Michigan Law Review

Volume 90 | Issue 3

1991

Guilt: Henry Friendly Meets the MaHaRaL of Prague

Irene Merker Rosenberg
University of Houston

Yale L. Rosenberg
University of Houston

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Constitutional Law Commons, Criminal Procedure Commons, Fourth Amendment Commons, and the Law Enforcement and Corrections Commons

Recommended Citation

Irene M. Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the MaHaRaL of Prague*, 90 MICH. L. REV. 604 (1991).
Available at: https://repository.law.umich.edu/mlr/vol90/iss3/4

This Essay is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

ESSAY

GUILT: HENRY FRIENDLY MEETS THE MaHaRaL OF PRAGUE

*Irene Merker Rosenberg**
and *Yale L. Rosenberg***

In 1970, when for a brief moment in time federal collateral review was broadly available for both federal and state prisoners,[1] Henry J. Friendly, "the preeminent appellate judge of his generation,"[2] questioned whether innocence had become irrelevant in the litigation of constitutional claims in federal habeas corpus.[3] Advancing finality,

---

* Professor of Law, University of Houston. B.A. 1961, College of the City of New York; LL.B. 1964, New York University School of Law. — Ed.

** Law Foundation Professor, University of Houston. B.A. 1959, Rice University; LL.B. 1964, New York University School of Law. — Ed.

We wish to thank the University of Houston Law Foundation for its financial support and Roberta Dohse, University of Houston Law Center, Class of 1991, for her research assistance, and our colleague, David Dow, for his thoughtful comments. Our special thanks to Chaya Blaut and to Rabbi Yitzchok Adlerstein, Professor of Judaic Studies at the Yeshiva of Los Angeles.

1. The modern expansion of federal habeas corpus began in 1953 with Brown v. Allen, 344 U.S. 443 (1953), making the remedy generally available to state prisoners pursuant to 28 U.S.C. § 2254 (1988). In 1963, a banner year for federal habeas, the Court broadened § 2254 in three important decisions: Fay v. Noia, 372 U.S. 391 (1963), authorizing petitions by state prisoners who had committed procedural defaults unless they had deliberately bypassed state procedures for vindicating their federal constitutional claims; Townsend v. Sain, 372 U.S. 293 (1963), requiring full and fair evidentiary hearings for petitioners who had not received them in state court; and Sanders v. United States, 373 U.S. 1 (1963), downplaying finality concerns for federal prisoners making successive motions for relief under the companion provisions of 28 U.S.C. § 2255 (1988), and making clear that the same rules would govern state prisoners. The final expansion was in 1969, when the Court held that Fourth Amendment claims could be asserted under § 2255. Kaufman v. United States, 394 U.S. 217 (1969). Rolling back federal habeas, the Court in Stone v. Powell, 428 U.S. 465 (1976), discussed *infra* notes 11-13 and accompanying text, effectively barred Fourth Amendment claims by state prisoners. Even before *Stone*, Davis v. United States, 411 U.S. 233 (1973), had held that federal prisoners who failed to object to the composition of the grand jury by appropriate motion under the Federal Rules of Criminal Procedure could not make that claim under § 2255. Wainwright v. Sykes, 433 U.S. 72, 89-91 (1977), substantially enlarged the *Davis* exception, rejecting *Noia*'s reasoning with respect to all trial-type defaults in state court and holding that procedural defaults preclude habeas corpus relief absent showings of cause and prejudice. *Noia* was completely overruled in Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991). Other recent decisions have curtailed federal habeas corpus still further. *See infra* notes 12-17 and accompanying text. *See also* LARRY W. YACKLE, POSTCONVICTION REMEDIES §§ 19-21 (1981 & Supp. 1987) for a historical overview of federal habeas corpus.

2. Wilfred Feinberg, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709, 1713 (1986). For a collection of such accolades, see Pierre N. Leval, *Henry J. Friendly — In Memory of a Great Man*, 52 BROOK. L. REV. 571, 572 n.2 (1986).

3. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

frivolity, and floodgate concerns,[4] he argued that, with certain exceptions — such as challenges to "the very basis of the criminal process"[5] — prisoners seeking collateral relief should be required to make a colorable showing of innocence. Under Judge Friendly's formulation, the petitioner would have to demonstrate "a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted . . . , the trier of the facts would have entertained a reasonable doubt of his guilt."[6] The effect of the proposal would be to exclude from federal collateral attack most nonguilt-related constitutional claims,[7] and in particular *Mapp*[8] and *Miranda*[9] exclusionary rule violations.

Two decades later, it is clear that the probability that a habeas petitioner in fact committed the crime is not merely relevant but often dispositive as a basis for denying relief. Indeed, going well beyond remedies, the issue of factual guilt now pervades American criminal constitutional law,[10] often in ways that do not rest comfortably alongside the Bill of Rights' guarantees limiting government power in the criminal justice process.

Factual guilt affects federal habeas corpus primarily in two ways. First, in accord with Judge Friendly's recommendation,[11] the entire class of Fourth Amendment claims has virtually been barred as nonguilt-related,[12] a potentially omnivorous rationale.[13] Second, with

---

4. *Id.* at 142-51.

5. Judge Friendly enumerated four exceptions to the innocence requirement: (1) attacks relating to "the very basis of the criminal process," such as lack of counsel; (2) claims grounded on evidence outside the record and thus not considered on appeal; (3) attacks based on state failure to provide a "proper procedure for making a defense at trial and on appeal," such as not permitting a prior determination of the voluntariness of a confession before its consideration by the jury; and (4) contentions stemming from new constitutional developments given retroactive application, such as double jeopardy claims. *Id.* at 151-54.

6. *Id.* at 160 (footnote omitted). Judge Friendly's definition would allow the federal habeas petitioner to argue for the exclusion of unreliable evidence, including evidence unconstitutionally obtained, and for the inclusion of evidence that was improperly excluded or that became available only after trial. *Id.*

7. *Id.* at 160-61. "[T]he exclusionary rule is a bonanza conferring a benefit altogether disproportionate to any damage suffered." *Id.* at 161.

8. Mapp v. Ohio, 367 U.S. 643 (1961).

9. Miranda v. Arizona, 384 U.S. 436 (1966).

10. *See infra* notes 12-33 and accompanying text.

11. *See supra* note 7 and accompanying text. The majority in Stone v. Powell, 428 U.S. 465 (1976), discussed *infra* note 12 and accompanying text, cited the Friendly article in support of its ruling. *See* 428 U.S. at 480 n.13, 489 n.27, 491 n.31.

12. *See Stone,* 428 U.S. at 481-82 (precluding Fourth Amendment claims in federal habeas corpus as long as there was an opportunity for full and fair litigation thereof in state court).

13. The rationale of *Stone* seemingly authorizes the elimination of whole subject matter areas from the federal habeas jurisdiction whenever the implicated constitutional right is not guilt-related. 428 U.S. at 489-91. So far, however, the Court has refused to extend *Stone* in this manner. *See* Rose v. Mitchell, 443 U.S. 545, 559-64 (1979) (claim of racial discrimination in

respect to other allegations of unconstitutionality, some showing of innocence is a prerequisite to availability of relief if the petitioner has defaulted in state court[14] or has filed any previous federal writs[15] or has asserted a claim that is not based squarely on existing precedent.[16] Not merely in the foreground, factual guilt, along with federalism and finality, is now one of the dominant themes of federal habeas corpus.[17]

This ascendancy of innocence has not, however, been limited to collateral attacks. It is becoming increasingly important in direct review as well,[18] affecting the substantive content of constitutional

grand jury selection cognizable in federal habeas); *see also* Brewer v. Williams, 430 U.S. 387, 413-14 (1977) (Powell, J., concurring) (responding to the dissent of Chief Justice Burger by arguing that the question of extending *Stone* to Fifth and Sixth Amendment claims was not properly before the Court).

14. Wainwright v. Sykes, 433 U.S. 72 (1977), required the defaulting state prisoner to show cause for the default and prejudice resulting therefrom. United States v. Frady, 456 U.S. 152 (1982), defined prejudice to require a showing by petitioner that the constitutional error "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." 456 U.S. at 170. Because the evidence of homicide was overwhelming and Frady had not substantiated his claim that he had acted without malice, the Court concluded that there was "no risk of a fundamental miscarriage of justice." 456 U.S. at 171-74. In Murray v. Carrier, 477 U.S. 478, 495-96 (1986), the Court clarified this miscarriage of justice standard, stating that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."

