reasonable cause to apprehend danger from a direct answer."[197] It further pointed out that the inquiry is for the court since the witness's assertion does not by itself establish the risk of incrimination.[198] Citing *Mason*, the Court stated that a danger of "imaginary and unsubstantial character" will not suffice.[199]

However, the Court disagreed with the Supreme Court of Ohio's holding because the Court had never held that the privilege was unavailable to those who claim innocence.[200] The Court cited *Grunewald v. United States*,[201] where it emphasized that one of the Fifth

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[190] *Id.*
[191] *Id.*
[192] *Id.* at 19–20.
[193] *Id.* at 20.
[194] *Id.*
[195] *Id.* at 20–22.
[196] *Id.* at 20.
[197] *Id.* at 21.
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] 353 U.S. 391 (1957).

Amendment's "basic functions is to protect innocent men who otherwise might be ensnared in ambiguous consequences."[202] The Court felt that the Supreme Court of Ohio's decision conflicted with *Hoffman* and *Grunewald*.[203] It looked to several facts to conclude that Batt had "reasonable cause" to apprehend danger from her answers if questioned at Reiner's trial.[204] It listed the facts that Batt spent extended periods of time alone with Alex, she was with Alex within the potential time frame of the trauma, and the defense's theory that Batt was responsible, as evidence of Batt's reasonable fear that answers to questions might tend to incriminate her.[205]

Finally, the Court noted that it did not address whether the immunity from suit under section 2945.44 of the Ohio Revised Code was appropriate.[206] Since the Supreme Court of Ohio erroneously held that Batt's assertion of innocence deprived her of the Fifth Amendment privilege against self–incrimination, the peition for writ of certiorari was granted, the Supreme Court of Ohio's judgment was reversed, and the case was remanded for further proceedings.[207]

V. ANALYSIS

In *Reiner,* the United States Supreme Court provided inadequate analysis in determining that a witness who disclaims all liability for a child's death may still validly assert her Fifth Amendment privilege against self–incrimination. Although the Court's holding follows case precedent, continuing the ongoing expansion of the privilege,[208] the Court's principal argument is based on a policy rationale that the privilege against self–incrimination is to protect innocent men, a justification that scholars now believe is tenuous at best.[209] Not only does the Court provide ambiguous analysis, it failed to even address the more significant issue: how to justify the grant of immunity to an innocent, non–defendant witness. Thus, the *Reiner* Court provided a weak decision that leaves questions unanswered regarding the complexities of the Fifth Amendment in the context of innocent witnesses.

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[202] *Reiner*, 532 U.S. at 21 (quoting *Grunewald*, 353 U.S. at 421).
[203] *Id.*
[204] *Id.*
[205] *Id.* at 21–22.
[206] *Id.* at 22.
[207] *Id.*
[208] *See supra* note 8 and accompanying text.
[209] *See supra* note 9 and accompanying text.

A. MODERN TREND

This section demonstrates that the Supreme Court's conclusion in *Ohio v. Reiner* follows prior decisions, continuing the expansion in claims of incrimination.[210] In *Hoffman*, the Supreme Court noted that the privilege against self–incrimination not only applies to witness's responses to questions that would in themselves sustain a conviction, but also applies to answers which would "furnish a link in the chain of evidence needed to prosecute" the witness.[211] The Court qualified the privilege, however, in stating that the "protection must be confined to instances where the witness ha[d] reasonable cause to apprehend danger from a direct answer."[212] In *Hoffman,* the Court concluded that based on the witness's history of crime and his reputation as a gangster, he could reasonably fear that his responses to questions would forge links in a chain of facts which could lead to his conviction.[213] Similarly, the Court in *Greenberg* held that the witness validly asserted his Fifth Amendment privilege.[214] In that case, the Court reasoned that the witness could reasonably apprehend danger from answering questions regarding the numbers racket, since these answers could connect him with a failure to withhold his employees' wages for income and social security tax purposes.[215] Finally, in *Malloy v. Hogan*, a witness was called to testify regarding gambling activities, for which he was already tried and faced no further prosecution.[216] The Court upheld the witness's Fifth Amendment privilege, however, by taking into account "the setting in which the questions were asked."[217] Since the man in charge of the gambling operation was still at large, the witness's answers could connect him to a more recent crime for which he could still be prosecuted.[218]

Consistent with these cases, the Supreme Court held in *Reiner* that Ms. Batt properly asserted her Fifth Amendment privilege.[219] Even though Ms. Batt did not have a history or reputation of child

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[210] BERGER, *supra* note 8, at 88; *see* MAYERS, *supra* note 8, at 236.

