

Summer 6-1-2016

The Supreme Court's Talmudic Debate on the Meanings of Guilt, Innocence, and Finality

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Recommended Citation

Jonathan D. Colan, *The Supreme Court's Talmudic Debate on the Meanings of Guilt, Innocence, and Finality*, 73 Wash. & Lee L. Rev. 1243 (2016), <https://scholarlycommons.law.wlu.edu/wlulr/vol73/iss3/8>

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The Supreme Court’s Talmudic Debate on the Meanings of Guilt, Innocence, and Finality

Jonathan D. Colan*

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I. Introduction

In *Brown v. Allen*,¹ Justice Robert Jackson famously declared of the Supreme Court “[w]e are not final because we are infallible, but we are infallible only because we are final.”² The Supreme Court exercised its power of finality in that case by limiting the collateral review accorded to state court decisions by denying post-conviction relief to prisoners challenging the constitutionality of their convictions.³ Despite Justice Jackson’s characterization of the Supreme Court’s finality, however, its *Brown* decision was subsequently abrogated by amendments to 28 U.S.C. § 2254, as part of Congress’s revisions to the federal courts’ ability to collaterally review both federal and state convictions in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).⁴ Balancing the interests of finality and fallibility, however, remains the fundamental principle underlying appellate review in the American legal system.⁵

People of good faith *want* to get it right. They want justice. From time to time, Americans have focused their attention on

1. 344 U.S. 443 (1953) *superseded by statute*, 28 U.S.C. § 2254 (2012), as recognized in *O’Brien v. Dubois*, 145 F.3d 16 (1st Cir. 1998).

2. *Id.* at 540 (Jackson, J., concurring).

3. *See O’Brien*, 145 F.3d at 20 (“Thus, even if lower federal court decisions support the petitioner’s position or adumbrate the emergence of a rule favorable to him, the writ cannot issue unless the state court decision contravenes, or involves an unreasonable application of, extant Supreme Court jurisprudence.”).

4. *See* 28 U.S.C. § 2254(d) (2012); *Williams v. Taylor*, 529 U.S. 362, 402–13 (2000) (acknowledging that the *Brown* decision was superseded by statute). *See generally* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (claiming a purpose of “deter[ing] terrorism, provid[ing] justice for victims, [and] provid[ing] for an effective death penalty”).

5. *See* Joseph M. Giarratano, Essay, “*To the Best of Our Knowledge, We Have Never Been Wrong: Fallibility vs. Finality in Capital Punishment*,” 100 YALE L.J. 1005, 1006 (1991) (discussing the fundamental balance between wanted fairness and wanting a final decision).

cases in which we fear our legal system has gotten it wrong. Whether it is the case of Adnan Syed made famous in Sarah Koenig's *Serial* podcast,⁶ or the case of Joseph Giarratano (which anti-death penalty activists have raised as a rallying cry),⁷ our attention keeps being drawn towards the re-examination of questionable cases. The proper balance between finality and accuracy is not an easy one to achieve.

Absent divine intervention, human beings cannot achieve metaphysical infallibility. Any serious attempt to even approach infallibility in the results of our criminal justice system would require an open-ended commitment to further review trial court decisions as many times as necessary to eliminate any question that could ever be raised, now and into the indefinite future. There could never be a final decision. If it is anathema in any just legal system to execute an even possibly innocent person, then such an open-ended system may be necessary.

By contrast, any attempt to settle on a final, ultimate resolution of a defendant's guilt would necessitate cutting off all further attempts to raise new facts or arguments questioning that decision. One is hard-pressed to imagine any combination of confessions, eye-witness identifications, and forensic evidence that cannot be called into doubt. In fact, the cases where just such evidence has been called into doubt are legion.⁸ Any declaration that we will review a defendant's guilt no more simply asserts that we have reviewed such questions enough. This begs the question: Enough for what purpose?

The problem is that we do not all agree on what it means to be "innocent" or "guilty." Is guilt an objective truth or a procedural conclusion? If it is an objective truth, no human-run

6. See Sarah Koenig, *Serial*, WBEZ CHICAGO (Fall 2014) (discussing the evidence, whether admitted in trial or not, in the case of Adnan Syed's conviction for the murder of Hae Min Lee).

7. B. Drummond Ayres, Jr., *Virginia Governor Blocks an Execution*, N.Y. TIMES (Feb. 20, 1991), <http://www.nytimes.com/1991/02/20/us/virginia-governor-blocks-an-execution.html> (last visited Sept. 21, 2016) (on file with the Washington and Lee Law Review).

8. See WRONGFUL CONVICTIONS INVOLVING UNVALIDATED OR IMPROPER FORENSIC SCIENCE THAT WERE LATER OVERTURNED THROUGH DNA TESTING, INNOCENCE PROJECT, http://www.innocenceproject.org/wp-content/uploads/2016/02/DNA_Exonerations_Forensic_Science.pdf (collecting cases where a conviction was based on wrongful forensic evidence).

system can ever reach a final, definitive answer. If it is a procedural conclusion, then metaphysical certainty is impossible.

One of the premises underlying the American legal system of trials and appeals is that while we cannot achieve metaphysical certainty of the accuracy of the results reached by our courts, we can achieve a sufficient level of trust in the results if we carefully guard the inputs and process by which we reach those results. The function of the appeal is not to offer the defendant a second chance to determine the question of his guilt, but a chance to call the process by which his guilt was determined into doubt. To achieve finality, the American legal system attempts to enforce certain limits on perpetual appeals, though it leaves open the possibility of an escape hatch to prevent everyone's worst nightmare—the execution of an actually innocent person.

An interesting comparison to the American legal system's attempt to impose an imperfect finality is the Talmud's criminal justice system, which imposes no deadline on a condemned defendant's ability to raise new questions concerning his guilt.⁹ One feature of the Talmud—Judaism's compendium of religious and civil law, rabbinic tradition, and philosophy—is its striving to know the essence of a thing.¹⁰ The Talmud's "concern for precise definitions" manifests itself in explorations of what constitutes an object's or an obligation's "essence and which [of its features] are dispensable."¹¹ According to the Talmud, earthly judges are not merely acting on their own behalf, but are representatives of G-d,¹² and G-d's presence is in their

9. See *infra* Section III.B (discussing the Talmud's open-ended post-conviction review process).

10. See Adam Kirsch, *What Happens When the Talmud Asks, 'What If?'*, TABLET (Jan. 14, 2014), <http://www.tabletmag.com/jewish-life-and-religion/159223/daf-yomi-66> (last visited Sept. 21, 2016) (describing the function of the remote speculations within the Talmud as provocation to consider definitions and essences of things) (on file with the Washington and Lee Law Review).

11. Adam Kirsch, *How the Talmud Maps Behavior by Exploring Definitions, Not Listing Rules*, TABLET (June 18, 2013) <http://www.tabletmag.com/jewish-life-and-religion/135210/daf-yomi-38> (last visited Sept. 21, 2016) [hereinafter Kirsch, *How the Talmud Maps Behavior*] (on file with the Washington and Lee Law Review).

12. Beyond refraining from writing or uttering the formal or even informal names of G-d, many Jews hyphenate the word itself. When writing for myself,

judgment.¹³ Thus, determining whether a condemned prisoner is actually innocent or guilty is not a mere procedural question, but a search for divine truth. Innocence and guilt are metaphysical states of being. G-d commands: “An innocent person you shall not slay.”¹⁴ The Talmud, thus, bends over backwards to avoid carrying out capital punishment, despite its exhaustive treatment of the subject and deceptively draconian tone.¹⁵ Finality of judgment is sacrificed to ensure that no inaccurate judgment is carried out.

These competing ideas between guilt and innocence as states of being or conclusions derived from a valid, judicial process are reflected in a debate that has engaged legal scholars—from the Talmudic rabbis to the United States Supreme Court—for more than a thousand years.¹⁶ Importantly, recognizing the difference between guilt and innocence as objective truths and guilt and innocence as legal conclusions explains how Justice John Paul Stevens and Justice Antonin Scalia managed to talk past each other in *In re Davis*,¹⁷ one of the Supreme Court’s treatments of the subject of “actual innocence.” When Scalia’s critics attributed to him the position that “executing even innocents doesn’t violate the Constitution,”¹⁸ they confused the two different views about what it means to be “innocent.” This philosophical nuance is meaningless to the horrifying prospect that a person may have been wrongfully put to death by the American legal system. But understanding the difference between these competing definitions of “innocence” is essential to understanding Justice Scalia’s and Justice Stevens’s disagreement in *In re Davis*.

and not directly quoting others whose practices may differ, I will keep to that practice.

13. Haim Shapira, “*For the Judgment is God’s*”: *Human Judgment and Divine Justice in the Hebrew Bible and in Jewish Tradition*, 27 J.L. & REL. 273, 294–300 (2011–12).

14. *Exodus* 23:7.

15. See *infra* Section III.B (discussing the Talmud’s criminal justice system).

16. See *infra* Section IV (discussing the Talmud’s criminal justice debates).

17. 557 U.S. 952 (2009).

18. Dahlia Lithwick, *How the Innocent End up on Death Row*, TAMPA BAY TIMES (Sept. 4, 2014), <http://www.tampabay.com/news/nation/how-the-innocent-end-up-on-death-row/2196162> (last visited Sept. 21, 2016) (on file with the Washington and Lee Law Review).

This thousand-year-old argument continued to stymie the Supreme Court through its 2015 term.¹⁹ Justice Breyer argued that the imposition of the death penalty is unconstitutionally cruel because of its “serious unreliability.”²⁰ He cited research “estimat[ing] that about 4% of those sentenced to death are actually innocent.”²¹ Justice Scalia responded that the petitioners before the Court were “afforded counsel and tried before a jury of their peers” and thus “duly convicted and sentenced.”²²

The different ways in which the Talmud’s legal system and the American legal system attempt to balance the competing interests in accuracy and finality spotlight these different conceptions of innocence and guilt. A system that prizes accuracy above all, as the Talmud does in attempting to implement a divinely-inspired system of ultimate justice, dispenses with finality to ensure it never executes an innocent man. Yet a system that attempts to maintain some element of finality in its judgments, as the American legal system does, can still claim never to have executed an innocent person—if you accept that “guilt” is a legal determination, not an objective truth. The proper balance between finality and accuracy plagued the rabbis of the Talmud and continues to plague the Justices of the United States Supreme Court.

As centuries of Talmud scholars have discovered, a good Talmudic debate can be both a useful way to derive a difficult answer and an enjoyable intellectual exercise for its own sake.²³ This Article will present one such Talmudic debate—on the subject of finality in the criminal justice system’s attempt to determine a condemned prisoner’s guilt or innocence—and show that this same debate was carried out in almost identical terms by the United States Supreme Court in *In re Davis*. Part II will introduce readers to the Talmud, its structure, and its distinctive

19. See *Glossip v. Gross*, 135 S. Ct. 2726, 2736–38 (2015) (debating the merits of enforcing the death penalty).

20. *Id.* at 2756 (Breyer, J., dissenting).

21. *Id.* at 2758 (citation omitted).

22. *Id.* at 2746–47 (Scalia, J., concurring).

23. See David A. Frank, *Arguing with God, Talmudic Discourse, and the Jewish Countermodel: Implications for the Study of Argumentation*, 41 ARGUMENTATION AND ADVOCACY 71, 80–83 (2004) (describing the historical role of Talmudic debate in Jewish discourse).

method of debate and analysis. Part III will compare the American and Talmudic criminal justice systems, highlighting the differences in available avenues for appellate review under the Talmud and American law. Part IV will relate the debate in the Talmud between Rav Acha bar Huna and Rav Sheishess over what to do when a member of the court raises a new argument to acquit a condemned prisoner, but is struck mute before being able to state his argument, and will compare this debate with the one between Justice Stevens and Justice Scalia over whether a condemned prisoner who has exhausted his direct and collateral appeals may raise a new claim of actual innocence. Part V will further discuss the case of Troy Davis, the prisoner whose matter was the subject of Justice Stevens's and Justice Scalia's debate. Part VI will offer a conclusion about the meaning of guilt, innocence, and finality in systems of divine and human justice.