15. See McCleskey v. Zant, 111 S. Ct. 1454 (1991), redefining the successive petition requirements of Sanders v. United States, 373 U.S. 1 (1963), and holding that second or successive writs filed by habeas petitioners will be deemed an abuse of the writ absent showings of cause and prejudice or proof of a fundamental miscarriage of justice. The Court defined the terms "prejudice" and "miscarriage of justice" in the manner described *supra* note 14. *McClesky,* 111 S. Ct. at 1470-74.

16. Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion), held — with two narrow exceptions — that claims based on a "new" rule would not be applied retroactively to cases on collateral review. The second of these exceptions was with respect to cases announcing new procedural rules that were both " 'implicit in the concept of ordered liberty' " and "without which the likelihood of an accurate conviction is seriously diminished." 489 U.S. at 311, 313 (quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring and dissenting)). Butler v. McKellar, 110 S. Ct. 1212 (1990), made it clear that most habeas claims would involve new rules, defining that term to include any contention concerning which reasonable judges might differ. 110 S. Ct. at 1217-18.

17. Federalism and finality are the primary policy rationales that the Court has offered for severely restricting federal collateral review. *See, e.g., Teague,* 489 U.S. at 309-10 (1989) (plurality opinion); Engle v. Isaac, 456 U.S. 107, 134 (1982). The Justices have been willing, however, to relax such restraints if the petitioner demonstrates some likelihood of innocence. *See supra* notes 14-16 and accompanying text.

18. In this respect the Court has gone well beyond Judge Friendly's proposal to make innocence relevant in habeas. Indeed, Judge Friendly acknowledged that innocence "may continue to be largely [irrelevant] on direct appeal." Friendly, *supra* note 3, at 172. In a similar spirit of doing the creator one better, the Rehnquist Court adopted the recommendation in Justice Harlan's concurring opinion in Mackey v. United States, 401 U.S. 667, 675 (1971), that habeas be available for the litigation of new claims only if the asserted procedural rights were necessary to assure fundamental fairness implicit in the concept of ordered liberty, but added the requirement that the likelihood of an accurate conviction would be seriously diminished absent the right. *Teague,* 489 U.S. at 311-13.

rights, the circumstances in which their violation will be excused, and the applicability of barriers to their adjudication.

The Justices have infused the guilt-innocence issue into the very substance of Bill of Rights' guarantees in various ways. Assertions of ineffective assistance of counsel under the Sixth Amendment, for example, require a showing of prejudice, that is, a reasonable probability that, but for counsel's incompetence, the outcome would have been different.[19] Similarly, availability of the due process right to counsel at a probation or parole revocation hearing turns in part on whether the petitioner can make a "colorable claim" that she has not violated the terms of parole or probation.[20]

In addition to including innocence as a specific element of the constitutional safeguard, the Court often looks to that factor in determining the proper breadth of a right. The less guilt-related a right, the more likely its interpretation will be narrow. This phenomenon is apparent in the Fourth Amendment exclusionary rule case law,[21] and it also influences the continuing constriction of the scope of the amendment itself, subsumed under the rubric of effective law enforcement.[22] Indeed, the Court has stated explicitly that innocence of the accosted person is a factor in determining whether there was a seizure within the meaning of the Fourth Amendment.[23] On the other hand, the Justices seem unconcerned that their approval of new and not necessarily reliable police techniques such as drug courier profiles may subject

19. Strickland v. Washington, 466 U.S. 668, 694 (1984). In her majority opinion, Justice O'Connor stressed that the reviewing court, in its determination of prejudice, must consider the totality of the evidence; thus "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." 466 U.S. at 696. In his dissenting opinion, Justice Marshall objected to the ruling because, inter alia, it rested on the theory "that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted." 466 U.S. at 711. *Cf.* Kimmelman v. Morrison, 477 U.S. 365, 391 (1986) (Powell, J., concurring) (questioning whether "the admission of illegally seized but reliable evidence can ever constitute 'prejudice' under *Strickland*").

20. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

21. *See, e.g.,* United States v. Leon, 468 U.S. 897, 907 (1984) (creating a good faith exception to exclusionary rule for officer relying on defective warrant, and referring to "inherently trustworthy tangible evidence").

22. *See, e.g.,* California v. Acevedo, 111 S. Ct. 1982, 1989-91 (1991) (expanding automobile exception to warrant requirement, based in part on alleviating confusion of police officers that may impede law enforcement); Illinois v. Gates, 462 U.S. 213, 237-38 (1983) (stating that probable cause may be established by totality of the circumstances because a more stringent rule interferes with effective police investigations).

23. See Florida v. Bostick, 111 S. Ct. 2382, 2388 (1991), the bus sweep case, in which the majority said, "We . . . reject . . . Bostick's argument that he must have been seized because no reasonable person would freely consent to a search of luggage that he or she knows contains drugs. This argument cannot prevail because the 'reasonable person' test presupposes an *innocent* person."

innocent persons to unwarranted stops.[24] Nor has the Fifth Amendment been unaffected by this concentration on guilt. As Justice O'Connor noted in a decision facilitating waivers of *Miranda* rights, admissions "are essential to society's compelling interest in finding, convicting, and punishing those who violate the law."[25]

Similarly, the Court is contracting constitutional protection by using factual guilt defensively, as a means of expanding the scope of rules that inhibit consideration or application of constitutional rights. Doctrines such as harmless error,[26] inevitable discovery,[27] and impeachment,[28] which in effect excuse or partially excuse constitutional violations, as well as barriers to adjudication such as standing[29] and

24. *See* United States v. Sokolow, 490 U.S. 1, 13 (1989) (Marshall, J., dissenting) ("Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention. This risk is enhanced by the profile's 'chameleon-like way of adapting to any particular set of observations.' ").

25. Moran v. Burbine, 475 U.S. 412, 426 (1986). The Court also held that police deception of defendant's attorney was not sufficiently egregious to constitute a due process violation. 475 U.S. at 432-34.

26. In Chapman v. California, 386 U.S. 18 (1967), the Court ruled that constitutional error did not require reversal of the conviction if it was harmless beyond a reasonable doubt. Justice Black noted that harmless error rules "serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." 386 U.S. at 22. Although the *Chapman* Court suggested that some errors, such as admission of coerced confessions, could never be harmless, 386 U.S. at 23 n.8, in Arizona v. Fulminante, 111 S. Ct. 1246 (1991), five Justices concluded that harmless error analysis was also applicable to involuntary confessions. Chief Justice Rehnquist asserted that the "harmless error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence.' " 111 S. Ct. at 1264 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986)).

27. In Nix v. Williams, 467 U.S. 431 (1984), the Court held that physical evidence obtained in violation of the Sixth Amendment right to counsel nonetheless could be used at trial if the police could establish by a preponderance of the evidence that the challenged information would in any event have been discovered by lawful means. Chief Justice Burger observed that a contrary view "fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice." 467 U.S. at 445.

28. For instance, Harris v. New York, 401 U.S. 222 (1971), concluded that statements obtained in violation of *Miranda* could be used to impeach a defendant who testified on his own behalf at trial. 401 U.S. at 226. The *Harris* majority viewed the impeachment process as helpful to the jury in assessing the credibility of the accused and stressed that defendants who testify have no right to commit perjury. 401 U.S. at 225-26.

Thus, although a confession obtained in violation of *Miranda* may not be used as evidence in the case in chief, the violation is partially excused when use of the statement is permitted for impeachment purposes.

29. In Rakas v. Illinois, 439 U.S. 128 (1978), although purporting to eschew standing analysis, the Court decided that passengers in an automobile could not object to the search of its glove compartment and passenger seat because they had no expectation of privacy in those portions of the vehicle. The holding therefore precluded the Court from determining whether there was a lawful basis for the stop and search. The broad rationale underlying the restriction was that

> [e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. . . . [Thus,] misgivings as to the benefit of enlarging the class of persons who may invoke that rule are properly considered when deciding whether to expand standing to assert Fourth Amendment violations.

consent,[30] arguably are responses to concern over freeing the guilty. The ultimate barrier preventing courts from reaching the merits of constitutional claims — a restriction premised in large part on the guilt of the accused[31] — is of course the rule that voluntary guilty pleas constitute waivers precluding defendants from asserting most antecedent constitutional violations.[32] This prohibition, in conjunction with the high percentage of guilty pleas, masks the extent to which the Constitution may leave improper police investigatory techniques and other official misconduct unregulated.[33]

Taken together, these doctrines severely impede application of constitutional rights. They also reinforce the Court's substantive dilution of constitutional guarantees as well as its evisceration of federal remedies for their vindication. Cumulatively, all these substantive, procedural, and remedial restraints, which are based in whole or in part on considerations of factual guilt, have seriously undermined the constitutional balance struck by the Bill of Rights.