[211] Hoffman v. United States, 341 U.S. 479, 485 (1951) (citing Blau v. United States, 340 U.S. 159, 161 (1950)).

[212] *Id.* (citing Mason v. United States, 244 U.S. 362, 365 (1917)).

[213] *Id.* at 489–90.

[214] Greenberg v. United States, 343 U.S. 918 (1951)

[215] *Id.*

[216] 378 U.S. 1, 12–13 (1964).

[217] *Id.* at 13.

[218] *Id.*

[219] Ohio v. Reiner, 532 U.S. 17 (2001).

abuse, her answers could provide a link in the chain of evidence needed to prosecute her for the child's death.[220] Following *Hoffman*, she consequently had reasonable cause to apprehend danger of conviction. After the *Hoffman* and *Greenberg* cases, a federal appellate court interpreted the circumstances under which the Supreme Court would find a "link in the chain" of evidence:

> It is enough (1) that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime . . . and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. It is in this latter connection, the credibility of the suggested connecting chain . . . may be significant. Finally, in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection incrimination may be approached and achieved by obscure and unlikely lines of inquiry.[221]

It would seem then, that any plausible connection to a crime would suffice for a finding of reasonable fear of prosecution.[222] As long as the suggested chain of events was credible, such as the connection between the numbers racket and violations of the tax and social security laws, a witness may avoid answering questions by invoking the Fifth Amendment.[223] In the same vein, the court in *Reiner* noted that Ms. Batt was alone with Alex for lengthy periods of time and that she was with Alex within the possible timeframe of the trauma.[224] Regardless of Ms. Batt's claim of innocence, these facts seemed to sufficiently link Ms. Batt to the child's death for the Court. Moreover, her ties to the crime were more directly connected than the ones demonstrated in *Greenberg*, where the Court still upheld the witness's Fifth Amendment privilege.[225] Finally, the conclusion in *Reiner* is consistent with the *Malloy* decision. In *Malloy*, the Court looked to the setting in which the questions were asked in determining that an injurious disclosure could result.[226] Similarly, the Court

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[220] *Id.*

[221] United States v. Coffey, 198 F.2d 438, 440 (1952).

[222] *See* Wollam v. United States, 244 F.2d 212 (1957) (stating that disclosure of address could lead to incrimination); United States v. Courtney, 236 F.2d 921 (1956) (finding a connection between payments in an extortion charge and failure to report payments to the Internal Revenue Service).

[223] Greenberg v. United States, 343 U.S. 918 (1951)

[224] *Reiner*, 532 U.S. at 17.

[225] *Greenberg*, 343 U.S. at 918.

[226] Malloy v. Hogan, 378 U.S. 1, 13 (1964).

addressed the setting that Ms. Batt faced.[227] Since the defense's theory was that Ms. Batt was responsible for Alex's death and his twin brother's other injuries, it was evident that answers to questions in this setting might be dangerous.[228] Based on Ms. Batt's reasonable cause to fear prosecution by answering, the Court found that she validly invoked the privilege against self–incrimination.[229] Thus, in line with case precedent, the Court extended the Fifth Amendment privilege to an innocent witness.

The significant distinction between the prior cases and *Reiner*, however, is that the witnesses in the prior cases were guilty of crimes. In contrast, Ms. Batt in the Reiner case maintained innocence throughout the entire judicial process.[230] The Court disposes of this distinction by relying on the policy that "one of the Fifth Amendment's basic functions is to protect innocent men."[231] This rationale, nevertheless, has been criticized by scholars and was expressly disclaimed by the Supreme Court itself.[232] The Court fails to address this point, and perhaps more importantly, fails to consider how to rationalize the grant of immunity to an innocent witness. We turn to a discussion of the policy justifications for the Fifth Amendment in the next section.