Conceding my amateur status as a Talmud scholar, I make no claims of understanding or conveying the entirety of the Talmud's treatment of the procedures and principles to be applied in criminal trials or appeals. As discussed below, conveying the entirety of the Talmud's thought on any subject is a near impossibility for even the most learned Talmud scholar. My purpose in this essay is to highlight the similarity between one particular Talmudic debate on the question of finality of criminal judgments and an on-going debate amongst the Justices of the United States Supreme Court on the same subject. Any debate that continues in the same form for more than a thousand years deserves our attention.

II. A Brief Introduction to the Talmud

Before I continue, a little explanation about the Talmud is in order, as it has been remarked, "The Talmud is . . . a nightmare for the uninitiated."²⁴ Worse, a little knowledge is a completely

24. See Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self Incrimination*, 63 N.Y.U. L. REV. 955, 972–73 (1988) [hereinafter Rosenberg, *In the Beginning*] ("There is neither table of contents nor index, and it is written in Hebrew and Aramaic freely intermixed. It has no vowels and no punctuation. The language is, on its face, terse and cryptic, presupposing broad and deep knowledge of the totality.").

baffling thing. Although the Talmud is divided into sixty sections, called tractates, named for their purported areas of focus (e.g., “Tractate Sanhedrin” refers to the courts (*sanhedrin*)), the discussions found within each tractate wander in an almost stream of consciousness fashion to a seeming infinite series of digressions—“[y]ou [will] seldom find subjects in the place where you expect them.”²⁵ In the tractate ostensibly devoted to the rules of regarding the observance of the Jewish High Holiday of Yom Kippur, you will find significant information regarding which types of structures require the posting of a mezuzah on the door.²⁶ A tractate regarding the procedures for verifying the time of the New Moon commencing the High Holiday of Rosh Hashana provides the maxim that “a witness cannot act as a judge” and then proceeds to discuss whether such rule only applies in capital cases.²⁷ Because of this style of discussion and digression, “it is impossible to find all conceptually related materials on any given issue, unless, of course, one is already familiar with and understands the entire Talmud.”²⁸ Another writer put it this way: “[T]he Talmud itself is so unpredictably structured that it is almost unusable as a practical legal guide. In order to know where to look for a given subject, you’d have to know the entire Talmud in advance.”²⁹

25. See Kirsch, *How the Talmud Maps Behavior*, *supra* note 11 (noting the confusing structure of the Talmud and how within one chapter the focus can shift to different subjects).

26. See Adam Kirsch, *The Talmud Says God Can’t Protect Jews From Persecution; They Must Take Precautions*, TABLET (Nov. 26, 2013), <http://www.tabletmag.com/jewish-life-and-religion/154044/daf-yomi-60> (last visited Sept. 21, 2016) [hereinafter Kirsch, *The Talmud Says God Can’t Protect Jews From Persecution*] (“The connection with the ostensible subject of the tractate, as often happens in the Talmud, is so fleeting that if you blinked you might miss it.”) (on file with the Washington and Lee Law Review).

27. See Adam Kirsch, *Talmudic Rabbis Debate the Practice of the Law Versus the Intention Behind It*, TABLET (June 10, 2014), <http://www.tabletmag.com/jewish-life-and-religion/175313/daf-yomi-85> (last visited Sept. 21, 2016) (explaining that a witness cannot also be a judge because then the judge will not be able to exonerate the accused and follow the principal of innocent until proven guilty that all judges are to follow) (on file with the Washington and Lee Law Review).

28. Rosenberg, *In the Beginning*, *supra* note 24, at 972.

29. Kirsch, *The Talmud Says God Can’t Protect Jews From Persecution*, *supra* note 26.

But the Talmud is more than a compilation of Jewish law. “If the Bible is the cornerstone of Judaism, then the Talmud is the central pillar, soaring up from the foundations and supporting the entire spiritual and intellectual edifice.”³⁰ “Indeed, at least from the perspective of traditional Judaism, to divine original intent with respect to any law, one must view the Bible and the Talmud as an indivisible partnership.”³¹

According to Jewish tradition, G-d personally delivered to Moses at Mount Sinai both the written Law set forth in the Torah³² and the oral Law that was then passed down from Moses and on through his rabbinic successors in each generation.³³ Debates about the oral and written Law have occupied the Jewish people from late Biblical times through the modern day. The Talmud represents “the primary source” of Jewish law, though far from the final and definitive source.³⁴

30. ADIN STEINSALTZ, *THE ESSENTIAL TALMUD 3* (Chaya Galai trans., Basic Books 2006).

31. Irene Merker Rosenberg & Yale L. Rosenberg, *Of God's Mercy and the Four Biblical Methods of Capital Punishment: Stoning, Burning, Beheading, and Strangulation*, 78 TUL. L. REV. 1169, 1175–76 (2004) [hereinafter Rosenberg, *Of God's Mercy*] (explaining that in order to understand the biblical death penalty, one must understand the Talmud).

32. The Torah contains the Five Books of Moses, traditionally given to the Children of Israel by G-d at Sinai, during their exodus from Egypt. Collectively, the Torah, the Writings, and the Prophets constitute the Jewish Bible, which is known by the acronym formed by the Hebrew names for each section (Torah + Nevi'im + Ketuvim = Tanach).

33. See Martin Pritikin, *The Value of Talmud Study to Modern Legal Education*, 21 TEMP. INT'L & COMP. L.J. 351, 352 (2007) (using cases from the Talmud to explain its relevance to modern legal thought); Rosenberg, *Of God's Mercy*, *supra* note 31, at 1175 n.16 (“If we do not trust [the Sages'] interpretation, we will be unable to fully understand the [commandments]. Just as we received the Written Torah from our ancestors, so did we receive its oral interpretation.” (quoting YEHUDA NACHSHONI, *STUDIES IN THE WEEKLY PARASHAH, SH'MOS 491* (Shmuel Himelstein trans., 1998) (citations omitted))); see also Rosenberg, *In the Beginning*, *supra* note 24, at 967 n.47 (discussing further the history of the oral and written Law in Jewish tradition and scholarship).

34. STEINSALTZ, *supra* note 30, at 4. Over the generations, Jewish scholars have continued to comment on and add their own gloss to the never-ending debate. Subsequent attempts to distill Jewish law and explain the Talmud continued from the Twelfth Century *Mishneh Torah* of Moses Maimonides to the legal opinions authored by leading rabbis to this day (*responsa*). See Pritikin, *supra* note 33, at 355–57 (detailing the sources of Jewish law).

The Talmud consists of two parts. The Mishnah, “a book of halakha (law) written in Hebrew,” and the Gemara, “a summary of discussion and elucidations of the Mishnah written in Aramaic-Hebrew.”³⁵ The Mishnah was compiled between 30 B.C.E. and 200 C.E. and attempts to set forth the “terse, black-letter law” derived from the “unbroken chain” of the oral Law transmitted from the time of Moses.³⁶ The word “Mishnah” derives from the verb root meaning “to repeat.”³⁷ The Gemara was compiled between 200 C.E. and 500 C.E. and consists of rabbinic debates about the meaning and sources of the law, with reference to Biblical text, oral tradition, and Jewish folklore.³⁸ The word “Gemara” means “learning” or “scholarship” in Aramaic and “completion” in Hebrew.³⁹ “Whereas the Mishnah’s mission is to lay out the law, the Gemara’s primary function is ‘to serve . . . as a vehicle of theoretical explication [of the law].’⁴⁰ The title “Rabbi” (or its variants “Rav” or “Rabban”), given to the scholars quoted in the Talmud, derives from the word for teacher or master.⁴¹

The Talmud as it comes to us today is in large measure the result of editing, compilation, and gloss added by the Eleventh Century Rabbi Shlomo Yitzchaki (known by the acronym “Rashi”).⁴² Rashi’s place as “the greatest commentator on the Talmud” is “universally acknowledged,” and “[a]lmost all Talmudic commentators after the time of Rashi relate to his

35. STEINSALTZ, *supra* note 30, at 3.

36. *Id.* at 10, 57–62; *see also* Pritikin, *supra* note 33, at 353 (providing a basic explanation of the Mishnah); Rosenberg, *Of God’s Mercy*, *supra* note 31, at 1175 (discussing biblical death penalties).

37. Rosenberg, *In the Beginning*, *supra* note 24, at 968 n.48.

38. *See* STEINSALTZ, *supra* note 30, at 10; Rosenberg, *Of God’s Mercy*, *supra* note 31, at 1175 (“The Mishnah, which generally states terse, black-letter law, was redacted circa 200 C.E.; the far lengthier Gemara, which is an extraordinary commentary consisting largely of rabbinic debates invoking biblical, mishnaic, and midrashic sources, was redacted some three centuries later.”).

39. Rosenberg, *In the Beginning*, *supra* note 24, at 969 n.49.

40. Rosenberg, *Of God’s Mercy*, *supra* note 31, at 1188 (quoting ADIN STEINSALTZ, *THE STRIFE OF THE SPIRIT* 80 (1988)).

41. PETER SCHAFFER, *THE HISTORY OF THE JEWS IN THE GRECO-ROMAN WORLD* 133 (2003).

42. STEINSALTZ, *supra* note 30, at 116.

commentary, in some way disagreeing with it, defending it, interpreting it, or clarifying it.”⁴³ Because of the respect given to his views, Rashi’s commentaries are included alongside the Talmud’s text, set apart in special “Rashi script.”⁴⁴

A passage in the Talmud will begin with a statement of the law from the Mishnah, followed by a rabbinic debate in the Gemara posing questions about the Mishnah’s assertion, typically questioning the source for the Mishnah’s conclusion, challenging its reasoning, or seeking to clarify its meaning through the use of hypothetical scenarios.⁴⁵ As readers will discover when this Article explores one such rabbinic debate concerning finality in criminal jurisprudence, that these hypotheticals may stray from the legal point under consideration or propose absurd situations does not undercut the Talmud’s elucidation of the law, but rather serves to support the entire structure. “The Gemara may, after a detour, return to the prior topic, or it may finish a topic with certain questions left unresolved. But no matter what twists and turns the Gemara takes, the job of the student is to look for logical consistency throughout.”⁴⁶ As should be familiar to any American law student practiced in the art of Socratic instruction, “[a]s new sources or arguments are introduced, the [Talmud reader] may be forced to revisit and revise initial assumptions about the scenario, the rule, or the underlying principles that connect them.”⁴⁷

For example, if in the Torah G-d commands the Jewish people that on the Sabbath they are to “perform no labor,”⁴⁸ the Talmud attempts to answer the question of what constitutes performing labor. Such a question may appear simple. One oral tradition relies on the idea that G-d’s command to observe the Sabbath as a day of rest commemorated G-d’s cessation of labor

43. *Id.* at 119.

44. *Id.* at 116–19.

45. See Pritikin, *supra* note 33, at 358 (comparing Mishna argument to Gemara argument).

46. *Id.*

47. *Id.* at 351, 361 (“Often, a mishna will employ only a few words to represent a complicated factual scenario. Part of the job of the student is to try to determine what that scenario is. Logic, creativity, and linguistic analysis are all crucial ingredients to success in this endeavor.”).

48. *Exodus* 20:8–11.

at the completion of creating the universe, and thus “labor” should constitute creative actions.⁴⁹ This generalized approach does not suffice, however, because “no single definition could cover all the complex problems likely to develop.”⁵⁰ The Mishnah can compile a list of forbidden actions (based upon the thirty-nine separate, basic labors said to be necessary for the construction of the Tabernacle in the wilderness—something the Torah specifically forbids the Jewish people from doing on the Sabbath) but the commentary in the Gemara is necessary to derive from this list the types of labors “similar in essence, although differing in detail,” which are then likewise forbidden.⁵¹ If “carrying” is forbidden, is “transporting saliva in one’s mouth” considered “carrying”?⁵² To love such a question is to love the Talmud.