While the Court has rather freely insisted on colorable claims of innocence as a means of preserving convictions of the guilty, peppering its opinions with graphic descriptions of the crime and the defendant's connection to it,[34] the Justices have seemed less in touch with the

---

439 U.S. at 137-38 (footnote omitted). *But see* Minnesota v. Olson, 110 S. Ct. 1684 (1990) (overnight guest has expectation of privacy in the home in which he is staying).

30. Schneckloth v. Bustamonte, 412 U.S. 218 (1973), determined that consent to a search could be voluntary even though the defendant had not been advised of his right to refuse permission, and that such waiver was to be determined by examining the totality of the circumstances. A finding of consent legitimizes a search, even if the police did not have probable cause or a warrant. Justifying this result, the majority emphasized that "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may ensure that a wholly innocent person is not wrongly charged with a criminal offense." 412 U.S. at 243. Illinois v. Rodriguez, 110 S. Ct. 2793 (1990), expanded the consent doctrine, ruling that if the police reasonably, albeit mistakenly, believed that a third party had authority to consent to search of a home, the resulting search was reasonable.

31. In McMann v. Richardson, 397 U.S. 759, 773 (1970), the Court held that a plea of guilty constitutes a waiver of the right to attack the voluntariness of defendant's confession, and noted that defendant was "convicted on his counseled admission in open court that he committed the crime charged against him." *Cf.* North Carolina v. Alford, 400 U.S. 25 (1970) (holding that an express admission of guilt is not a constitutional requirement for acceptance of a guilty plea and imposition of punishment, at least where there is factual support for the plea).

32. *See* Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970). *But see* Menna v. New York, 423 U.S. 61 (1975) (double jeopardy claim not waived by counseled guilty plea).

33. It is estimated that up to 90% of all criminal convictions are obtained by guilty pleas. *See, e.g.,* DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966). Thus, the likelihood that unconstitutional action will go undetected is very high.

34. *See, e.g.,* United States v. Frady, 456 U.S. 152, 155 (1982) ("Inside Bennett's house, police officers . . . found . . . blood-spattered walls. Thomas Bennett lay dead in a pool of blood. His neck and chest had suffered horseshoe-shaped wounds from the metal heel plates on Frady's

converse principle, namely, assuring acquittal of the innocent or less culpable. Although the reasonable doubt standard has been constitutionalized,[35] and requires the prosecution to establish each material element of the crime beyond a reasonable doubt, this standard has yielded to federalism considerations. States now may conflate degrees of criminality,[36] permitting, for example, the punishment of manslaughterers as if they were murderers, and they may shift burdens with respect to defenses that define culpability, such as requiring defendants accused of murder to prove self-defense.[37]

The cognate concept of the presumption of innocence, which prevents punishment prior to conviction, has fared no better. In *Bell v. Wolfish,*[38] which upheld body cavity searches and other intrusions on incarcerated persons awaiting trial, the Court redefined[39] this presumption as merely a "doctrine that allocates the burden of proof in criminal trials . . . [but] has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[40] Similarly, in upholding the constitutionality of preventive detention against due process and Eighth Amendment bail claims, the majority elevated the legal consequences of indictment while stripping the presumption of any substantive vitality.[41]

Given its preoccupation with law and order, the Rehnquist Court's

---

leather boots and his head was caved in by blows from a broken piece of a tabletop. . . . One of Bennett's eyes had been knocked from its socket.").

35. *In re* Winship, 397 U.S. 358 (1970). Relying on *Winship,* the Court in Sandstrom v. Montana, 442 U.S. 510 (1979), held unconstitutional jury instructions creating a mandatory presumption with respect to a material element of the crime. *Sandstrom* thus reinforces *Winship* by requiring that juries be permitted to resolve issues of fact relating to material elements of the crime. Rose v. Clark, 478 U.S. 570 (1986), undercut *Sandstrom* by making violations thereof subject to harmless error analysis. Yates v. Evatt, 111 S. Ct. 1884 (1991), however, established stringent requirements for finding a *Sandstrom* error to be harmless.

36. *Compare* Mullaney v. Wilbur, 421 U.S. 684 (1975) (state not permitted to shift burden of proving heat of passion to defendant accused of murder) *with* Patterson v. New York, 432 U.S. 197 (1977) (no violation of *Winship* for state to shift burden of proving extreme emotional disturbance to defendant charged with murder).

37. *See* Martin v. Ohio, 480 U.S. 228 (1987). *See also* Irene M. Rosenberg, Winship *Redux: 1970 to 1990,* 69 TEXAS L. REV. 109, 120 (1990) (footnote omitted) (noting that the result in *Martin* means that "the state may punish as a murderer one who may have killed in self-defense").

38. 441 U.S. 520 (1979).

39. *Compare Bell with* Stack v. Boyle, 342 U.S. 1, 4 (1951) (finding that bail set higher than necessary to assure presence at trial is excessive under the Eighth Amendment and noting that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning").

40. 441 U.S. at 533. *Contra* 441 U.S. at 582 (Stevens, J., dissenting) ("Prior to conviction every individual is entitled to the benefit of a presumption both that he is innocent of prior criminal conduct and that he has no present intention to commit any offense in the immediate future." (footnote omitted)).

41. United States v. Salerno, 481 U.S. 739 (1987). In *Salerno* the majority upheld the preventive detention provisions of the Bail Reform Act of 1984. In his dissenting opinion Justice

emphasis on factual guilt, at least as a ground for upholding convictions, is hardly unexpected. Nonetheless, even the present majority has wavered occasionally between establishing standards that assure conviction of the guilty and adhering to rules that prevent prosecutorial or police overreaching regardless of the defendant's culpability. The Justices, for instance, have expanded *Miranda* protection for suspects in custody who have invoked their right to counsel,[42] and have required that police officers legitimately on the premises establish probable cause even for minimal inspections of items in plain view,[43] although these categories of claims are usually unrelated to factual guilt. Such straying, however, often provokes admonitions from the true believers. For example, in *Powers v. Ohio*[44] the Court held that a prosecutor's use of the state's peremptory challenges to exclude otherwise qualified jurors on the basis of their race violated equal protection and that the defendant had standing to raise the excluded black jurors' claims even though he was white. Dissenting together with the Chief Justice, Justice Scalia accused the majority of reprising *Miranda:*[45] "[T]he Court uses its key to the jail-house door not to free the arguably innocent, but to threaten release upon the society of the unquestionably guilty unless law enforcement officers take certain steps that the Court newly announces to be required by law."[46]

In short, the factual guilt credo has limitations. Even its foremost enthusiasts have never suggested either that the Bill of Rights is merely hortatory or that all constitutional guarantees are conditioned on showings of innocence. That the Constitution expresses at least

---

Marshall noted the relationship between the presumption of innocence and the reasonable doubt standard:

> Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is "implicit in the concept of ordered liberty," and is established beyond legislative contravention in the Due Process Clause.

481 U.S. at 763 (citations omitted).

42. Minnick v. Mississippi, 111 S. Ct. 486, 492 (1990). *But see* McNeil v. Wisconsin, 111 S. Ct. 2204 (1991) (holding that an invocation of the Sixth Amendment right to counsel during a bail hearing does not constitute an invocation of the right to counsel derived from *Miranda,* and that therefore confession obtained through police-initiated questioning of jailed suspect with respect to another charge was admissible in evidence).

43. Arizona v. Hicks, 480 U.S. 321 (1987). Justice Scalia's majority opinion noted "nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." 480 U.S. at 329. Justice Scalia premised his decision on the language of the Fourth Amendment. Where such textual support is in his view missing, Justice Scalia is likely to emphasize instead the question of factual guilt. *See infra* text accompanying notes 44-46.

44. 111 S. Ct. 1364 (1991).

45. 111 S. Ct. at 1381 (Scalia, J., dissenting).