B. AN INVALID POLICY JUSTIFICATION

The Supreme Court's principal argument for upholding Ms. Batt's privilege against self–incrimination in *Reiner* is based on a policy that scholars argue is improper.[233] There is no consensus regarding the policy of the privilege, in part because it serves many purposes in different settings.[234] Nevertheless, the Court recognized in the past that one of the goals of the Fifth Amendment privilege is the protection of innocent individuals from unjust prosecution.[235] In adhering to this view in *Reiner*, the Court only cited cases that refer to former Harvard Dean Erwin Griswold's book[236] as support for this

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[227] *Reiner*, 532 U.S. at 17.
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *See supra* note 9.
[233] *See supra* note 9.
[234] 8 J. WIGMORE, EVIDENCE § 2251, at 296 (1961).
[235] BERGER, *supra* note 8, at 27.
[236] ERWIN N. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955).

position.[237] This section will first address the hypothetical posed by Griswold and the context in which he developed this rationale. It will then examine the arguments why this policy justification has since been "criticized by commentators" and "qualified by Dean Griswold himself."[238]

1. Dean Griswold's Hypothetical

In 1955, Dean Griswold published a speech he delivered to the Massachusetts Bar Association on February 5, 1954.[239] He effectively argued that a witness may criminally damage himself when forced to answer questions, even though he may not have committed a criminal offense.[240] His argument was aimed at House Un–American Activities Committee's effort to identify communist associations.[241] Even though the purpose was to gather information to aid in enacting legislation, the effect of the investigations was to humiliate and isolate those with communist ties.[242] Americans were not as concerned with whether these investigations were unnecessarily abusive as they were with the number of witnesses who claimed innocence yet invoked their Fifth Amendment privilege against self–incrimination.[243] A question arose as to what people feared if they were innocent.[244]

Dean Griswold touched upon this question in his speech of 1954.[245] He clearly stated his position that "another purpose of the Fifth Amendment is to protect the innocent."[246] He posed the following hypothetical: A college professor does not find what he's looking for in the established political parties so he enters the Communist party.[247] He later drifts away from the group during the time of the

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[237] *Reiner*, 531 U.S. at 19 (citing Grunewald v. United States, 353 U.S. 391, 421 (1957); Slochower v. Board of Higher Ed. Of City of N.Y., 350 U.S. 551, 557–58 (1956)).

[238] BERGER, *supra* note 8, at 27.

[239] GRISWOLD, *supra* note 236.

[240] BERGER, *supra* note 8, at 27.

[241] *Id.*

[242] *Id.*

[243] *Id.* at 28.

[244] *Id.*

[245] GRISWOLD, *supra* note 236, at 9.

[246] *Id.* Prior to Dean Griswold's speech, the Supreme Court stated that the privilege "was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions." Twining v. New Jersey, 211 U.S. 78, 91 (1908).

[247] GRISWOLD, *supra* note 235, at 10–11.

Korean invasion, but never formally resigns.[248] A Congressional Committee then summons him for questioning, and asks whether he was ever a Communist.[249] Although he honestly believes he is innocent of any crime, he is under substantial risk of guilt under the Smith Act of 1940.[250] Since past affiliation with the Communist party could be a "link in a chain of proof of a criminal charge," he decides to assert his Fifth Amendment privilege, yet he is not guilty of any crime.[251]

The courts embraced Griswold's hypothetical and claim that the Fifth Amendment was to "protect the innocent." In *Grunewald v. United States*, the court referred directly to Griswold's speech stating that "recent re–examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect innocent men."[252] Similarly, the Court in *Slochower* cites Griswold for the proposition that the "privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."[253]

2. The Critics

The view that the purpose of the privilege against self–incrimination is to protect the innocent has been criticized for several reasons.[254] First, several scholars have objected to the "protecting the innocent" justification because the highly factual hypothetical posed by Dean Griswold does not necessarily mean that a purpose of the privilege is protection of the innocent.[255] Rather than addressing Fifth Amendment goals, the argument could be duplicating the First Amendment's role of safeguarding freedom of belief.[256] The context of government invasion into an individual's beliefs posed in Griswold's hypothetical may only create an illusion that the

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[248] *Id.* at 12–13.