While the Talmud contains a myriad of important rules and regulations governing every aspect of an observant Jew’s life, it also displays an abiding “interest in theoretical argument, even when no practical issue is at stake.”⁵³

Voicing doubts is not only legitimate in the Talmud, it is essential to study. To a certain degree, the rule is that any type of query is permissible and even desirable; the more the merrier. No inquiry is regarded as unfair or incorrect as long as it pertains to the issue and can cast light on some aspect of it.⁵⁴

49. See STEINSALTZ, *supra* note 30, at 148 (“Just as God ceased from His labor—creation of the world—on the Sabbath, so the children of Israel are called upon to refrain from creative work on this day.”).

50. *Id.* at 148–49.

51. See *id.* at 149 (discussing the complex subcategories derived from the thirty-nine basic labors). For a more thorough example of the Talmud’s analytical approach, see Pritikin, *supra* note 33, at 365–85. The fact that Pritikin titles step six of his eight-step illustration of the Talmud’s reasoning process “A Proposed Solution to the Flaw in the Alternative Resolution” should tell readers something about the complexity of Talmudic analysis. This should not daunt American lawyers who are woefully familiar with pleadings such as Sur-Replies to the Second Cross-Motion for Reconsideration of the District Court’s Order Denying Rehearing.

52. Kirsch, *What Happens When the Talmud Asks, ‘What If?’*, *supra* note 10.

53. Kirsch, *The Talmud Says God Can’t Protect Jews From Persecution*, *supra* note 26.

54. STEINSALTZ, *supra* note 30, at 8.

“[I]t is the debates themselves, rather than the rules propounded, that are the glory of the Talmud.”⁵⁵ Even G-d is said to enjoy a good Talmudic debate and does not mind losing.⁵⁶

In fact, the Talmud's entire treatment of the procedures and safeguards required before condemning a criminal to death, reviewing his sentence, and carrying out the punishment constitutes a giant advisory opinion. The Talmud recognizes that capital cases can only properly be tried while there is a Great Sanhedrin sitting in the Temple in Jerusalem that was destroyed by the Romans in 70 C.E.⁵⁷ The Talmud's compilers did not let the hypothetical nature of many of their questions stop them from addressing them in great detail. Deriving the correct answer was its own reward and half the fun.⁵⁸ All of us who have been first-year law students should appreciate that.

55. Rosenberg, *In the Beginning*, *supra* note 24, at 969–70.

56. In Bava Metzia 59b, the Talmud relates a much-loved story about Rabbi Eliezer's lone defense of his position regarding the ritual purity of an oven (“The Oven of Akhnai”) against an unnamed majority of opposing rabbis. Rabbi Eliezer appeals for signs from G-d to show support for his position, which G-d provides by way of several miracles—a carob tree is uprooted, the waters of a canal run backwards, the walls of the hall lean. *Id.* Finally, a voice from Heaven itself proclaims support for Rabbi Eliezer. *Id.* The other rabbis, astoundingly, reject this Heavenly support for Rabbi Eliezer, citing Deuteronomy 30:12 for the proposition that the Law “is not in Heaven”—meaning that G-d already set forth the Law and presented it to Moses and his rabbinic successors, to whom G-d gave authority to decide such matters by majority. *Id.* The Talmud's coda to this story relates Rabbi Nassan's occasion to meet the prophet Elijah who tells Rabbi Nassan that G-d's reaction to the rabbis' refutation of his support for Rabbi Eliezer was one of joy: G-d “was laughing and saying my children have prevailed over Me, My children have prevailed over Me.” *Id.* Generations of Talmud scholars have taken heart from this story as encouragement to leave no argument unchallenged. See Stephen J. Werber, *The Essence of Talmudic Law and Thought by Samuel N. Hoenig*, 17 J.L. & REL. 297, 300 (2002) (“It is man, and man's intelligence and free will, that rules.”); Daniel J.H. Greenwood, *Akhnai*, 1997 UTAH L. REV. 309, 342–44 (1997) (explaining how the Talmud story of Eliezer defeating G-d in argument shows that to be called argumentative in the Talmud is to be praised).

57. Sanhedrin 52b. See also Shabbos 15a (acknowledging the Great Sanhedrin's abstention from hearing capital cases in exile); Rosenberg, *Of God's Mercy*, *supra* note 31, at 1176 n.21 (describing the destruction of the Temple and the various theories on when the Temple ceased to hold hearings).

58. Kirsch, *The Talmud Says God Can't Protect Jews From Persecution*, *supra* note 26, describes the Talmud's attention to the question of how a Temple High Priest would arrange to have a second wife ready, just in case his original wife died immediately before the Jewish holiday of Yom Kippur. Because certain rituals must be performed by the High Priest—and *only* the High Priest—in

Literary critic Adam Kirsch, writing about his experience engaging in the tradition of *Daf Yomi* (reading and studying a page of the Talmud a day), observes that the Talmud's attention to hypothetical questions is not merely "academic speculation[]":

I've found it useful, in the course of reading *Daf Yomi*, to think of these kinds of questions as the rabbis' indirect way of asking about definitions and essences. In laying down the Shabbat laws, for instance, one rabbi asks whether transporting saliva in one's mouth is considered "carrying," in which case one would have to spit it out every few paces. The point of the question, it seems to me, is not whether a Jew should go around spitting all the time, but exactly how to define a substance: Is matter within the body a separate entity, or part of the body itself? This kind of speculation about substances and their qualities was central to classical and medieval thought, including Jewish thought. Because Jewish law deals with everyday matters, it produces a kind of everyday metaphysics.⁵⁹

order for the Jewish people to make proper atonement to G-d for their sins on this most holy day, the Talmud describes various preparations to be undertaken to ensure the High Priest's presence and spiritual purity when he is needed on Yom Kippur. *Id.* Elsewhere in the Talmud, the rabbis determined that the High Priest must be a married man. *Id.* Kirsch notes that the Talmud's tractate setting forth the rules for observing Yom Kippur require that "an alternate High Priest [be] appointed for Yom Kippur, in case the regular one was disqualified by ritual impurity." *Id.* (discussing Yoma 13a). Rabbi Yehuda suggested, if an alternate High Priest was required, should not the High Priest likewise have an alternate wife standing by, to ensure that he satisfied the requirement that he be a married man? *Id.* The Talmud rejected this arrangement as an unnecessary precaution. *Id.* Kirsch observes: "[T]his doesn't stop the Gemara from picking up Yehuda's suggestion and examining its legal implications. The High Priest doesn't need an alternate wife, the rabbis say—but what if he did?" *Id.* The Talmud then proceeds to discuss how such a hypothetical, not-required precaution would be arranged.

The Talmud itself illustrates the risk involved in dismissing seemingly absurd hypotheticals. In a discussion regarding the proper method for putting on *tefilin* (prayer boxes strapped to one's head and arms), one rabbi scoffed at a question asking how a man with two heads should wear *tefilin*—in so many words telling the questioner to get out of here with such a stupid question. At just that moment, a man arrives to ask the rabbi whether he is required to make one donation or two for his son who was just born with two heads. *See* Rosenberg, *In the Beginning*, *supra* note 24, at 970 n.52 (discussing Menachos 37a); Menachos 37a (discussing the obligation to make a donation of five silver shekels to "redeem the firstborn" from the otherwise applicable obligation of the firstborn to serve the Tribe of Levi).

59. Kirsch, *What Happens When the Talmud Asks, 'What If?'*, *supra* note

Many such questions addressed by the Talmud have important implications to the daily lives of traditionally observant Jews. An observant Jew must know what he or she is permitted to carry on the Sabbath, while obeying the commandment to “perform no labor.” But the Talmud also trains the student to explore the essence of questions for its own intellectual exercise.

In his attempt to introduce the Talmud to readers, like your humble author, who lacked a yeshiva education and years of Talmud learning, Adin Steinsaltz conceded that “[a]ny description of its subject matter or study methods must, inevitably be superficial because of the Talmud’s unique nature.”⁶⁰ Steinsaltz advised that “[t]rue knowledge can only be attained through spiritual communion, and the student must participate intellectually and emotionally in the talmudic debate, himself becoming, to a certain degree, a creator.”⁶¹ Let us then, together, continue the tradition of Talmud learning, and explore what it has to teach us about how the American legal system handles the question of finality in the criminal justice system.⁶²

A. *The Use of Talmud in American Law*

In fact, the Talmud is no stranger in this strange land. Justice William Douglas noted the differences between American constitutional law’s distinction between coerced and voluntary confessions and the Talmud’s exclusion from court of all self-incriminatory statements (whether coerced or voluntary) in *Garrity v. New Jersey*.⁶³ In *Caperton v. A.T. Massey Coal Co.*,⁶⁴

10.

60. STEINSALTZ, *supra* note 30, at 9.

61. *Id.*

62. For additional history and understanding of the Talmud’s place in Jewish law and thought, see Michael J. Broyde, *The Foundations of Law: A Jewish Law View of World Law*, 54 EMORY L.J. 79, 80 n.3 (2005) and Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 816 n.13 (1993).

63. 385 U.S. 493, 497 n.5 (1967). *See also* *Asherman v. Meachum*, 957 F.2d 978, 990 (2d Cir. 1992) (“[A]s part of the ancient Jewish law, there is found in the Talmud the Hebrew equivalent of the Latin *maxim nemo tenetur seipsum prodere*, ‘no one is bound to betray himself.’” (citations omitted)).

64. 556 U.S. 868 (2009).

Justice Scalia noted the Talmud's remark, with respect to the Scripture—"Turn it over, and turn it over, for all is therein"—before chiding the Supreme Court majority, saying, "Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not."⁶⁵

At times, American courts have praised as "Talmudic" analyses that display "breadth and thoroughness"⁶⁶ or painstaking attempts to find "compatibility [in] seemingly inconsistent provisions."⁶⁷ Other American courts have dismissed as "Talmudic" the "dissection" of word choices that deprive court opinions of context,⁶⁸ or the "parsing of a single sentence or two, as if we were occupied with a philosophical enterprise or linguistic analysis."⁶⁹

The Talmud has much to teach American lawyers, jurists, and scholars. One need not propose the adoption of the Talmud's conclusions to questions of modern American law to appreciate its methodology and the pleasure of Talmudic reasoning, in the most positive sense of the phrase.⁷⁰

65. *Id.* at 903 (Scalia, J., dissenting).

66. *Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371 (Fed. Cir. 2009).

67. *Morgan Stanley High Yield Sec., Inc. v. Seven Circle Gaming Corp.*, 269 F. Supp. 2d 206, 219 (S.D.N.Y. 2003).

68. *United States v. Libby*, 498 F. Supp. 2d 1, 4 (D.D.C. 2007).

69. *Ollman v. Evans*, 750 F.2d 970, 991 (D.C. Cir. 1984).

70. See Samuel J. Levine, Essay, *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY'S L.J. 1037, 1037–38 (1998) ("In recent years, a growing body of scholarship has developed in the United States that applies concepts in Jewish law to unsettled, controversial, and challenging areas of American legal thought. While some scholars endorse the application of Jewish legal theory to American law, others are more cautious." (footnotes omitted)); Irene Merker Rosenberg & Yale L. Rosenberg, *Advice from Hillel and Shammai on How to Read Cases: Of Specificity, Retroactivity and New Rules*, 42 AM. J. COMP. L. 581, 582 (1994) ("One of the pleasures of studying Talmud . . . is encountering arguments between the Sages that took place 1,500–2,000 years ago concerning sophisticated issues that are . . . analogous to . . . American law. We are not surprised when the Talmud's resolution of a problem is superior to the modern answers.").

B. A Note on Talmud Citations

Two versions of the Talmud exist—one compiled by the smaller Jewish community that remained in Jerusalem after the Roman exile of the Jews in 70 C.E. and one compiled by the then more prominent center of Jewish scholarship in Babylonia.⁷¹ Because the Babylonian Talmud was completed at a later date, is more extensive in coverage, and is considered to have undergone more thorough editorial review, it is generally considered more authoritative than the Jerusalem Talmud.⁷² This Article uses the Talmud Bavli (Babylonian Talmud) as its source material.