46. 111 S. Ct. at 1381 (Scalia, J., dissenting).

some values that transcend guilt and innocence may be regretted, but it has never been doubted.[47]

The constitutional safeguards governing the criminal process may be viewed as an extension of the long common law history of evidentiary rules and privileges, many of which deflect accurate factfinding.[48] In Anglo-American jurisprudence, a criminal trial is concerned primarily, but not exclusively, with adjudication of guilt. Unrelated but important societal concerns often affect the outcome. Over the centuries, we have protected marital,[49] spiritual,[50] and medical[51] relationships because in general we have considered them to be more important than determining guilt in individual cases. The Bill of Rights, much of which is derived from English law,[52] embodies yet another set of values that are intimately related to the criminal process and that define the relationship between the government and the governed. The desire to protect this spectrum of interests in the criminal adjudicative process impinges on the need to assure punishment of

47. *See, e.g.*, James v. Illinois, 493 U.S. 307, 311, 320 (1990) (holding that the prosecution could not use illegally obtained statements of the defendant to impeach the credibility of a defense witness, and noting that "various constitutional rules limit the means by which government may conduct [the] search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation's history.").

48. With respect to privileges:

> Their effect . . . is clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light.
>
> . . . Their warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice.

KENNETH S. BROUN et al., MCCORMICK ON EVIDENCE § 72, at 171 (Edward W. Cleary, 3d ed. 1984) (footnotes omitted).

49. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 43, 53 (1980) (acknowledging the "ancient roots" of spousal privilege, but refusing to permit defendant in criminal case to invoke it to prevent testimony of spouse willing to do so, and ruling instead that "the witness-spouse alone has a privilege to refuse to testify adversely"); People v. Fields, 328 N.Y.S.2d 542 (App. Div. 1972) (reversing conviction because based in part on privileged spousal communication). *See generally* 8 JOHN HENRY WIGMORE, EVIDENCE §§ 2332-33, at 642-45 (John T. McNaughton, rev. ed. 1961) (discussing history and policy of the marital communications privilege, and referring to policy underpinning that "the injury that would inure to [the relationship] by disclosure is probably greater than the benefit that would result in the judicial investigation of truth").

50. *See generally* WIGMORE, *supra* note 49, §§ 2394-95, at 869-77 (although priest-penitent communications not privileged at common law, such a privilege has been recognized by statute or judicial decision in two thirds of the states); *id.* § 2396, at 878 ("Would the injury to the penitential relation by compulsory disclosure be greater than the benefit to justice? Apparently it would.").

51. *See, e.g.*, People v. Stritzinger, 668 P.2d 738, 742-45 (Cal. 1983) (reversing conviction because, inter alia, trial court's admission of testimony violated defendant's psychotherapist-patient privilege). *See generally* WIGMORE, *supra* note 49, § 2380, at 818-20 (while rejected at common law, the privilege for physician-patient communications has been adopted by two thirds of the states, where it "is a settled part of the law"). *But see id.* § 2380a, at 830 ("The injury to justice by the repression of the facts of corporal injury and disease [due to invocation of the privilege] is much greater than any injury which might be done by disclosure.").

52. *See* SOURCES OF OUR LIBERTIES *passim* (Richard L. Perry ed., 1959).

wrongdoers.[53]

The resulting tension between factual and legal guilt is thus not a new problem. Any legal system that does not depend on summary justice must come to grips with this issue, and the more elaborate the rules governing determination of guilt and the more attenuated such rules are from factual guilt, the harder the problem.

We have never been moved by the Court's emphasis on innocence as a precondition to constitutional relief. Factual guilt has always seemed elusive.[54] The best one can do in a criminal trial is to approximate truth, and only rather grossly at that.[55] Ascertaining factual guilt through a dry appellate record is more slippery still.[56] The safeguards in the Bill of Rights, on the other hand, represent this country's historical view of what is essential to prevent government oppression and to assure accuracy, fairness, and just punishment in the criminal process.[57] Linking factual guilt and constitutionality is

53. Although there may be remedies other than exclusion of evidence at the criminal trial, such as civil rights actions under 42 U.S.C. § 1983 (1988), *see* Monroe v. Pape, 365 U.S. 167, 168-72 (1961), administrative quasi-judicial proceedings, *see* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 422-24 (1971) (Burger, C.J., dissenting), and administrative rulemaking by police, *see, e.g.*, Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 810-15 (1970), we question the effectiveness of these alternatives, none of which speaks to the issue of judicial integrity. *See* Mapp v. Ohio, 367 U.S. 643, 659-60 (1961), and discussion *infra* notes 109-11 and accompanying text.

54. As our colleague David Dow has noted:

> "Guilt" is a term of art. It does not mean that the defendant "did it," for that statement would raise difficult, perhaps unanswerable, epistemological questions in many, though not all, cases. . . . What we really mean by "guilt" is that a jury of the defendant's peers believed beyond a reasonable doubt that the defendant did it. . . . This legal idea of guilt is simply not the same as the question of whether the defendant "did it," for the legal category acknowledges that in many cases it is, as a matter of epistemology, impossible to answer with certainty the question of whether he "did it."

David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 301, 317-18 (1991).

55. *See* Richard M. Markus, *A Theory of Trial Advocacy*, 56 TUL. L. REV. 95 (1981). Markus states:

> A trial presents selected witnesses who recite selected portions of their respective memories, concerning selected observations of the disputed event. . . .
>
> . . . .
>
> . . . Manifestly, the recited data are a fraction of the remembered data, which is a fraction of the observed data, which is a fraction of the total data for the event.

Id. at 97-99.

56. See Justice Marshall's dissent in Strickland v. Washington, 466 U.S. 668 (1984):

> On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.

466 U.S. at 710 (Marshall, J., dissenting) (footnote omitted).

57. *But see* John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 705-10 (1990) (stating that the

one way of effectively diminishing the Bill of Rights without directly addressing whether we as a polity should do so, and that appears to be what is happening now to the Fourth Amendment.[58] Notwithstanding its role as the countermajoritarian branch in our constitutional scheme, the Court has embraced the political branches' manipulation of public concern over crime, correlating constitutional protection with wrongdoing and making *Mapp* and *Miranda* the fall guys for the crack epidemic.

As proverbial card-carrying ACLU members, we give primacy to constitutional limitations on state power. For us, McCarthyism was not merely an aberrational excess. And as Jews, both our history and our law make us wary of venerating factual guilt and sacrificing procedural rights in the process. Our history is *res ipsa:* it teaches us to be cautious when government flexes its police power. Our law represents a triumph of legal guilt, a complex superstructure of rules whose violation necessitates dismissal of criminal charges regardless of the defendant's apparent culpability.[59] Jewish law offers a striking contrast to the Supreme Court's blossoming love affair with factual guilt as a basis for preserving judgments of conviction.

To be sure, Jewish law may be considered irrelevant to American constitutional analysis, separated as the two systems are not only by millennia, but by religious, cultural, social, and economic differences. In fact, Jewish and American criminal jurisprudence arguably start from different premises. Among the underlying assumptions in Jewish criminal law are that the human courts must operate within strict constraints designed to assure absolutely reliable determination of guilt,[60] and that in any case of acquittal of the factually guilty, God will ulti-

argument for collateral review of nonguilt-related defaulted claims on the basis of their symbolic value is wrong because it denies that there is a hierarchy of constitutional rights).

58. The assault on the Fourth Amendment has come from many directions. To mention only a few, the Warrant Clause has been significantly restricted, *see, e.g.,* United States v. Watson, 423 U.S. 411 (1976) (warrants not required for routine arrests in public); the probable cause requirement has been diluted, *see, e.g.,* Illinois v. Gates, 462 U.S. 213 (1983) (substituting a "totality of the circumstances" test for determining probable cause); the category of permissible stop and frisk situations has been expanded, *see, e.g.,* Michigan v. Long, 463 U.S. 1032 (1983) (permitting protective search of automobile interior based on reasonable suspicion); the exclusionary rule has been limited, *see, e.g.,* United States v. Leon, 468 U.S. 897 (1984) (evidence obtained by officers relying in good faith on defective warrant is admissible); the definition of a seizure has been narrowed, *see, e.g.,* Florida v. Bostick, 111 S. Ct. 2382 (1991) (invalidating per se prohibition on evidence garnered by police who randomly boarded bus and asked passengers for permission to search luggage); and courts have increasingly used the balancing test, and, as a result, have more frequently upheld administrative or regulatory searches. *See, e.g.,* New Jersey v. T.L.O., 469 U.S. 325 (1985) (upholding school official's search of student's purse if reasonable under all the circumstances).