[249] *Id.* at 15.

[250] *Id.* The Smith Act of 1940 banned advocacy for the violent overthrow of the government. Although communist membership per se was not enough to support a conviction, membership in addition to other evidence would suffice. BERGER, *supra* note 8, at 28. *See also* Griswold, *supra* note 236, at 15–16.

[251] GRISWOLD, *supra* note 236, at 15.

[252] Grunewald v. United States, 353 U.S. 391, 421 (1957).

[253] Slochower v. Board of Higher Ed. Of City of N.Y., 350 U.S. 551, 557–58 (1956).

[254] BERGER, *supra* note 8, at 29.

[255] *Id.*

[256] *Id.* at 28.

privilege is protecting innocence.[257] Judge Henry Friendly agreed with this position in stating that "however appropriate [Dean Griswold's] comments were in the context in which they were written, courageously supporting use of the privilege to defeat outrageous inquiries into beliefs and associations, they do no help in the decision of concrete cases arising in the enforcement of the criminal law."[258] Most importantly, Dean Griswold himself has acknowledged how the events of the time impacted his analysis, revealing that "those were somewhat parlous times, and the speeches were made under some emotional pressure."[259] Furthermore, Griswold retracted the original statements from his 1954 speech, explaining the following:

> Others have said, and I think they are right, that the privilege protects the guilty more often that it does the innocent .... It is enough to say that the privilege is available to protect those who are guilty only of heretical or unpopular beliefs. The privilege is fully justified and is of first importance if it serves to protect dissent and opposition to the government, and all matters of thought and freedom and opinion which, as history shows, are central to the preservation of political and intellectual and religious liberty.[260]

Protection of freedom of thought and association is already addressed under the First Amendment.[261] Perhaps the First Amendment should be applied to Dean Griswold's innocent witness so that "Fifth Amendment doctrine is not distorted by being tied to an objective it cannot fulfill."[262]

A second criticism to the notion that the Fifth Amendment's purpose is to protect the innocent is the practical application of the concept. Scholars question whether protection of the innocent is actually achieved as a consequence of the Fifth Amendment.[263] Lewis Mayers acknowledged that several courts and commentators have asserted protection of the innocent.[264] He argues, however, that there has been lacking "any convincing demonstration of this proposition."[265] Judge Friendly concurred that no proof of protection of the

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[257] *Id.*

[258] Friendly, *supra* note 9, at 684.

[259] Erwin N. Griswold, *The Right to be Let Alone*, 55 NW. L. REV. 216, 217 (1960).

[260] *Id.* at 223.

[261] BERGER, *supra* note 8, at 28.

[262] *Id.*

[263] *Id.* at 29.

[264] MAYERS, *supra* note 8, at 61.

[265] *Id.*

innocent has been offered.[266] He further stated that "on balance the privilege so much more often shelters the guilty and even harms the innocent that . . . its occasional effect in protection of the innocent would be an altogether insufficient reason."[267] Dean Griswold himself has agreed that protection of the innocent as a Fifth Amendment purpose is not justified from a practical perspective.[268] He stated "it was a mistake, I now think, to undertake to defend the privilege on the ground that it is basically designed to protect those innocent of crime, at least in any numerical sense."[269] Thus, a deficiency of actual cases to support the 'protection of the innocent' rationale leaves its validity in question. It is difficult to justify a broad rule based on so narrow an impact.[270]

A third criticism expressed by C. Dickerman Williams is that the notion of protecting the innocent from the English case *Regina v. Boyes*[271] is applied with a "reverse twist" by U.S. courts.[272] In *Boyes*, a witness was called to testify in a case involving bribery in an election to the House of Commons.[273] The Queen granted the witness a pardon, and under English law, he was required to accept it.[274] He asserted the privilege of self–incrimination based on the fact that, even with his pardon, he could be left open to impeachment by the House of Commons.[275] The court rejected the claim of privilege, finding that there was no reasonable ground for the witness to apprehend danger.[276] Although he could be subject to impeachment, the court stated "no one seriously supposes that the witness runs the slightest risk of an impeachment by the House of Commons. No instance of such a proceeding . . . has ever occurred, or, so far as we are aware, has ever been thought of."[277]