Working with the Talmud in translation, as I do, loses much of its flavor and diversity of opinion. A great deal of the Talmud's value lies in the interspersed commentary on commentary, some of the most important being the glosses added by later scholars, such as Rashi, added to the margins of the original material. Published translations lose much of this material. For my lay-scholar purposes, I have worked with the ArtScroll Series Schottenstein Travel Edition of the Talmud Bavli.⁷³ Though I am citing to an English language translation, I will adhere to traditional Talmud citation forms and reference quoted passages by tractate and folio (folios being further divided into two parts—a and b—representing the Hebrew letters aleph and bet).⁷⁴ Thus, I will cite the key passage discussed below as “Sanhedrin 43a” and will not refer to the page number of my particular volume in translation. In fact, the Schottenstein Edition, following tradition, contains no page numbers for its translation.⁷⁵ Some folios are given additional superscript notations, e.g., “Sanhedrin 34a¹.” I will cite references to the modern footnoted explanations

71. See Pritikin, *supra* note 33, at 353–54 (providing more detail on the origins of both versions of the Talmud).

72. See *id.* (explaining differences between the two versions of the Talmud).

73. *Schottenstein Travel Edition of the Talmud Bavli* (Rabbi Tisroel Simcha Schorr & Rabbi Chaim Malinowitz eds., 2009) [hereinafter the Schottenstein Edition].

74. See Rosenberg, *In the Beginning*, *supra* note 24, at 969 n.49 (explaining naming conventions of the Talmud).

75. See *id.* (“Although modern editions include page numbers in Arabic numerals, it is considered a sign of ignorance and bad form to use them in Talmudic discourse.”).

added by the editors of my edition, for example, as “Sanhedrin 43a Schottenstein Edition n.24.”

III. Comparing Criminal Justice Under American and Jewish Law

This Part will summarize and compare the basic substantive and procedural facets of the American and Talmudic criminal justice systems, with particular attention to the procedural requirements for appellate review of guilty verdicts. This Article will not engage in a thorough analysis of the substantive hurdles claimants must overcome. This Article will present procedural limitations and substantive standards in summary fashion merely to give readers an idea of how the respective criminal justice systems function and compare. For example, while the Talmud permits a convicted defendant to present any new argument so long as there is “substance” to it,⁷⁶ American law restricts petitioners attempting to raise new claims they failed to raise in previous rounds of review to claims that could not have been discovered previously or which have only become available through a recent change in applicable law.⁷⁷ What sorts of arguments will satisfy the Talmud’s or AEDPA’s requirements can be addressed in greater detail elsewhere. It is my intention here merely to demonstrate that the American legal system imposes greater limitations on the number and kinds of new arguments a condemned prisoner may raise to reargue the question of his guilt than the Talmud’s legal system does. Once we have confronted the difference in how the American legal system and Talmudic legal system treat the interest in finality, we can then explore the implications of this difference as brought out in the debates among the Talmud’s rabbis and American jurists when a difficult case strains the court’s willingness to accept a final decision.

76. See Sanhedrin 42b–43a (laying out the Talmud conditions for a convicted person to bring up a new argument on appeal).

77. See *infra* Parts II–III (discussing the United States’ conception of a fair trial and appeal).

A. American Law's Limitations on Post-Conviction Review

Anyone who tells you that some large number of judges has reviewed a criminal conviction and assured themselves that the convicted defendant was guilty is someone who does not understand how the American criminal justice system works.

1. A Fair Trial

Accused defendants are entitled to a familiar panoply of constitutional safeguards to ensure that their trials are fair—the right to counsel, the right to confront and cross-examine witnesses, the introduction of only evidence that was collected according to constitutional requirements, the prosecution's burden to prove the accused's guilt beyond a reasonable doubt, et cetera.⁷⁸ But after such a trial is held, the defendant's guilt is something that the jury decides, not the judge (unless the defendant has waived that right and consented to a bench trial).⁷⁹ Even the trial judge, in the first instance, can only throw out the jury's verdict and enter a judgment of acquittal if she determines that “a reasonable jury could not [have found] guilt beyond a reasonable doubt.”⁸⁰ It is not within the trial judge's prerogative to simply “reweigh the evidence or second-guess the jury's credibility determinations.”⁸¹ Short of ruling that no reasonable jury could have found guilt beyond a reasonable doubt, the best the trial judge can do is order a new trial “if [she] believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted.”⁸² As the phrase suggests, when a defendant successfully moves for a new trial order based on such a ruling, he still faces possible conviction at the conclusion of that new trial.⁸³

78. U.S. CONST. amends. IV, V, and VI.

79. U.S. CONST. amend. VI.

80. *United States v. Jones*, 713 F.3d 336, 339 (7th Cir. 2013).

81. *See United States v. Gonzalez*, 737 F.3d 1163, 1168 (7th Cir. 2013) (noting that the decision a jury gives should be given great deference by the judge).

82. *United States v. Silveus*, 542 F.3d 993, 1004–05 (3d Cir. 2008).

83. *See United States v. Alvarez-Moreno*, 657 F.3d 896, 901 (9th Cir. 2011) (detailing when a motion for a new trial can be made).

2. A Direct Appeal

A convicted defendant may file a direct appeal challenging the legal sufficiency of the evidence against him to support the verdict (reviewed *de novo* by the appellate court, albeit with all inferences arising from the evidence made in the light most supportive of the guilty verdict).⁸⁴ “A jury’s verdict cannot be overturned if any reasonable construction of the evidence would have allowed the jury to find the defendant guilty beyond a reasonable doubt.”⁸⁵ Jurors, after all, had the opportunity to hear the evidence first-hand and look the witnesses in the eye when weighing their credibility, while all appellate courts have to go on are the cold transcripts of the trial proceedings.⁸⁶

A convicted defendant may also seek a new trial on the basis of any evidentiary⁸⁷ or procedural errors⁸⁸ he asserts the trial judge may have made (reviewed only for an abuse of the trial judge’s discretion over such matters). The appellate court reviews the trial court’s findings of fact for clear error and reviews legal errors (such as misapplication of the law or infringement of constitutional rights) *de novo*.⁸⁹ That is, while an appellate court is free to decide for itself whether the trial court properly interpreted and applied the law,⁹⁰ an appellate court reviews the

84. *United States v. Friske*, 640 F.3d 1288, 1290–91 (11th Cir. 2011).

85. *Id.* (citation omitted).

86. *See, e.g., United States v. Curry*, 79 F.3d 1489, 1497 (7th Cir. 1996) (“As an appellate court, we will not second-guess the jury on [the credibility determination], which was best resolved through giving the . . . jury the opportunity to observe the verbal and non-verbal behavior of the witnesses . . . rather than looking at the cold pages [of a transcript].” (quoting *United States v. Lakich*, 23 F.3d 1203, 1210–11 (7th Cir. 1994))).

87. *See United States v. Hale*, 685 F.3d 522, 538 (5th Cir. 2012) (examining what sort of evidentiary errors would lead to abuse of discretion).

88. *See United States v. Jirak*, 728 F.3d 806, 815 (8th Cir. 2013) (“We review a district court’s denial of a request for continuance for an abuse of discretion and will only reverse if the moving party was prejudiced by the denial.”).

89. *See United States v. Howard*, 621 F.3d 433, 450 (6th Cir. 2010) (explaining the applicable standards of review); *United States v. Lazarenko*, 564 F.3d 1026, 1043 (9th Cir. 2009) (same).

90. *See United States v. Williams*, 340 F.3d 1231, 1237 (11th Cir. 2003) (“[D]e novo review requires us to look at a question as if we are the first court to consider it. Put simply, it is definitionally impossible to give deference of any sort to a decision being reviewed *de novo*.”).

trial court's factual findings with greater deference and will only reverse the trial court's decision if, after reviewing all of the evidence in the light most favorable to the decision, it is left with "a definite and firm conviction that a mistake has been made."⁹¹ An appellate court reviews a defendant's sentence for both procedural error and substantive reasonableness under a deferential abuse of discretion standard.⁹²

Still, a criminal defendant is entitled only to a "fair trial," not a perfect one, "for there are no perfect trials."⁹³ Under the Harmless Error doctrine, "[a]ny error, defect, irregularity, or variance that does not affect [a defendant's] substantial rights must be disregarded."⁹⁴ The requirement that an error affect a defendant's substantial rights in order to be considered reversible error essentially means that it "must have affected the outcome" of the trial.⁹⁵ The Harmless Error doctrine—requiring the prosecution to establish that a challenged error did not affect the outcome of the trial in order to preserve the judgment—applies only to claims of error that the defendant preserved at trial by raising a contemporaneous objection to the challenged conduct.⁹⁶ If the defendant failed to raise a contemporaneous objection at trial, the burden switches to *him* and *he* would be required to establish on appeal that any claimed error constituted "plain error"—i.e., error that was plainly established by the time of the appeal, affected the outcome of the trial, and seriously affected the fairness, integrity or public reputation of judicial proceedings.⁹⁷ Only certain structural errors—such as the total

91. *United States v. Camacho*, 661 F.3d 718, 728 n.3 (1st Cir. 2011).

92. *See United States v. Gibson*, 708 F.3d 1256, 1275 (11th Cir. 2013) (citations omitted) (describing the different levels of analysis used under an abuse of discretion standard).

93. *Brown v. United States*, 411 U.S. 223, 231–32 (1973).

94. FED. R. CRIM. P. 52(a).

95. *United States v. Olano*, 507 U.S. 725, 734 (1993).

96. *See United States v. Barone*, 114 F.3d 1284, 1293 (1st Cir. 1997) ("[A]bsent a timely objection at trial, our review is solely for plain error under Federal Rule of Criminal Procedure 52(b)." (quoting *United States v. Reed*, 977 F.2d 14, 17 (1st Cir. 1992))).

97. *See Olano*, 507 U.S. at 732, 734–35 ("It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial.").

deprivation of the right to counsel or the right to an impartial judge—are said to so fundamentally “affect[] the framework within which the trial proceeds” that they are exempt from harmless or plain error analysis and trigger an automatic reversal of a judgment and the defendant’s right to a new trial.⁹⁸ Such structural defects so pervasively affect the proceedings that the “trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.”⁹⁹ The process the defendant received in such cases cannot properly be called a “trial” at all. Absent such a structural error, however, the defendant’s appeal depends on establishing that any errors committed at his trial sufficiently affected the outcome to be considered reversible errors.

For a defendant tried in federal court, his direct appeal is to the United States Court of Appeals, and if the appellate court rules against him, he may seek review by the United States Supreme Court.¹⁰⁰ In the case of a defendant tried and convicted in state court, he may seek Supreme Court review from the final decision of whichever state appellate court constituted the court of last resort in his circumstances.¹⁰¹ In either case, the United States Supreme Court has discretion whether to accept review of the lower court’s ruling, and typically accepts review of a very small percentage of the cases seeking its attention.¹⁰² In an average year, the Supreme Court receives approximately 7,000–8,000 petitions to review lower court decisions and hears argument in only about eighty cases.¹⁰³ In its 2012–2013 term,

98. *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991).

99. *Id.*

100. *See* 28 U.S.C. § 1254 (2012) (describing methods of Supreme Court review of circuit court decisions).

101. The United States Supreme Court has discretionary authority to review “judgments of a ‘state court of last resort’ or of a lower state court if the ‘state court of last resort’ has denied discretionary review.” *Gonzalez v. Thaler*, 132 S. Ct. 641, 656 (2012) (quoting SUP. CT. R. 13.1). *See also* 28 U.S.C. § 1257 (2012) (granting the Supreme Court certiorari jurisdiction to review “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had”).

102. *See* SUP. CT. R. 10 (“Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.”).