59. *See generally* HAIM COHN, HUMAN RIGHTS IN JEWISH LAW 208-16, 225-30 (1984) (discussing panoply of procedural and legislative safeguards in the Jewish criminal process).

60. *See infra* notes 67-77 and accompanying text.

mately assess culpability correctly and completely and punish accordingly.[61] That American law does not accept an omniscient and omnipotent God as the ultimate enforcer or backstop does not, however, preclude comparison of the two legal systems. This country is in many ways religiously oriented, and, in any event, moral and ethical beliefs, which surely pervade our society, may provide a roughly equivalent deterrent to wrongdoing and an underpinning for the notion that evil is its own retribution.

Furthermore, the differences between Jewish and American law should not obscure their similarities. After all, the purpose of both is to set normative standards of social conduct that everyone is required to obey. Like its American counterpart, Jewish law seeks to deter wrongdoing, as exemplified by the Biblical refrain, "all Israel shall hear, and fear," which accompanies particular punishments and legal requirements.[62] Indeed, Jewish law is a fundamental building block of Western civilization. Consciously or not, the United States has adopted basic concepts of Jewish criminal procedure, such as double jeopardy,[63] the privilege against self-incrimination,[64] notice, and the ex post facto prohibition.[65] Moreover, the Supreme Court itself has referred to Jewish law in support of some of its most important rulings.[66] Finally, notwithstanding their differences, both systems address the core concern of dealing properly with those accused of crime, and both set up rules limiting and canalizing the criminalization process. Jewish law does so as a religious imperative; American

---

61. *See infra* note 84 and accompanying text.

62. *See Deuteronomy* 13:7-12 (punishment of solicitors of idolatry); *id.* at 21:18-21 (punishment of stubborn and rebellious son); *id.* at 17:8-13 (requiring obedience to judges and stating that "all the people shall hear, and fear"); *id.* at 19:16-20 (punishing perjury and stating that "those that remain shall hear, and fear, and shall henceforth commit no more any such evil in the midst of thee"). These translations are from the Soncino Press edition of the Old Testament, entitled THE PENTATEUCH AND HAFTORAHS (J.H. Hertz ed., 2d ed. 1960).

63. If a defendant's act constituted a violation of two separate laws, he was generally punished only for the greater offense. See discussion of multiple punishments in BABYLONIAN TALMUD, KETHUBOTH 30a-35b (I. Epstein ed., 1971).

64. *See* COHN, *supra* note 59, at 212-14.

65. The warning requirement, *see infra* notes 70-71 and accompanying text, together with the Talmudic rule that no act is punishable unless it is expressly stated in the Bible, gave the suspect notice that his acts were criminal and served as a safeguard against retrospective criminal legislation. *See* COHN, *supra* note 59, at 210, 226-29.

66. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (stating that "[p]roscriptions against [homosexual] conduct have ancient roots," and citing *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986), which in turn notes the absolute Mosaic prohibition against homosexuality); Roe v. Wade, 410 U.S. 113, 160 & n.57 (1973) (the view that life does not begin until live birth "appears to be the predominant, though not the unanimous, attitude of the Jewish faith"); Miranda v. Arizona, 384 U.S. 436, 458 n.27 (1966) (stating that "[t]hirteenth century commentators found an analogue to the privilege grounded in the Bible," and citing Maimonides).

law does so based on philosophical concern with fairness and government oppression. Given these lines of convergence, that the two systems may approach the problem of criminal wrongdoing from somewhat different angles does not preclude meaningful comparison of the Jewish and American views on factual and legal guilt.

Notwithstanding its emphasis on procedure, Jewish law is deeply concerned with factual guilt, so much so that it is absolutely clear that only the guilty (with one narrow exception[67]) can be convicted. Conviction requires the testimony of two[68] competent witnesses.[69] The accused must be warned that his act will constitute an offense,[70] and he must acknowledge that warning.[71] The defendant must then commit the entire offense in the sight of the two witnesses. Circumstantial evidence, no matter how strong, cannot establish guilt.[72] The defend-

67. An innocent person can be convicted only if the prosecution witnesses lie and are not found out in the course of the proceeding, despite vigorous admonitions and cross-examination. *See infra* notes 74-77 and accompanying text. If, however, additional witnesses refute the testimony of the original witnesses, the defendant cannot be convicted. Such refutation can occur in two ways. The second set of witnesses can either dispute the facts of the crime ("contradicting witnesses") or can testify that the first set of witnesses was with them elsewhere at the time of the offense and thus could not have seen the event in controversy ("plotting witnesses"). In the first situation the court simply rejects both sets of testimony, because it cannot determine which was truthful. In the latter situation, if the court has rendered its verdict but not yet carried out the sentence, the first set of witnesses will suffer the same fate that they had plotted to have inflicted on the defendant. If the discovery of the plotting witnesses is either too early or too late, they are not punished by the court. *See* ARTSCROLL MISHNAH SERIES, SEDER NEZIKIN, VOL. II(B), TRACTATE MAKKOS 1:4, at 19-20 (Avrohom Y. Rosenberg trans., 1987) [hereinafter MISHNAH MAKKOS]. For explanations concerning why the witnesses are punished only after judgment but before imposition of the sentence on the defendant victim, and concerning the differences between contradicting and plotting witnesses, see YEHUDA NACHSHONI, 5 STUDIES IN THE WEEKLY PARASHAH 1302-10 (Shmuel Himelstein trans., 1989).

The *Mishnah*, a basic codification of Jewish law, was redacted in approximately 200 C.E. *See* A. COHEN, EVERYMAN'S TALMUD xxi-xxx (1949) (introduction by Boaz Cohen), describing the *Mishnah* and its origins.

68. *See Deuteronomy* 19:15, 17:6; *cf. Numbers* 35:30.

69. *See* ARTSCROLL MISHNAH SERIES, SEDER NEZIKIN, VOL. II(A), TRACTATE SANHEDRIN 3:1, 3:3-3:5, at 41-43, 47-54 (Matis Roberts trans., 1987) [hereinafter MISHNAH SANHEDRIN] (describing the categories of persons who are disqualified from testifying in criminal cases).

70. *See* BABYLONIAN TALMUD, SANHEDRIN 80b (I. Epstein ed., 1960) [hereinafter BABYLONIAN TALMUD, SANHEDRIN]; THE CODE OF MAIMONIDES, BOOK XIV, THE BOOK OF JUDGES, SANHEDRIN 12:2, at 34 (Abraham M. Hershman trans., 1949) [hereinafter THE CODE OF MAIMONIDES] ("How is he warned? He is told: 'Abstain, or Refrain, from doing it, for this is a transgression carrying with it a death penalty,' or, 'the penalty of flagellation.' ").

Scholars dispute whether the warning must be given by the witnesses themselves. The prevailing view is that others may also do so. MISHNAH MAKKOS, *supra* note 67, 1:9, at 32.

71. *See* BABYLONIAN TALMUD, SANHEDRIN, *supra* note 70, at 81b ("If he [the transgressor] was warned [of his liability to flagellation], but remained silent, or . . . nodded his head, —the first and second time he is to be warned, but on the third occasion he is placed in a cell.") (alteration in original); *see also* MOSES JUNG, THE JEWISH LAW OF THEFT 21-23 (1929) (defendant's acceptance of the warning established his mens rea).

72. *See* BABYLONIAN TALMUD, SANHEDRIN, *supra* note 70, at 37a-37b. Responding to the *Mishnah*'s admonition against conjecturing by witnesses, the Talmud gives this illustration: "Perhaps ye saw him running after his fellow into a ruin, ye pursued him, and found him sword

ant cannot be one of the witnesses: confessions, even if completely voluntary and rendered in court, are inadmissible, and judicial tribunals do not accept guilty pleas.[73] The court is required to admonish the witnesses as to the seriousness of their testimony,[74] and then interrogate each witness separately[75] and intensively.[76] Contradictions in testimony even about nonessential facts may result in disqualification of the witnesses.[77]

Even after conviction, as the defendant is being taken to the execution site, Jewish law requires that official criers go ahead of the procession, announcing the identity of the condemned, the nature of the crime, the date and time thereof, and the names of the witnesses, and asking anyone who knows any grounds for acquittal to come forward.[78] The defendant himself can suspend the execution if he says that he can plead something in his favor.[79] An erroneous acquittal, on the other hand, generally cannot be reversed.[80] Although Jewish law does not require a unanimous verdict, instead mandating only a majority of two in the twenty-three judge court,[81] the emphasis on searching out any conceivable possibility of innocence, as well as the law's extensive safeguards, give extraordinary protection to the accused.