Since *Boyes*, the U.S. Supreme Court has relied upon the 'rea-

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[266] Friendly, *supra* note 9, at 686.
[267] *Id.* at 689; *see* Williams, *supra* note 9, at 30.
[268] Griswold, *supra* note 259, at 223.
[269] *Id.*
[270] BERGER, *supra* note 8, at 29.
[271] 1 B. & S. 311.
[272] Williams, *supra* note 9, at 26.
[273] *Id.* at 27.
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.*

sonable danger' rule and has quoted the opinion at length.[278] In *Mason*, the Court definitively adopted it.[279] Williams argued, however, that the Court has misapplied the *Boyes* decision.[280] In *Boyes*, even though the witness's testimony revealed a crime, the witness was unable to claim the privilege since there was not reason to anticipate that he would be prosecuted on the basis of that testimony.[281] In other words, even though the witness could have been prosecuted for a crime, he could not say that he had reasonable cause to apprehend danger of conviction since it was unlikely that the House of Commons would pursue prosecution.[282] The U.S. courts now apply that reasoning to "justify the refusal to give testimony that will not reveal a crime [since the witness is innocent] . . . because of the witness's alleged anticipation of prosecution for a crime of which he is innocent."[283] Thus, Williams points out that circumstances in *Boyes* involved unwillingness by prosecutors to proceed against a *criminal.*[284] In contrast, the circumstances in present cases involve the *witness's assumption* of the willingness by prosecutors to proceed against an *innocent* man.[285] Thus, the validity of the application of *Boyes* to present cases seems doubtful.[286]

Finally, and perhaps most importantly, the Supreme Court itself has disclaimed reliance on the idea that a purpose of the Fifth Amendment is to protect the innocent.[287] In *Tehan v. United States ex rel. Schott*,[288] the Court considered whether the no comment rule under *Griffin v. California*[289] should be applied retroactively. In *Griffin*, the prosecutor's closing argument included disparaging remarks to the jury regarding the defendant's failure to take the stand to explain why he was in an alley where a murder victim's body was found.[290] In addition, the trial judge's instructions stated that "if [the defen-

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[278] Williams, *supra* note 9, at 28.
[279] Mason v. United States, 244 U.S. 362, 365 (1917).
[280] Williams, *supra* note 9, at 26.
[281] *Id.* at 28.
[282] *Id.*
[283] *Id.*
[284] *Id.* (emphasis added).
[285] *Id.* (emphasis added).
[286] *Id.*
[287] Tehan v. United States *ex rel.* Schott, 382 U.S. 406, 416 (1966).
[288] *Id.*
[289] Griffin v. California, 380 U.S. 609 (1965).
[290] *Id.* at 610–11.

dant] does not testify . . . the jury may take that failure into consideration as tending to indicate . . . that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."[291] The Supreme Court concluded that any comment about the defendant's silence violated the Fifth Amendment because it "is a penalty imposed by courts for exercising a constitutional privilege."[292] In *Tehan,* the no–comment rule would have been applied retroactively if the purpose of the privilege was a concern over the conviction of an innocent defendant.[293] This was not the concern of the Court, however, in holding that the no–comment rule only applied prospectively.[294] Justice Stewart stated "the basic purposes that lie behind the privilege against self–incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the load . . . .'"[295] Thus, the Court at last rejected the proposition that the Fifth Amendment privilege is largely concerned with protecting the innocent.[296] It follows that the Supreme Court mistakenly relied on this policy justification for the Fifth Amendment in its conclusion in *Reiner.* Ultimately, prior Fifth Amendment cases and the Court's express repudiation of the policy rationale upon which it relied are in tension, leaving a muddled and unclear analysis by the Court.