103. *Frequently Asked Questions (FAQ)*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/faq.aspx> (last visited Sept. 21, 2016) (on

only twenty-one out of seventy-eight cases decided on the merits were criminal matters.¹⁰⁴ In the unlikely event that the Supreme Court hears the case, it will review whether the lower courts applied the correct legal standards, not the substantive merits of the jury's verdict.¹⁰⁵

That is the defendant's one direct appeal. After the court of last resort, whether it is the state or federal intermediate appellate court or the Supreme Court, has denied the defendant relief from his conviction or sentence, the judgment is considered final.¹⁰⁶

There are various reasons for the procedural and substantive limitations on direct appeals and deferential review afforded trial court decisions, but the point is that the appellate system is designed to ensure that a defendant receives a fair trial because a trial is where the question of a defendant's guilt is determined. The appellate system is not intended to answer that question, but to make sure that that question is answered in a trustworthy manner. If we satisfy ourselves that the inputs used to decide the question of the defendant's guilt merited our trust, then we can accept the verdict produced by the trial.

3. Collateral Review

To help safeguard the output produced by the trial and direct appeal processes, additional but circumscribed opportunities to

file with the Washington and Lee Law Review).

104. Kedar S. Bhatia, *Final October Term 2012 Stat Pack*, SCOTUSBLOG at 6 (June 27, 2013), <http://www.scotusblog.com/2013/06/final-october-term-2012-stat-pack/> (last visited Sept. 21, 2016) (on file with the Washington and Lee Law Review).

105. See Christopher R. Drahozal, *Error Correction and the Supreme Court's Arbitration Docket*, 29 OHIO ST. J. ON DISP. RESOL. 1, 6 (2014) ("[T]he Court is not in the business of error correction. Rather, the Court seeks to decide legal issues of broad public importance." (footnote omitted)); SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

106. See *Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when [the Supreme] Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.").

correct errors exist through the collateral review process. This process, long-maligned as a series of endless appeals, has been curtailed in recent decades as American law sought to re-emphasize the finality of criminal judgments.¹⁰⁷

As the defendant—now serving his sentence and thereafter generally referred to as the “prisoner” (or “petitioner” or “movant,” depending the procedural context)—seeks another journey up the ladder of review, each additional step constricts the extent to which the substance of his arguments are at issue. The question of his guilt becomes more and more subordinate to questions regarding his compliance with various procedural hurdles and deadlines and with issues regarding the extent to which his arguments are cognizable at all. Each successive court starts with the prisoner’s guilt as an established proposition and has to be convinced that it is even its business to re-examine the process that made that determination.

A prisoner convicted in federal court can ask the federal trial court to vacate his conviction and sentence, pursuant to 28 U.S.C. § 2255, on the grounds that the judgment was imposed “in violation of the Constitution or laws of the United States.”¹⁰⁸ A prisoner convicted in state court can bring a similar action in federal court, after first exhausting his available post-direct-appeal review remedies in state court.¹⁰⁹ These proceedings—collateral to the prisoner’s original trial and appeal—though generally defined by statute in modern practice, arose out of the Common Law writ of habeas corpus and still can be referred to as habeas petitions.¹¹⁰

107. See generally Scott R. Grubman, *What a Relief? The Availability of Habeas Relief Under the Savings Clause of Section 2255 of the AEDPA*, 64 S.C. L. REV. 369 (2012) (providing additional history and background on the common law writ of habeas corpus and AEDPA’s modern adaptation of its substantive and procedural application); Randal S. Jeffrey, *Successive Habeas Corpus Petitions and Section 2255 Motions After the Antiterrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues*, 84 MARQ. L. REV. 43 (2000) (same).

108. 28 U.S.C. § 2255 (2012). See also *United States v. Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010) (explaining the purpose and function of 28 U.S.C. § 2255).

109. See 28 U.S.C. § 2254(b) (2012) (addressing federal collateral review remedies for State prisoners).

110. The Talmudic conundrum regarding the extent to which a § 2255 proceeding is “not a habeas corpus proceeding,” while providing a remedy “exactly commensurate with that which had previously been available by habeas

Such a petition “may not be used as a chance at a second appeal.”¹¹¹ “Because collateral review is not a substitute for a direct appeal . . . a defendant must assert all available claims on direct appeal,” and “relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.”¹¹²

A state¹¹³ and a federal prisoner¹¹⁴ each face a one-year period of limitation in which to bring his habeas claim in federal court, running from the latest of: the date his judgment becomes final on direct appeal; the date on which any impediment to his filing his claims created by government action “in violation of the Constitution or laws of the United States is removed”;¹¹⁵ “the date on which the [constitutional] right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review”;¹¹⁶ or “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.”¹¹⁷

A federal habeas court will not grant relief to prisoners convicted in state court for “any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim”:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

corpus in the court of the district where the prisoner was confined,” is beyond the scope of this Article. *Brown v. United States*, 748 F.3d 1045, 1059–60 (11th Cir. 2014) (quoting *United States v. Hayman*, 342 U.S. 205, 220 (1952), and *Hill v. United States*, 368 U.S. 424, 427 (1962)).

111. *Berry*, 624 F.3d at 1038 (citation omitted).

112. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (citations omitted).

113. 28 U.S.C. § 2244(d)(1) (2012).

114. *Id.* § 2255(f) (2012).

115. *Id.* § 2244(d)(1)(B); *id.* § 2255(f)(2).

116. *Id.* § 2244(d)(1)(C); *id.* § 2255(f)(3).

117. *Id.* § 2244(d)(1)(D) (2012); *id.* § 2255(f)(4).

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.¹¹⁸

This additional layer of review in federal court, thus, does not grant a federal judge discretion to decide for himself whether he thinks the prisoner's previously-raised claims are meritorious. If anything, a federal court owes additional deference to the state courts' handling of the convicted defendant's claims. "[O]n habeas review, 'a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was objectively unreasonable.'"¹¹⁹ Factual determinations made by the state court while considering the prisoner's state collateral review petition are presumed by the federal court to be correct and the prisoner has "the burden of rebutting the presumption of correctness by clear and convincing evidence."¹²⁰

Federal courts are not only limited in their ability to reconsider claims state prisoners already presented to the state courts; they are also limited in their ability to consider claims state prisoners are trying to raise for the first time in federal court. If a state prisoner "failed to develop the factual basis of a claim in state court proceedings," the federal habeas court will only hold an evidentiary hearing on the claim under certain circumstances. First, the claim must rely on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or on "a factual predicate that could not have been previously discovered through the exercise of due diligence," *and*, second, "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no

118. *Id.* § 2254(d).

119. *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012) (citation omitted). *See also* *Brown v. Payton*, 544 U.S. 133, 141 (2005) ("A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result.").

120. 28 U.S.C. § 2254(e)(1) (2012).

reasonable factfinder would have found the applicant guilty of the underlying offense.”¹²¹

If a prisoner wants to file a second or successive habeas petition, our system avoids re-examining old decisions once made and even resists considering newly-thought-of arguments that could have been raised earlier. A state¹²² or federal¹²³ prisoner cannot reargue any issues he raised unsuccessfully in an earlier petition. Nor can he raise any new issue he failed to raise earlier unless he can show that:

(A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.¹²⁴

In order even to file such a new claim in federal court, the petitioner must first “move in the appropriate court of appeals for an order authorizing the district court to consider the application.”¹²⁵ If the appellate court refuses to authorize the filing of a second or successive petition, that order “shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.”¹²⁶

If a prisoner does manage to get his habeas claims heard by the federal trial court, and that court denies his petition, he can

121. 28 U.S.C. § 2254(e)(2) (2012).

122. *See id.* § 2244(b)(1) (“A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.”).

123. *See id.* § 2255(h) (requiring a second or successive motion by a federal prisoner to vacate, set aside, or correct a sentence to be certified by a panel to contain new evidence or a new rule of constitutional law not previously available); *id.* § 2244(a) (cross-referencing § 2255).

124. *Id.* § 2244(b)(2).

125. *Id.* § 2244(b)(3)(A).

126. *Id.* § 2244(b)(3)(E).

only obtain review by the federal appellate court if either the trial judge or the appellate court grants him a certificate of appealability.¹²⁷ Such a certificate is only warranted if the petitioner “has made a substantial showing of the denial of a constitutional right.”¹²⁸

A prisoner asserting his innocence will find that each step up the ladder of review, or return trip up the ladder, comes with additional reliance on the results of decisions made previously. In holding that a prisoner, generally, has no right to appointed counsel to help him navigate the collateral review process, the Supreme Court “contrasted the trial stage of a criminal proceeding, where the State by presenting witnesses and arguing to a jury attempts to strip from the defendant the presumption of innocence,” from later proceedings “where the defendant needs an attorney not as a shield to protect him against being ‘haled into court’ by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.”¹²⁹ The Supreme Court explained that “[p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review” and “serve[s] a different and more limited purpose than either the trial or appeal.”¹³⁰

AEDPA added weight to finality in the courts’ balancing act with accuracy. A prisoner seeking a return trip to the courthouse to have his actual guilt or innocence re-examined has a difficult road to travel.¹³¹

127. *Id.* § 2253(c).

128. *Id.* § 2253(c)(2).

129. *Murray v. Giarratano*, 492 U.S. 1, 7 (1989) (quotations omitted). Of course, as with many collateral review issues, the right to an appointed attorney within this process is somewhat complicated. *See* *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012) (holding that “a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective”); *see also* *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013) (extending *Martinez’s* holding to cases “where . . . [a] state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal”).

130. *Giarratano*, 492 U.S. at 8, 10 (citation omitted).

131. *See* Grubman, *supra* note 107, at 378–81 (discussing “AEDPA’s Restrictions on Second or Successive Motions for Post-Conviction Relief”). *See generally*, Jeffrey, *supra* note 107 (discussing AEDPA’s “dramatic[] change[s]” to

B. The Talmud's Open-Ended Post-Conviction Review Process

Like America's criminal justice system, the Talmud requires various procedural safeguards to protect the rights of the accused. Though the Talmud imposes a death penalty for a variety of offenses, "[t]he rabbinic legal system is. . . so extreme in protecting both the innocent and the guilty" that the "barriers to imposition of the death penalty by the rabbinic courts amount to a supercharged Bill of Rights."¹³² A common retort to the Talmud's repeated endorsement of the death penalty and exhaustive discussion of the proper (and to the modern mind, horrific) means of carrying it out is the expression that any court that managed to overcome the numerous hurdles to actually imposing a death sentence even once in seven years "was known as 'the killing court.'"¹³³

"both the procedural and substantive law governing second and successive applications" for collateral relief). As Jeffrey recognizes, "[o]ne focus of the AEDPA was to restrict habeas corpus relief available in the federal courts." *Id.* at 44.

132. See Rosenberg, *Of God's Mercy*, *supra* note 31, at 1177, 1191–92 (discussing the Talmud's barriers to carrying out the death penalty and the four methods of execution utilized on those occasions when it is carried out).

133. STEINSALTZ, *supra* note 30, at 206. The Talmud itself describes such a court as a "destroyer." *Makkot 7a*. Preeminent rabbis Tarfon and Akiva went so far as to assert that "[h]ad we been on a sanhedrin [at the time when they still convened and imposed death sentences,] no person would ever have been executed." *Makkot 7a*. Lest the reader think the rabbis were in agreement on the criminal justice implications of a system of harsh capital punishments with lax practical enforcement, Rabban Simeon ben Gamaliel replied to Tarfon and Akiva that their policy "would thus increase shedders of blood in Israel." THE BOOK OF LEGENDS (*SEFER HA-AGGADAH*): LEGENDS FROM THE TALMUD AND MIDRASH 744 (Hayim Nahman Bialik & Yehoshua Hana Ravnitzky eds., William G. Raude trans., Schocken Books 1992). Some resolve this dilemma by deeming the entire capital criminal procedure set forth in the Talmud to be "merely idealistic and pedagogical, . . . never actually implemented or intended to be implemented." Rosenberg, *Of God's Mercy*, *supra* note 31, at 1175. For additional discussion about the debate between Rabbis Akiva and Tarfon and Rabban Simeon ben Gamaliel, see Levine, *supra* note 70, at 1046–48.