Many of the evidentiary and procedural rules in Jewish law can be explained on reliability grounds. Yet some are so attenuated from that

---

in hand with blood dripping from it, whilst the murdered man was writhing [in agony]: If this is what ye saw, ye saw nothing." (alteration in original).

73. *See* AARON KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW 114-15 (1970).

74. *See* MISHNAH SANHEDRIN, *supra* note 69, 4:5, at 71-77. The admonition was designed to frighten prospective witnesses into giving only true and accurate testimony.

75. *See id.* 5:4, at 85.

76. *See id.* 5:1-5:3, at 77-85. "Whoever expands the interrogations is praiseworthy. It [once] happened that Ben Zakkai interrogated concerning the stems of figs." *Id.* 5:2, at 79-81 (alteration in original). Ben Zakkai questioned witnesses to a murder that took place under a fig tree, asking them whether the stems were thick or thin. *Id.* at 80.

77. *See id.* 5:3, at 81-85; THE CODE OF MAIMONIDES, *supra* note 70, Evidence 2:1-2:5, at 84-85.

78. MISHNAH SANHEDRIN, *supra* note 69, 6:1, at 92-93. If any person comes forward with new facts or arguments, or if one of the judges has a new theory for acquittal, the case must be reconsidered. *Id.* at 92-93.

79. *Id.* The *Mishnah* states: "Even if [the defendant] says, 'I have grounds for my own acquittal,' they return him, even four or five times, as long as there is substance to his words." The requirement of "substance" is not applicable the first two times that the defendant speaks out because he may be so fearful that he cannot express himself coherently. *Id.*

80. *Id.* 4:1, at 63-65. The judges may invalidate an erroneous verdict of innocence only if they have overlooked an explicit law in the Torah. *Id.* at 64.

81. See *id.* 1:6, at 23-25, requiring a two-judge majority for conviction by a court of twenty-three. The decision to acquit, on the other hand, requires only a majority of one. *Id.* 1:6 at 25. See also *infra* note 115 for the argument that unanimous guilty verdicts may result from defective factfinding.

Capital cases were tried by a 23-judge court, *see id.* 1:4, at 17-18. The sages debated whether offenses punishable by flogging were heard by three-judge or 23-judge courts. *Id.* 1:2, at 8-9.

concern that they appear to be unrelated to guilt; as a result, authorities view them as divine decrees.[82] Whatever the reason for these limitations, which no doubt prevent conviction of the factually guilty,[83] distrust of human courts is clearly implicated. It was understood and accepted that the slack would be taken up by higher authority.[84]

The Jewish law relating to criminal punishment consequently presents an ostensible contradiction. The rules are so strict that they assure conviction of only the factually guilty, and at the same time the very same rules make it almost impossible to convict even the factually guilty.[85] Thus, the preoccupation with factual guilt resulted in an extremely elaborate system of legal guilt.

Coming from this background, we view the restrictions embodied in the Bill of Rights as rather tepid. *Miranda* does, after all, pale beside an absolute prohibition against confessions.[86] Over the ages Jew-

82. For example, the Jewish rule against admissibility of confessions is only tenuously related to reliability concerns, since even obviously voluntary, in-court confessions were excluded. Thus, while Maimonides conjectured that confessions were barred because mentally ill persons might accuse themselves falsely, he ultimately concluded that the prohibition was a divine decree beyond human comprehension. *See* THE CODE OF MAIMONIDES, *supra* note 70, Sanhedrin 18:6, at 52-53.

83. A famous *Mishnaic* debate concerns whether the so-called "Bloody Sanhedrin" executed one defendant during a seven-year period or a 70-year period. In this connection, Rabbis Tarfon and Akiva stated that, had they been on the court, there would have been no executions. Commentators suggest that these rabbis would have been able to raise doubts as to the defendant's guilt by skillful cross-examination. For example, a person who has a life expectancy of less than 12 months is called a *treifah* and is deemed legally dead for many purposes, including being the victim of a homicide. Rabbi Tarfon and Rabbi Akiva "would suggest that perhaps there was a hole in the place where the sword was thrust, and the murdered man was, in reality, a *treifah.*" MISHNAH MAKKOS, *supra* note 67, 1:10, at 35-36.

84. This view is epitomized in a Talmudic discussion in tractate Makkos on the meaning of a Biblical verse:

> What is this verse talking about? About two people — each of whom killed a person. One killed inadvertently and one killed intentionally. This one has no witnesses to testify against him, and this one has no witnesses. Since neither event was witnessed, the unintentional killer was not exiled and the intentional killer was not executed. The Holy One, Blessed is He, summons them to the same inn, where the one who killed intentionally sits under a ladder, while the one who killed inadvertently descends the ladder and falls upon him and kills him. The result of this chain of events is that the one who had killed intentionally is killed, as he deserved, and the one who had previously killed inadvertently is exiled, since he has now killed inadvertently in the view of witnesses.

TALMUD BAVLI, TRACTATE MAKKOS 10b (Hersh Goldwurm & Nosson Scherman eds., Art-Scroll Series 1st ed. 1990). Moreover, if the court was unable to convict a murderer, he remained subject to the vengeance of the victim's relatives. *See id.* at *Introduction to Chapter Two.*

85. Given such stringency, some commentators have argued that these rules were simply ideals that were never actually applied. *See, e.g.,* GEORGE HOROWITZ, THE SPIRIT OF JEWISH LAW 165-66 (1953). *But see, e.g.,* AARON M. SCHREIBER, JEWISH LAW AND DECISION-MAKING 278 (1979) ("It is difficult to maintain that talmudic criminal law was ideal only, since a tremendous amount of discussion in the Talmud is devoted to very detailed discussions of these norms. Furthermore, some of the incidents recorded in the Talmud purport to report the application in practice of these rules.").

86. Irene M. Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination,* 63 N.Y.U. L. REV. 955, 1041-46 (1988).

ish law authorities were not unaware of the extreme nature of some of these requirements and, when necessary and possible, they applied exceptions, particularly in eras in which crime flourished.[87] Nonetheless, these safeguards constitute normative Jewish law, just as the guarantees in the Bill of Rights are normative law in this country.

The MaHaRaL,[88] a highly individualistic sixteenth-century philosopher, mathematician, and commentator who was Chief Rabbi of Prague,[89] "a brilliant thinker and one of the most renowned scholars in medieval Jewry,"[90] undertook to answer the seven most difficult types of challenges that skeptics raised concerning rabbinic Judaism.[91] In this connection he considered a prohibition against unanimous verdicts, which in turn led him to discuss a rabbinic law providing that a court may not adjudge the defendant guilty without reflecting on the evidence overnight.[92] If it fails to do so, the defendant goes free. The paradox is quite compelling. Envision a situation where the evidence is so strong, so overwhelming that the court does not feel the need to deliberate until the next day. The judges are so convinced of the defendant's guilt that they enter a judgment of conviction on the same day that they hear the testimony. And in just such a case, where the evidence of guilt appears indisputable, Jewish law frees the suspect on the basis of an apparent technicality. On the other hand, in a case where the evidence is weaker, so that the judges feel the need to con-

---

87. The primary exception was for emergency situations, when general lawlessness was prevalent. *See* EMANUEL B. QUINT & NEIL S. HECHT, JEWISH JURISPRUDENCE: ITS SOURCES AND MODERN APPLICATIONS 139-213 (1980). The rights of certain habitual offenders also were curtailed. *See* MISHNAH SANHEDRIN, *supra* note 69, 9:5, at 165-66.

88. MaHaRaL is a Hebrew language acronym whose letters stand for our teacher Rabbi Loew. The MaHaRaL's actual name was Judah Loew ben Bezalel.

89. *See* 10 ENCYCLOPAEDIA JUDAICA 374-79 (1972).

90. BEN ZION BOKSER, FROM THE WORLD OF THE CABBALAH: THE PHILOSOPHY OF RABBI JUDAH LOEW OF PRAGUE 17 (1954); *see also* Yitzchok Adlerstein, *Unraveling the Mystery: The Power and Elegance of Aggada According to MaHaRaL*, JEWISH ACTION, Summer 1991, at 31 ("[The MaHaRaL's] works are one of the most important resources in making the words of our Sages come alive.").