C. AN INNOCENT PERSON DOES NOT NEED IMMUNITY

Not only did the Supreme Court provide ambiguous analysis in its opinion, but the Court failed to even address the more significant issue: how to justify the grant of immunity to an innocent non–defendant witness.[297] Extending the Fifth Amendment to innocent witnesses is pertinent to cases where state immunity statutes include a threshold requirement of a valid privilege of self–incrimination.[298] In state statutes similar to Ohio Revised Code Section 2945.44, once the court finds that a witness has properly invoked the privilege, it must then determine whether granting immunity to a witness "furthers the

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[291] *Id.* at 610.
[292] *Id.* at 614.
[293] McKay, *supra* note 9, at 207.
[294] *Id.*
[295] Tehan v. United States *ex rel.* Schott, 382 U.S. 406, 415–16 (1966).
[296] McKay, *supra* note 9, at 208.
[297] *See supra* note 10.
[298] Ohio v. Reiner, 532 U.S. 17 (2001).

administration of justice."[299] The question the *Reiner* court neglected to answer is why does an innocent person need immunity from prosecution in the first place?

Although the Supreme Court of Ohio's majority opinion addressed the issue of innocent witnesses and transactional immunity, its analysis did not reach the question either.[300] The court first pointed out that "there is no need for a grant of immunity where the witness denies all culpability."[301] The court focused, however, on the fact that Reiner's defense was Ms. Batt caused Alex's death. The court stated the following:

> In situations where an admission of guilt by one person would completely exonerate any possible guilt of another person, as is the case here, a grant of immunity is unnecessary and improper .... Had Susan Batt been granted immunity and testified that she had shaken Alex and caused his death, the prosecution would have no further grounds to prosecute Matthew Reiner. To grant immunity in such a situation may have allowed the guilty party to go free and would not 'further the administration of justice.'[302]

The court went on to conclude that serious prejudice resulted from the grant of immunity to Ms. Batt.[303] Since Reiner's defense was that Ms. Batt caused Alex's death, the court's grant of immunity to her was in effect telling the jury that Batt was not responsible for Alex's death.[304] In order to "further the administration of justice," the jury should have heard all the evidence to determine whether someone other than Reiner caused Alex's death.[305] Thus, the court focused on the limited situation where a defendant's only defense involved a witness who was granted immunity. So the Ohio Supreme Court also failed to reach the question of why an innocent witness needs a grant of immunity.

Some may question why this inquiry is even significant. They may argue that the outcome of granting immunity to an innocent witness is the same: the witness will not be prosecuted. However, the grant of witness immunity is an *exchange* of useful testimony that may assist in the conviction of a defendant for the avoidance of

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299 *Id.*

300 Ohio v. Reiner, 731 N.E.2d 662, 674 (Ohio, 2000).

301 *Id.*

302 *Id.*

303 *Id.* at 675.

304 *Id.*

305 *Id.*

prosecution.[306] If the prosecution is already entitled to that useful testimony, why should the court grant the witness immunity? Even though the emphasis in our time is usually on the right of an individual to remain silent, this right is limited and exceptional.[307] In fact, the general rule is that an individual has a duty to testify before grand juries, courts, or investigating committees that have legitimate interests.[308] As Chief Justice Hughes noted, "[I]t is . . . beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned."[309] Thus, it is worth considering whether or not immunity should apply to innocent witnesses. The Supreme Court passed on this opportunity and provided no guidance in this context of the Fifth Amendment and witness immunity.

VI. CONCLUSION

The Supreme Court provided a deficient analysis in *Reiner*. The Court first unconvincingly determined that an innocent witness may assert a valid Fifth Amendment privilege against self-incrimination. Although the extension of the privilege is in line with prior precedent, the policy rationale relied upon is criticized by both scholars and the Court itself. The Court then failed to address the issue of whether the prosecution should grant immunity to an innocent witness. In the end, the weak decision in *Reiner* leaves questions unanswered with respect to the complexities of the Fifth Amendment in the context of innocent witnesses.

Angela Roxas

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[306] *Id.* at 674 (emphasis added).

[307] DAVID FELLMAN, THE DEFENDANT'S RIGHTS TODAY 324 (1976).

[308] *Id.*

[309] *Id.* at 324–25.