1. Trial Protections in the Talmud

A special court of twenty-three judges, referred to as the *Sanhedrei Katana*, tried capital offenses.¹³⁴ A guilty verdict required a majority vote by at least a three-judge margin (i.e., at least thirteen to ten), and while “[a] judge who expressed an opinion in favor of the defendant was forbidden to change his views,” a change of mind in favor of the defendant was permitted.¹³⁵

Guilty verdicts required testimony from at least two adult eye-witnesses to the offense, who themselves had never been accused of a criminal offense of any kind and who were not related to the parties, judges, or each other.¹³⁶ Not only could a defendant not be required to incriminate himself, he was not permitted to do so, and any such evidence was inadmissible.¹³⁷ Witnesses could only testify to what they personally observed—hearsay evidence was not permitted.¹³⁸ “Such eyewitness testimony [was] the only valid method of proof”—no circumstantial evidence was permitted—and any discrepancies in the witnesses’ testimony, “even as to relatively minor matters,” would cause the court to exclude their testimony.¹³⁹ In order for an accused defendant to be condemned to death, the evidence must show that he acted with specific intent to commit a capital

134. See STEINSALTZ, *supra* note 30, at 203 (explaining that the twenty-three judge court was known as the “Small Sanhedrin,” in contrast to the “Great Sanhedrin” (Sanhedrei Gadol), a seventy-one judge body authorized to try cases involving false prophets, sages who instructed people to act in violation of the law, and other grave offenses).

135. *Id.* at 206. *But see* Sanhedrin 34a¹ (describing a rabbinic debate over whether the rule prohibiting a judge from changing his mind in favor of conviction applies only during initial deliberations during which judges are encouraged to maintain their arguments, but would allow him to change his mind at the vote on the verdict). Additional commentary on this debate can be found in Sanhedrin 34a¹ Schottenstein Edition nn.5–7.

136. STEINSALTZ, *supra* note 30, at 204; *see also* Rosenberg, *Of God’s Mercy*, *supra* note 31, at 1179 (characterizing the evidentiary and procedural safeguards, including the two-witness rule, as “breathhtaking”).

137. STEINSALTZ, *supra* note 30, at 205.

138. *Id.* at 206.

139. See Rosenberg, *Of God’s Mercy*, *supra* note 31, at 1179 (explaining how the judges would interrogate witnesses on tangential matters, like the thickness of a fig tree’s branches at the site of a crime).

offense.¹⁴⁰ Such proof required testimony that he was specifically warned immediately before committing the act that it was forbidden by law and punishable by death and that he acknowledged those facts and carried out the action anyway.¹⁴¹

2. Appellate Review in the Talmud

Talmudic courts were not hierarchically-structured, and thus challenges seeking review of a verdict were raised before the same court and judges that issued the original decision.¹⁴² Like the American system,¹⁴³ the Talmud provided that capital cases “may be reversed in favor of acquittal . . . but they are not reversed in favor of conviction.”¹⁴⁴ Interestingly, though it presents the matter as at least open to question, the Talmud seems to permit reversals of judgments of acquittal in at least certain non-capital cases.¹⁴⁵

Executions were to take place immediately after a verdict was reached, but the Mishnah states:

140. STEINSALTZ, *supra* note 30, at 206.

141. *Id.*; see also Rosenberg, *Of God's Mercy*, *supra* note 31, at 1179 (noting that two competent witnesses testifying that, in their view, the accused proceeded to commit the capital offense after he was warned of the consequences “is the only valid method of proof”).

142. STEINSALTZ, *supra* note 30, at 202.

143. Under American law, the prosecution may appeal from a trial judge's post-verdict judgment of acquittal setting aside a jury's guilty verdict, but it may not seek to overturn a jury's verdict in favor of acquittal without running afoul of the Double Jeopardy Clause of the Fifth Amendment. See U.S. CONST. amend. V (providing that no person shall be “twice put in jeopardy”); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568–76 (1977) (concluding that double jeopardy bars prosecutorial appeals from Rule 29(c) judgments of acquittal); *United States v. Ogles*, 440 F.3d 1095, 1099–1101 (9th Cir. 2006) (applying the double jeopardy rule to a court-directed acquittal upon the close of the prosecution's case); *United States v. Moran*, 312 F.3d 480, 487 n.7 (1st Cir. 2002) (finding that the double jeopardy clause did not bar appeal because the judgment of acquittal came after a guilty verdict by the jury).

144. Sanhedrin 33b¹.

145. See Sanhedrin 33b²–33b³ (relating the debates regarding whether death penalty acquittals may be reconsidered in cases where lesser punishments might still be imposed or whether the general rule even applies in all capital cases).

While the condemned is being escorted to the execution grounds, one man stands at the courthouse door with flags in his hand, and another sits astride a horse at a distance from him, but still within sight. If someone says: I have grounds to argue for his acquittal, [the flagman] waves the flags as a signal, and the horse with its rider races to the execution party and halts them. And even if [the condemned] himself says, "I have grounds to argue for my own acquittal," they return him to the courthouse to consider his arguments.¹⁴⁶

Thus, even the condemned is entitled to seek re-argument of his case "again and again," as many times as he requests, so long as there is "substance" in his argument.¹⁴⁷ Though the Mishnah states that the condemned is returned to the courthouse "even four or five times," this phrase is understood to be used figuratively and "there is actually no limit to the number of times he may be brought back for reconsideration of his case," as long as he satisfies the "substance" requirement.¹⁴⁸

A member of the court could always call for the condemned to be returned for further consideration of his case.¹⁴⁹ When capital cases were tried, rabbinic disciples would observe the proceedings, "and if one of them wished to advance an argument in favor of acquittal," he could do so, and "[i]f his words were found to be of substance, he was elevated to the position of one of the judges, and was given full voting rights."¹⁵⁰

The requirement that the condemned raise an argument with meaningful substance to it only applied to his third, fourth, or subsequent challenges. Thus, beginning on the third time the condemned leaves the courthouse on his way to his execution, "a

146. Sanhedrin 42b.

147. Sanhedrin 42b–43a (discussing the Mishnah's statement that the accused "is returned again and again . . . as long as there is substance to his words"); Sanhedrin 42b Schottenstein Edition n.9 (noting Rashi's holding that "[i]f he presents an argument that seems to have some validity, he is returned to the court for the consideration of his argument").

148. Sanhedrin 42b Schottenstein Edition n.8.

149. See Rosenberg, *Of God's Mercy*, *supra* note 31, at 1186–87 (explaining further that "the law requires that there be a sufficient distance for the defendant to travel while court officials ride with him, shouting out his name, his crime, and the names of the prosecuting witnesses, and asking anyone who has exculpatory information to come forward").

150. Sanhedrin 43a Schottenstein Edition n.22.

pair of Torah scholars . . . accompany him,” to determine whether there is substance to his challenge or not.¹⁵¹

The first two times he is returned even if his argument appears baseless, for it is possible that he indeed has a valid argument but is unable to properly express it due to his fright. When he returns to the courthouse, his mind will become more settled and he will be able to present his case more coherently.¹⁵²

Unlike the American legal system, a condemned prisoner's ability to return for further review of his case does not diminish with every step he takes away from the courtroom. Under the Talmud's criminal justice system, there is no deference paid to the tribunal's earlier rulings in favor of the condemned's guilt, there is no penalty for failing to raise a claim at a previous opportunity, and there are no procedural hurdles to overcome before a claim can be heard on its merits. “Jewish law encourages the reopening of cases to assure consideration of all nonfrivolous arguments.”¹⁵³ A case only becomes “final” when the death sentence is carried out.

C. American Law's Partial Gateway Back to the Courthouse

While the American legal system may impose significant procedural and substantive barriers to returning to the courthouse, as it were, it at least recognizes the conundrum posed by a claim of actual innocence by a condemned prisoner. This scenario cannot be taken lightly, as the many condemned prisoners released from death row demonstrate.¹⁵⁴ Yet, under the

151. Sanhedrin 43a.

152. Sanhedrin 43a Schottenstein Edition n.32.

153. Rosenberg, *Of God's Mercy*, *supra* note 31, at 1190–91.

154. See Douglas A. Blackmon, *DNA Evidence Exonerates Louisiana Death-row Inmate*, WASH. POST, Sept. 29, 2012, at A03 (“With Thibodeaux’s release Friday, he became the 300th wrongly convicted person and 18th death-row inmate exonerated in the United States substantially on the basis of DNA evidence, according to the New York-based Innocence Project, which provides legal counsel to prisoners it believes can be exonerated through DNA testing.”); Adam Liptak, *Study of Wrongful Convictions Raises Questions Beyond DNA*, N.Y. TIMES, July 23, 2007, at A1 (reporting on the case of Jerry Miller, who became the 200th American prisoner released by DNA evidence under the Innocence Project, and the fourteenth on death row).

American legal system, even having the opportunity to try to establish one's innocence in court, after one has been found guilty and has exhausted all of the available avenues of direct and collateral review, is not a road much traveled.

In a pre-AEDPA case, Leonel Torres Herrera was convicted in Texas state court of capital murder and sentenced to death.¹⁵⁵ He then unsuccessfully challenged his conviction in both direct appellate proceedings and state and federal collateral review proceedings.¹⁵⁶ Ten years after his conviction, he filed a second federal habeas petition, arguing that he was "actually innocent" of the murder and that the Eighth Amendment's prohibition on "cruel and unusual punishment[]"¹⁵⁷ and the Fourteenth Amendment's guarantee of "due process of law"¹⁵⁸ therefore precluded his execution.¹⁵⁹ Herrera proffered new evidence that someone else had committed the crime.¹⁶⁰ After the federal trial court considering his new habeas petition dismissed an additional claim alleging a constitutional violation during Herrera's prosecution, it stayed his execution to consider his new evidence.¹⁶¹ The federal appellate court vacated the stay, citing then-existing precedent "that claims of newly discovered evidence, casting doubt on the petitioner's guilt, are not cognizable in federal habeas corpus."¹⁶² Only new evidence that "bear[s] upon the constitutionality of the applicant's detention," such as a constitutional violation in his original trial, could justify federal habeas relief; a federal court could not consider

155. See *Herrera v. Collins*, 506 U.S. 390, 393 (1993) (recounting the trial and conviction of Herrera for the murder of a police officer in January 1982, after which Herrera also pled guilty in July 1982 to the murder of a public safety officer).

156. *Id.*

157. U.S. CONST. amend. VIII.

158. U.S. CONST. amend. XIV.

159. See *Herrera*, 506 U.S. at 393 (summarizing petitioner's claims).

160. See *id.* at 393, 396–97 (offering multiple affidavits that Herrera's brother, who died in 1984, committed the crimes).

161. See *id.* at 397 (noting the previous rejection of Herrera's separate Constitutional claims for lack of evidentiary basis).

162. *Herrera v. Collins*, 954 F.2d 1029, 1033 (5th Cir. 1992) (citing *Townsend v. Sain*, 372 U.S. 293, 317 (1963)).

evidence that was “merely . . . relevant to the guilt of a state prisoner.”¹⁶³

Reviewing the federal appellate court’s ruling, the United States Supreme Court reaffirmed “that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.”¹⁶⁴ The Supreme Court noted that a person charged with a crime “is entitled to a presumption of innocence,” but Herrera was not.¹⁶⁵ “[I]n the eyes of the law, petitioner does not come before the Court as one who is ‘innocent,’ but, on the contrary, as one who has been convicted by due process of law of two brutal murders.”¹⁶⁶ Chief Justice Rehnquist noted the various constitutional safeguards “ensuring against the risk of convicting an innocent person,” but, echoing Chief Justice Burger’s acknowledgement that a defendant is entitled to a fair trial but not a perfect one, he reiterated that “due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.”¹⁶⁷ Rehnquist explained: “To conclude otherwise would all but paralyze our system for enforcement of the criminal law.”¹⁶⁸

Nevertheless, the Supreme Court acknowledged that federal habeas law does not “cast[] a blind eye toward innocence” and that “a proper showing of actual innocence” could serve as “a gateway through which a habeas petitioner [could] pass to have his otherwise barred constitutional claim considered on the merits.”¹⁶⁹ Herrera had no separate constitutional claim to save, so his bare innocence claim was not cognizable.¹⁷⁰

163. *Id.*

164. *Herrera v. Collins*, 506 U.S. 390, 400 (1993).