91. The work, SEFER BE'ER HA-GOLAH (Prague 1598), is not translated into English.

92. *See* MISHNAH SANHEDRIN, *supra* note 69, 4:1, 5:5, at 63-66, 86-87 (explaining the overnight deliberation requirement). The Talmudic Sages also decided that if a court rendered a unanimous guilty verdict, the defendant must be acquitted. See BABYLONIAN TALMUD, SANHEDRIN, *supra* note 70, at 17a, 115a, in which Rabbi Kahana gives the overnight deliberation rule as a reason for the unanimity-acquittal provision. He suggests that the purpose of overnight reflection is to give judges supporting acquittal an opportunity to convince judges favoring conviction to change their minds. If, however, the members of the court unanimously favor conviction, the overnight deliberation requirement would be rendered ineffective, because no judges would be available to persuade those in favor of guilt that they are in error. Because of the interrelationship of the overnight deliberation and nonunanimity requirements, the MaHaRaL's arguments in support of the former support the latter as well. *See infra* notes 93-102, 115 and accompanying text.

template their decision overnight before rendering a guilty verdict, the suspect is convicted. Why such disparate results?

The MaHaRaL gave two related reasons for this law. He claimed that the failure of the court to retire before rendering a guilty verdict showed an impairment in the factfinding process.[93] A verdict depends on consideration of factual details that are necessarily incomplete and unclear. Man, who is limited because he is of the physical world, must think hard about the details and explore the issue deeply because that is the only way he can determine culpability. A judge who does not find at least some merit in the defendant's case and who instead votes immediately for guilt is not truly deliberating and using that part of his intellect necessary to make such a judgment. An intuitive belief that the accused is guilty is not enough to do justice. God can immediately discern absolute truth and distinguish between good and evil and their gradations, but humans cannot. In effect, the law demands a differentiation between the quality of God's omniscient justice and the fragile, fallible justice of the worldly courts. Therefore, when a court issues a verdict without deliberating overnight, it is failing to acknowledge that critical distinction between divine and human justice.[94]

The MaHaRaL's alternate explanation goes beyond the reliability concerns underlying his first reason. He argues that the function of a worldly court is not to do justice, but to be righteous, which, according to the MaHaRaL, means finding evidence of innocence rather than guilt.[95] Justice is of such transcending importance that we demand perfection in its pursuit. Perfection, however, can come only from God. Because no human court can do what God does, the Jewish court does not claim that it can get to the bottom of the matter and discern factual guilt. Rather, Jewish law embodies a more limited conception of the function of the courts, which is not to determine the absolute truth, but simply to lift the cloud of guilt from the accused. In the course of that process, it may be that sometimes the evidence is so overwhelming that the cloud of guilt cannot be lifted so the defendant must be found guilty. That, however, is simply incidental, and the judgment of guilt is entered so as not to pervert justice. But the court's main function is to find the defendant innocent.[96]

---

93. *See* MAHARAL, SEFER BE'ER HA-GOLAH 26 (L. Honig & Sons ed., 1960).

94. *Id.*

95. *Id.* at 26-27.

96. Rabbi Yitzchok Adlerstein of the Yeshiva of Los Angeles, himself a MaHaRaL devotee (*see supra* note 90), offers a possible explanation of the MaHaRaL's second rationale, which is based in turn on a commentary by Rabbi Yitzchok Hutner, an important contemporary authority on the sixteenth-century sage. When the MaHaRaL emphasizes that the essential function of the court is to find merit and that it adjudicates guilt only incidentally as a necessary byproduct

When a court makes an immediate determination of guilt, it is no longer considering the possibility of innocence, and the judges are thus no longer acting in a righteous way. When this occurs, the court is deemed to be improperly constituted, the judicial proceeding consequently is rendered void ab initio, and the defendant is set free.[97] Stated another way, when a court does not do its job of searching for innocence, it is simply not acting as a court. The underlying assumption is that ultimately God will deal appropriately with all who are guilty, and thus the human courts should not be so concerned about punishing those who have committed a wrong. The court should, in a manner of speaking, stick to its business of finding merit in the defendant's cause.[98]

The MaHaRaL's first argument in support of the overnight deliberation requirement, grounded primarily on reliability concerns, is quite traditional.[99] His second explanation, based as it is on the notion that a court's function is to search out the defendant's merit, is truly remarkable and may be viewed as adopting the functional equivalent of either a substantive presumption of innocence or a heightened reasonable doubt standard.[100]

In the course of his commentary, the MaHaRaL addresses the con-

---

of this process, he may be applying the philosophical notion that God seeks primarily to find merit in this world, but, to do so, guilt must trail behind it as a necessary adjunct. That is, the reason that there is a concept of judgment is only to serve the notion of merit. Awards of merit for doing good deeds through the exercise of free will cannot exist in the absence of accountability. God will therefore confirm merit only if the idea of judgment for wrongdoing is also present, thus giving reality to the choices that individuals make. In a free will context, reward cannot exist in the absence of punishment. Nonetheless, punishment is ancillary to reward. Likewise, in an imitation of God, the Jewish court seeks to find merit and punishes the guilty only incidentally. Telephone conversation between the authors and Rabbi Adlerstein on Oct. 11, 1991.

97. *See* MAHARAL, *supra* note 93, at 26-27.

98. *Id.* at 26. Rashi, who lived in the eleventh century and who is perhaps the foremost commentator on the Bible and the Talmud, expressed this same notion in his commentary to Exodus 23:7. In explaining the verse "For I will not justify the wicked," Rashi states: "It is not (incumbent) upon you to [find him guilty], for I shall not justify him in My court. If he has gone forth from your hand acquitted, I have many messengers to slay him with the death of which he is guilty. . . ." 2 THE PENTATEUCH AND RASHI'S COMMENTARY 271 (Abraham Ben Isaiah & Benjamin Sharfman trans., 1949) [hereinafter RASHI'S COMMENTARY]; *see also supra* note 84 and accompanying text.

99. For example, Maimonides describes the overnight deliberation process as follows:

> [T]he judges meet in pairs to study the case, eat but little and drink no wine at all; all night each judge discusses the case with his colleague or deliberates upon it by himself. The following day, early in the morning, they come to court.

THE CODE OF MAIMONIDES, *supra* note 70, 12:3, at 35.

100. The MaHaRaL's position can be viewed in this way not because he considered that Jewish law assumes the defendant's innocence, but on the basis of the MaHaRaL's understanding that the legal process has a limited goal, namely, to clear the names of those who are innocent.

Rashi observed that the overnight deliberation rule was designed to give the court one last chance to find a basis for declaring the defendant innocent. *See* MISHNAH SANHEDRIN, *supra* note 69, at 66. His position can be interpreted as based either on reliability concerns or on a view similar to the MaHaRaL's alternate explanation.

tention that enforcement of such stringent procedural requirements allows the guilty to go free.[101] He responds that preserving the court's role as a righteous court that seeks to free the innocent is more important than the incidental fact of the defendant's factual guilt. That we sometimes free guilty people is not significant. What is critical is preserving the character of the court.[102]

Thus, as to Judge Friendly's question whether innocence is irrelevant, the MaHaRaL presumably would agree that it certainly is not. In fact, in the MaHaRaL's view, innocence is central in a criminal justice process in which the court's *raison d'etre* is to remove the taint of guilt from the accused whenever possible. With a difference in degree, the MaHaRaL's position is echoed by American courts, which also are quite concerned that no innocent person be convicted.[103]

The MaHaRaL might add, however, that perhaps the question Judge Friendly really was asking in 1970, and the question that the Rehnquist Court is asking today, is a slightly different one, namely, is factual *guilt* irrelevant? To be sure, Judge Friendly was solicitous of "those few" habeas applicants in whose cases "injustice may have been done," but his real concern was with regard to the "great multitude of applications not deserving [the court's] attention" because the petitioners are "steeped in guilt."[104]

To Judge Friendly's reformulated question the MaHaRaL would answer, contrary to Judge Friendly, that factual guilt is irrelevant, because preserving the function of the court is more important than convicting the guilty. Judge Friendly might suggest that there is really no disagreement, giving a two-pronged apples-and-oranges rebuttal: (1) that the purpose of the overnight deliberation requirement is to assure reliable verdicts, whereas he, Henry Friendly, sought to prevent the application of rules that deflect accurate factfinding, and (2) that the Jewish law deals with the judicial process itself, whereas *Mapp* and *Miranda,* the focus of the Friendly article, relate to law enforcement activities outside the courtroom. In effect, Judge Friendly would be

101. *See* Rashi's commentary to *Exodus* 23:7 ("[T]he righteous slay thou not."). Rashi states: "And this man is righteous since he was acquitted in court." RASHI'S COMMENTARY, *supra* note 98, at 271.