165. *Id.* at 399–400.

166. *Id.*

167. *Id.* at 398–99. *See* *U.S. v. Lutwak*, 344 U.S. 604, 619 (1953) (“A defendant is entitled to a fair trial but not a perfect one.”).

168. *Herrera*, 506 U.S. at 399.

169. *Id.* at 404.

170. *Id.* at 404–05 (holding that the gateway exception was “inapplicable here,” because Herrera did “not seek excusal of a procedural error so that he may bring an independent constitutional claim challenging his conviction or sentence”).

Subsequently, in *Schlup v. Delo*,¹⁷¹ the Supreme Court addressed the case of a prisoner not bringing a bare innocence claim, like Herrera, but one attempting to use his innocence claim as a gateway to allow consideration of his otherwise procedurally-barred substantive constitutional claims.¹⁷² It is important, here, to recognize the difference between the type of relief Schlup was seeking and the type of relief Herrera had sought. Someone bringing a bare innocence claim, like Herrera, seeks a court finding that he is actually innocent, while someone bringing a gateway claim, like Schlup, seeks a court finding that his showing of innocence is strong enough to overcome the otherwise-applicable bars to consideration of his substantive claims of constitutional violations at his original trial.¹⁷³

The Supreme Court recognized that, “importantly, a court’s assumptions about the validity of the proceedings that resulted in conviction are fundamentally different in Schlup’s case than in Herrera’s.”¹⁷⁴ A prisoner’s bare innocence claim is “evaluated on the assumption that the trial that resulted in his conviction had been error free,” while a prisoner’s gateway innocence claim is accompanied by claims that his trial was tainted by constitutional violations.¹⁷⁵ Thus, while a bare innocence claimant would have to show “evidence of innocence . . . strong enough to make his execution ‘constitutionally intolerable’ *even if* his conviction was the product of a fair trial,”¹⁷⁶ a gateway innocence claimant only had to show “evidence of innocence so strong that a court cannot have confidence in the outcome of the trial *unless* the court is *also* satisfied that the trial was free of nonharmless constitutional error.”¹⁷⁷ Because a bare innocence

171. 513 U.S. 298 (1995).

172. *See id.* at 314 (observing that Schlup was seeking to overcome “procedural obstacles” barring the federal courts from “address[ing] the merits of [his separate] constitutional claims”).

173. Schlup was seeking a hearing on his claims of ineffective assistance of counsel in violation of his Sixth Amendment rights and prosecutorial withholding of exculpatory evidence in violation of his Fourteenth Amendment right to due process. *Id.* at 314.

174. *Id.* at 315.

175. *Id.* at 315–16.

176. *Id.* at 316.

177. *Id.* (emphasis added).

claimant concedes that his trial was fair—he merely asserts that new evidence exists casting doubt on its result—the courts require a higher threshold before re-examining the guilty verdict reached at his admittedly-fair trial. But because a gateway innocence claimant is also casting doubt on the fairness of the trial that produced his original guilty verdict, his evidence “must [only] establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice *unless* his conviction was the product of a fair trial.”¹⁷⁸

The Supreme Court held that a prisoner asserting a gateway innocence claim “must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.”¹⁷⁹ Unlike the applicable standard of review for challenges to the sufficiency of the evidence in a prisoner’s direct appeal, because the courts will necessarily be considering evidence that was never presented to a jury, “the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record,” and this “may include consideration of the credibility of the witnesses presented at trial.”¹⁸⁰

The Supreme Court emphasized that the threshold for establishing a gateway innocence claim is intended to be high and should only be met in a case that “is truly extraordinary.”¹⁸¹ By comparison, while recognizing that a bare innocence claim is hypothetically possible, the Supreme Court has yet to ever find a case compelling enough to meet that even higher threshold.¹⁸² Displaying a Talmudic approach to discerning the unresolved threshold for as-yet hypothetical bare innocence claims, the Supreme Court reasoned: “The sequence of the Court’s decisions in *Herrera* and *Schlup*—first leaving unresolved the status of freestanding claims and then establishing the gateway

178. *Id.*

179. *Id.* at 327.

180. *House v. Bell*, 547 U.S. 518, 538–39 (2006).

181. *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (citations omitted).

182. *See House*, 547 U.S. at 555 (“We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it.”); *see also McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013) (“We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.”).

standard—implies at the least that *Herrera* requires more convincing proof of innocence than *Schlup*.¹⁸³

The American legal system recognizes the need to balance the accuracy of its results with the finality of its decisions. Defendants are accorded significant constitutional protections before they can be deemed guilty in the first instance.¹⁸⁴ Even after they are adjudged guilty, prisoners have the ability to challenge their convictions through the direct appeal process and even thereafter through collateral review.¹⁸⁵ Every step further away from the trial courthouse, however, comes with a narrowing of the defendant's ability to have the question of his guilt re-examined. His presumption of innocence disappears the moment the trial jury finds him guilty. The judges who consider first his post-verdict motions, then his appeal, and ultimately his habeas petitions will grant increasing amounts of deference to the decisions that preceded their review of a case. This is not because the courts are blind to the possibility that an innocent man may be approaching execution. The courts' difficulty comes in the fact that a person who has exhausted his direct and collateral review mechanisms appears in court as a guilty man, not as an innocent man. Claims once heard, may not be heard again. Claims that are procedurally-barred may never be heard at all. To the frustrated prisoner, there may be none so deaf as those that will not hear.¹⁸⁶

183. *House*, 547 U.S. at 555.

184. *See supra* Part III.A.1 (discussing fair trial provisions under American law).

185. *See supra* Part III.A.2–3 (reviewing the procedures of direct and collateral review under American law).

186. *See* THE HOME BOOK OF PROVERBS, MAXIMS AND FAMILIAR PHRASES (Burton Stevenson ed., 1948) (“[W]ho is so deaf as he that will not hear?” (quoting JOHN HEYWOOD, PROVERBS, Pt. ii, ch. 9 (1546))); *see also* *Jeremiah* 5:21 (“Hear now this, O foolish people, and without understanding; which have eyes, and see not; who have ears, and hear not.”).

IV. *The Thousand-Year Debate About Finality in Criminal Justice*A. *Rav Acha Bar Huna Debates Rav Sheishess*

The rabbis of the Talmud considered the question of finality, too, and in true Talmudic fashion, they considered the case of a dissenting judge who has something to say, but cannot speak.

The Mishnah provides that “[i]f someone says: I have grounds to argue for [the condemned person’s] acquittal,” a man on horseback “races to the execution party and halts them.”¹⁸⁷ Rashi states that this procedure applies if one of the judges has a new argument to present that could alter the verdict, but commentary suggests that the same rule applies if someone who is not a judge has new evidence to present.¹⁸⁸

In the Gemara, Rav Acha bar Huna posed the question:

If one of the disciples said, ‘I have grounds to argue for [the defendant’s] acquittal, but then, before he could advance his argument, he was struck mute, and the judges were thus prevented from hearing his line of reasoning, what is the law? Do we simply disregard the fact that this disciple ever came forward, or do we instead rule that the case must be retried before a different panel of judges?’¹⁸⁹

Commentary explains that a different panel of judges is suggested, instead of having the original panel of judges rehear the case, because whatever line of reasoning the mute disciple wished to raise had already eluded the first set of judges.¹⁹⁰ A new panel of judges, through their own, fresh analysis of the case, might discover the mute disciple’s argument.¹⁹¹

The Talmud states that Rav Sheishess “blew on his hands,”¹⁹² before responding:

187. Sanhedrin 42b.

188. Sanhedrin 42b Schottenstein Edition n.6.

189. Sanhedrin 43a.

190. See *infra* note 192–192 (detailing the Talmud’s response to the hypothetical question of the man struck mute).

191. Sanhedrin 43a Schottenstein Edition n.23.

192. See *id.* at n.24 (blowing on his hands “was a show of scorn”). Rashi explains: “Rav Sheishess was in effect saying: ‘Just as the wind created by my own breath has no lasting value, so too, your inquiry is devoid of merit.’” *Id.*

If you are prepared to dismiss the case simply because [this disciple] was struck mute, then by the same token, you would also have to dismiss any capital case ever tried; for perhaps someone at the far end of the world might know of an argument for acquittal of which the court is not aware!¹⁹³

Rav Sheishess's opinion did not hold sway, however. The Gemara explains that in Rav Sheishess's hypothetical reference to an argument possibly awaiting the court at the far end of the world, "no one has actually come forward and said that he has reason to believe the condemned man is innocent."¹⁹⁴ Whereas in Rav Acha bar Huna's hypothetical case, the now-mute disciple (a disciple who immediately dies or for whatever reason cannot state his argument) "has come forward and said this; he has merely not had a chance to present his line of reasoning."¹⁹⁵

The Gemara noted the teaching of Rav Yose Bar Chanina that "[i]f one of the disciples argued for acquittal and then died, we view him as if he were still alive, maintaining his position for acquittal."¹⁹⁶ This could have implied that only if the disciple actually makes his argument before dying is his stance in favor of acquittal to be counted, "but when he never declares his argument for acquittal—as, for instance, in our case where he is struck mute—in such case, there is no significance to his words whatsoever."¹⁹⁷ The Gemara "rejects this inference," presuming that Rav Acha would respond:

If the disciple declared his argument for acquittal, it is obvious to me that his words are to be reckoned with. The question you should have is whether the proceedings are affected when he said that he can argue for acquittal but died (or was struck mute) before doing so.¹⁹⁸

As is often the case, the Gemara does not provide a definitive answer.¹⁹⁹ The text leaves it unclear whether the example of "a disciple who declared his argument for acquittal before being

193. Sanhedrin 43a.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. See generally Rosenberg, *Of God's Mercy*, *supra* note 31, at 1188.

incapacitated” was cited “because this is the *only* case in which his words are still reckoned with” or whether this example was cited “merely because it is the more common” case.²⁰⁰ Rashi suggests that if the latter view is correct, then Rav Yose “holds that it is not crucial for the disciple to actually articulate his argument; it is enough if he merely says that he knows of such an argument.”²⁰¹

Conceding that “[i]t is certainly unusual that [the disciple] should be incapacitated at precisely that moment” when he is attempting to raise a new argument for the condemned person’s acquittal,²⁰² the Talmud nonetheless considers the implications of such a scenario. As commentary explains, “we must be concerned that the disciple was about to make a substantive argument that might have altered the verdict.”²⁰³ Rashi holds: “If we are indeed concerned for this possibility, we must dismiss the current proceedings, and convene a new set of judges to retry the case.”²⁰⁴

Rashi essentially asserted that a system that refuses to execute an even-possibly innocent person cannot impose finality in its decisions. The court could not reach a final determination of guilt if additional arguments still existed somewhere.

B. Rabbi Scalia Debates Rabbi Stevens

More than one thousand years after Rav Acha bar Huna and Rav Sheishess debated whether a condemned man should be allowed another trip to the courthouse, based on a new—but unstated—argument for acquittal, Justice John Paul Stevens and Justice Antonin Scalia continued their debate, in the case of Troy Davis.²⁰⁵ Davis’s story began twenty years earlier.

A Georgia court convicted and sentenced Davis to death for the 1989 murder of Savannah police officer Mark Allen MacPhail.²⁰⁶ In his direct appeal, the Supreme Court of Georgia

200. Sanhedrin 43a Schottenstein Edition n.27 (emphasis added).

201. *Id.* (citing Rashi).

202. Sanhedrin 43a Schottenstein Edition n. 27.

203. Sanhedrin 43a n.23.

204. *Id.*

205. *In re Davis*, 557 U.S. 952 (2009).