102. MaHaRaL, *supra* note 93, at 27.

103. Although innocence by itself is not generally a basis for post-conviction relief, that concern is subsumed under due process rules relating to sufficiency of the evidence, perjured testimony, and suppression of evidence favorable to the defendant. *See, e.g., Ex parte* Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989) (granting relief in the "thin blue line" case to defendant who claimed innocence).

104. Friendly, *supra* note 3, at 150; *see also id.* at 148 n.25, suggesting that most habeas petitioners are "black with guilt." Much of Judge Friendly's article treats nonguilt-related claims as an impediment to conviction of the guilty.

arguing that the overnight deliberation rule falls within his first exception to the innocence requirement as a challenge to the "very basis of the criminal process."[105]

To Judge Friendly's first point, the MaHaRaL might answer that what is involved is a question of degree rather than kind. While it is true that the overnight deliberation requirement may help to assure reliability by encouraging more thorough consideration of the merits of each case,[106] the more immediate effect of the rule may be to compel the court to set free a person about whose guilt the judges were so certain that they neglected to continue the deliberation process overnight. Moreover, the second basis the MaHaRaL offered for freeing the accused when the judges violate the rule goes beyond reliability; it is that the court, by its failure to search for innocence, is not fulfilling its role as a court. To assure proper judicial functioning, Jewish law requires the release of the accused, even though in a particular case the defendant was factually guilty and therefore a judgment of conviction would have been perfectly reliable.

The MaHaRaL even might argue that this value — the proper functioning of the court — is being protected by a prophylactic rule that is not that different from the prophylactic rules of *Mapp* and *Miranda,* except that it is one designed for judges rather than law enforcement officials. Just as the American exclusionary rules are intended to prevent unconstitutional police conduct, release of the guilty defendant acts to deter judges from violating Jewish law by rendering a decision without waiting until the next day.[107]

In response to the second prong of Judge Friendly's argument, the MaHaRaL would of course have to acknowledge that the overnight

---

105. *See supra* note 5. Judge Friendly might also contend that because the overnight deliberation rule assured reliability in the factfinding process, it would be held retroactive and thus would fall within his fourth exception to the innocence requirement. *See supra* note 5.

While it is true that Judge Friendly could pretermit this entire fanciful dialogue with the MaHaRaL by simply pointing out that his article deals only with collateral review, *see supra* note 18, whereas the MaHaRaL discusses the criminal trial itself, we nonetheless consider it reasonable to discuss the distinctions made in the text because Judge Friendly opposed the fulsome application of *Mapp* and *Miranda,* the *betes noires* of his article, on direct review as well. *See* HENRY J. FRIENDLY, *The Bill of Rights as a Code of Criminal Procedure, in* BENCHMARKS 235, 247-65 (1967).

106. On the other hand, although both *Mapp* and *Miranda* may exclude reliable evidence of guilt, enforcement of the *Miranda* rule may also prevent police coercion that can lead to unreliable confessions. *Miranda,* 384 U.S. at 470. In addition, the *Miranda* Court noted that custodial interrogation "subject[s] large numbers of innocent persons to detention and interrogation." 384 U.S. at 482.

107. *Cf.* United States v. Leon, 468 U.S. 897, 917 (1984) (prophylactic exclusionary rule inapplicable in cases of good faith reliance on defective warrants, because, inter alia, it will not "in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests" (footnote omitted)).

deliberation requirement relates to the judicial process, whereas the exclusionary rules on which Judge Friendly focused deal with police activity outside the courtroom. The MaHaRaL might point out, however, that although illegal police methods in obtaining evidence work a wrong at the time the seizure occurs, such misconduct works a further wrong when the illegally secured evidence is introduced at trial.[108] The use of this evidence implicates judicial integrity, which, like the overnight deliberation rule, is an aspect of the proper functioning of the court. In fact, the *Mapp* majority embraced the judicial integrity concept as an alternative basis for its decision,[109] although admittedly this rationale has since fallen on hard times[110] and has been dismissed in favor of the more malleable deterrence argument.[111] The *Miranda* exclusionary rule also involves the judicial process: the requirement of warnings conserves judicial resources by eliminating the need to determine voluntariness on a case-by-case, totality of the circumstances basis, and also facilitates more accurate factfinding with respect to the voluntariness of admissions.[112]

So while the overnight deliberation rule is at least partially bound up with the question of reliability and relates to the judicial process itself, the broader and more fundamental issue raised by this law is whether we should free the guilty to preserve a value that we deem necessary to proper working of the criminal justice process, regardless of the culpability of individual defendants. To this Judge Friendly's answer is generally no,[113] and the MaHaRaL's is yes. For in our im-

108. *See Leon,* 468 U.S. at 933 (Brennan, J., dissenting) ("Because seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence.").

109. *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961) ("Our decision . . . gives . . . to the courts[] that judicial integrity so necessary in the true administration of justice.").

110. See, for example, Stone v. Powell, 428 U.S. 465, 485 (1976), in which the Court concluded that the judicial integrity concern "has limited force as a justification for the exclusion of highly probative evidence" (footnote omitted).

111. *See, e.g.,* Illinois v. Krull, 480 U.S. 340, 352 (1987) (discussing "whether exclusion of evidence seized pursuant to a statute subsequently declared unconstitutional will 'have a significant deterrent effect' on legislators enacting such statutes," and finding no such effect (citation omitted)); United States v. Janis, 428 U.S. 433, 457-58 (1976) ("Working, as we must, with the absence of convincing empirical data, common sense dictates that the deterrent effect of the exclusion of relevant evidence is highly attenuated when the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign."); United States v. Calandra, 414 U.S. 338, 351 (1974) ("Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal.").

112. *See* Miranda v. Arizona, 384 U.S. 436, 468-69 (1966).

113. *See supra* note 5.

perfect world there is only one kind of ascertainable guilt, and that is legal guilt.[114] The search for more is nothing less than arrogance.[115]

---

114. Jewish law's emphasis on legal guilt has a downside, however. If a conviction is obtained in compliance with all procedural and evidentiary requirements, it cannot be set aside even on the basis of innocence. Witnesses are not permitted to recant their testimony. *See* BABYLONIAN TALMUD, SANHEDRIN, *supra* note 70, at 44b; BABYLONIAN TALMUD, MAKKOTH 3a (I. Epstein ed., 1987); BABYLONIAN TALMUD, KETHUBOTH 18b (I. Epstein ed., 1971). This is illustrated by a Rashi commentary to the Jerusalem Talmud that tells of the son of Rabbi Shimon ben Shetach. The enemies of Rabbi Shimon ben Shetach hired false witnesses to concoct testimony that his son had murdered someone. After the son's conviction, the witnesses publicly recanted. The son refused to permit his father to save him, calling out to the judges who had convicted him: "Fulfill the sentence on me rather than transgress the Torah-law which states that the witnesses cannot revoke their testimony!" The execution proceeded. 2 MOSHE WEISSMAN, THE MIDRASH SAYS 218 (1980). While this result is harsh, it does demonstrate the respect that Jewish law gives to the concept of legal guilt. By comparison, it is difficult but not impossible to reopen American convictions on the basis of recanted testimony. *See, e.g.*, United States v. Mazzanti, 925 F.2d 1026 (7th Cir. 1991) (using the lenient test that jury might have reached a different conclusion absent the false testimony, and discussing stricter tests used in other circuits, such as probability that the false testimony would lead to acquittal on retrial, and requirement that conviction be based substantially on tainted evidence).

115. The related rule requiring acquittal in the case of a unanimous guilty verdict, *see supra* note 92 and accompanying text, also supports the view that in any conflict between legal and factual guilt, the former must prevail. Like the overnight deliberation requirement, the unanimity-acquittal rule appears to be a counterintuitive mandate, because unanimity might be considered a guarantor of correctness. *Cf.* Apodaca v. Oregon, 406 U.S. 404 (1972) (upholding nonunanimous jury verdicts in state criminal cases). Unanimity, however, arguably impinges on reliability, because judges speaking only in one voice may have failed to consider the issues deeply and, in the alternative, may not have fulfilled the function of the court to look for righteousness on the part of the accused.