206. *See Davis v. State*, 426 S.E.2d 844, 845 (Ga. 1993) (affirming his

affirmed Davis's conviction and death sentence, and the United States Supreme Court denied certiorari review.²⁰⁷ In subsequent collateral review proceedings, the Georgia trial court denied Davis's state habeas corpus petition, the Supreme Court of Georgia affirmed the denial of Davis's petition, and the United States Supreme Court denied certiorari review of the Supreme Court of Georgia's decision.²⁰⁸

In Davis's first federal habeas petition, he raised several claims asserting violations of his constitutional rights in the course of his original trial.²⁰⁹ Because he had failed to raise these claims in earlier proceedings, Davis asserted a gateway innocence claim—arguing “that his constitutional claims of an unfair trial must be considered, even though they are otherwise procedurally defaulted, because he has made the requisite showing of actual innocence under *Schlup*.”²¹⁰ Although Davis complained on appeal that the federal trial court did not adequately address the merits of his gateway innocence claim, he conceded that it nonetheless went on to address and reject the merits of his constitutional claims.²¹¹ The United States Court of Appeals for the Eleventh Circuit likewise failed to find error in the district court's conclusion “that Davis has not borne his burden to establish a viable claim that his trial was constitutionally unfair,” and it affirmed the denial of Davis's habeas petition.²¹²

Davis subsequently presented new evidence to the state trial court in an “extraordinary motion for new trial,” pursuant to Georgia law.²¹³ The state trial court denied Davis's motion after it “exhaustively reviewed each submitted affidavit and considered in great detail the relevant trial testimony, if any, corresponding

conviction and sentence).

207. *Id.*, cert. denied, 510 U.S. 950 (1993).

208. *Davis v. Turpin*, 539 S.E.2d 129 (Ga. 2000), cert. denied, 534 U.S. 842 (2001).

209. *Davis v. Terry*, 465 F.3d 1249, 1251–52 (11th Cir. 2006).

210. *Id.* at 1251.

211. *See id.* at 1252–53 (“Davis recognizes that, notwithstanding the procedural bar, the district court did consider the merits of his constitutional claims and rejected them as a matter of law.”).

212. *Id.* at 1256.

213. *In re Davis*, 565 F.3d 810, 814 (2009) (citing GA. CODE ANN. § 5-5-41 (West)).

to each.”²¹⁴ Davis’s further attempts to seek relief from the Georgia courts and State Board of Pardons and Paroles were unsuccessful.²¹⁵ The Supreme Court of Georgia affirmed the lower court’s denial of Davis’s motion, despite a “painstaking[]” review of Davis’s proffered evidence, concluding that it “simply cannot disregard the jury’s verdict in this case.”²¹⁶ Thereafter, the Georgia State Board of Pardons and Paroles issued an unusual statement, saying that “[a]fter an exhaustive review of all available information regarding the Troy Davis case and after considering all possible reasons for granting clemency, [it] determined that clemency is not warranted.”²¹⁷ Ultimately, the federal court of appeals rejected Davis’s application for permission to file a second federal habeas petition, holding that “Davis has completely failed to meet the procedural requirements of § 2244(b)(2).”²¹⁸

While only the jury at Davis’s original trial expressly addressed the question of whether Troy Davis was proven guilty of the murder of Officer MacPhail beyond a reasonable doubt, multiple state and federal courts determined that Davis’s trial was fair and constitutional.²¹⁹ Davis still had various opportunities to present his new evidence purporting to establish his innocence, but the judges and state officials considering Davis’s claims viewed his claims through their deference to “the jury [that] had the benefit of hearing from witnesses and investigators close to the time of the murder.”²²⁰ By the time Troy Davis’s case came back to the United States Supreme Court on the question of whether he was entitled to a new evidentiary hearing on the question of his guilt, the American judicial system

214. *See id.* (listing six categories of over twenty affidavits submitted by Davis as newly discovered evidence).

215. *See id.* at 814–15 (discussing Davis’s various attempts to obtain relief from the Georgia courts and State Board of Pardons and Paroles).

216. *Id.* at 815 (quoting *Davis v. State*, 283 Ga. 438, 447 (2008)).

217. *Id.* at 816 (quoting Georgia’s State Board of Pardons and Paroles, State of Georgia, Statement Regarding Troy Davis Case (Sept. 28, 2008)).

218. *Davis*, 565 F.3d at 816.

219. *See supra* notes 208–216 (tracing the procedural history of the *Davis* case).

220. *In re Davis*, 565 F.3d 810, 815 (2009) (quoting the Georgia Supreme Court’s decision in *Davis*, 660 S.E.2d at 362–63).

had determined that he was guilty, that he had been accorded a fair and constitutionally-valid trial and appellate process, and that his new claims of innocence were unpersuasive.

Nevertheless, on Davis's motion citing the Supreme Court's original jurisdiction to grant a writ of habeas corpus,²²¹ the Supreme Court ordered that Davis's case be returned to a Georgia federal courthouse, and remanded the matter to the trial court to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence."²²²

Justice Scalia, writing for himself and Justice Thomas, argued that the Court was wasting everybody's time. "Eighteen years ago, after a trial untainted by constitutional defect, a unanimous jury found petitioner Troy Anthony Davis guilty of the murder of Mark Allen MacPhail."²²³ Now, here was the Court instructing the district court to adjudicate Davis's habeas petition "even though every judicial and executive body that has examined petitioner's stale claim of innocence has been unpersuaded."²²⁴

In his most controversial assertion,²²⁵ Justice Scalia wrote that the Supreme Court "has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent."²²⁶ Many of Justice Scalia's critics misconstrue this as a statement that the Constitution would allow the execution of an innocent person. Those critics are missing his point. Justice Scalia did not say the Constitution allows the execution of a prisoner who *is* actually innocent.

221. *Davis v. Terry*, 625 F.3d 716, 718 (11th Cir. 2010).

222. *In re Davis*, 557 U.S. 952 (2009).

223. *Id.* at 954 (Scalia, J., dissenting).

224. *Id.*

225. See, e.g., Vincent Rossmeier, *Scalia: Innocence Doesn't Matter*, SALON (Aug 18, 2009), http://www.salon.com/2009/08/18/scotus_5/ (last visited Sept. 21, 2016) (characterizing Justice Scalia's dissent as possessing a "certain callousness" about "whether the courts should care if the state puts an innocent man to death") (on file with the Washington and Lee Law Review).

226. *In re Davis*, 557 U.S. at 955.

The Torah may teach: “An innocent person you shall not slay.”²²⁷ Justice Scalia does not consider Davis to be an innocent person. He considers Davis to be a convicted murderer. He *is* guilty. It has been determined.

Justice Stevens, writing for himself, Justice Ginsburg, and Justice Breyer, issued an opinion concurring with the Supreme Court’s order, responding to the arguments raised in Justice Scalia’s dissent from the Court’s action.²²⁸ Justice Stevens scoffed that Justice Scalia “assume[d] as a matter of fact that petitioner Davis is guilty of the murder of Officer MacPhail.”²²⁹ But Justice Scalia did not assume Davis’s guilt. Justice Scalia took notice of the trial court’s adjudication of Davis’s guilt and the fact that no subsequent review of his trial in direct or collateral proceedings found any constitutional defects in Davis’s trial.²³⁰ Justice Scalia took Davis’s guilt as an established fact because it had been established at Davis’s trial.

The Justices also disagreed about whether the federal courts would have the authority to offer Davis any relief. AEDPA bars relief to a state prisoner whose claim had been adjudicated by the state courts on the merits, unless the state adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”²³¹ Justice Stevens argued that neither Congress nor the Constitution would countenance an application of AEDPA’s procedural bars that would allow the execution of a person with “even the most robust showing of actual innocence” but precluded from relief due to “minor procedural error.”²³²

In a scene reminiscent of the Gemara, Rabbi Stevens posed this Talmudic hypothetical:

227. Sanhedrin 33b¹. See also *Exodus* 23:7 (“Keep thee far from a false matter; and the innocent and righteous slay thou not: for I will not justify the wicked.”).

228. *In re Davis*, 557 U.S. 952, 952–54 (2009).

229. *Id.* at 952–53.

230. See *id.* at 954 (regarding the trial of Davis as “untainted by constitutional defect”).

231. 28 U.S.C. § 2254(d)(1) (2012).

232. *In re Davis*, 557 U.S. at 953–54 (Stevens, J., concurring).

[I]magine a petitioner in Davis's situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless.²³³

One can almost picture Rabbi Scalia blowing on his hands in scorn²³⁴ as he responded:

There is no sound basis for distinguishing an actual-innocence claim from any other claim that is alleged to have produced a wrongful conviction. If the District Court here can ignore § 2254(d)(1) on the theory that otherwise Davis's actual-innocence claim would (unconstitutionally) go unaddressed, the same possibility would exist for *any* claim going beyond clearly established Federal law.²³⁵

Justice Scalia characterized the Supreme Court's action as depending on the idea "that capital convictions obtained in full compliance with law can never be final."²³⁶ He should have quoted Rav Sheishess. Perhaps someone at the far end of the world might know of an argument of which the trial and reviewing courts were not aware.

The real difference of opinion between Justice Stevens and Justice Scalia was not whether Troy Davis was innocent or guilty, but what it means to be innocent or guilty. As the Talmud might ask, what is the essence of innocence? The real debate between the Justices was whether guilt is a decision made once, in a full and fair trial, ensured by a thorough appellate process reviewing the manner in which that decision was made, or whether guilt is a question that remains unresolved until all possible innocence claims are heard and disposed of, even claims residing at the far end of the world. What are the Justices doing if not "asking about [the] definition[] and essence[]" of guilt?²³⁷

233. *Id.* at 954.

234. *See supra* note 192 (explaining the cultural significance of the physical gesture).

235. *In re Davis*, 557 U.S. 952, 955–56 (Scalia, J., dissenting) (internal quotation omitted).

236. *Id.* at 958.

237. Kirsch, *What Happens When the Talmud Asks, 'What If?'*, *supra* note 10.

The problem the Supreme Court wrestled with—and continues to wrestle with²³⁸—is how a criminal justice system designed and operated by fallible human beings comes to a definitive conclusion about a defendant's guilt. If Justice Stevens is correct that guilt is an objective state of being, then Troy Davis's claim must be heard. No court can come to a final, objective decision resolving the question of Davis's guilt. Someone can always come up with a new argument, and Davis should be returned to the courthouse to have the argument heard. If Justice Scalia is correct that guilt is a legal a conclusion, then Davis has already had his claim heard. The trial court determined that Davis was guilty, and subsequent examinations of Davis's trial in his direct and collateral appeals have ensured that Davis's trial was fair and free of constitutional errors.²³⁹ Justice Stevens wanted the courts to ensure that an innocent man was not executed. Justice Scalia believed the courts already had.

V. *The Fate of Troy Davis*

What do we know about Troy Davis's guilt or innocence? None of us—author or readers—have observed the witnesses or heard the evidence presented to establish his guilt. It is not this Article's purpose to present that evidence, for it is not our prerogative now to decide whether Troy Davis shot and killed Officer MacPhail. What we know is that numerous courts reviewed Davis's original trial and determined that it was free of constitutional defects.²⁴⁰ As far as the American legal system is concerned, Troy Davis was convicted by a jury of his peers in accordance with due process of law. We must acknowledge,

238. See *McQuiggin*, in which Justice Scalia, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito, continued to dissent from the Supreme Court's "actual innocence" exception to AEDPA's procedural bars. 133 S. Ct. 1924, 1937 (2013).

239. See *Davis v. State*, 426 S.E.2d 844, 845–49 (Ga. 1993) (affirming conviction of trial court and dismissing all claims of error alleged in appeal).

240. See *Davis v. Turpin*, 539 S.E.2d 129, 131 (Ga. 2000) (affirming denial of state habeas petition), *cert. denied*, 534 U.S. 842 (2001); *Davis v. Terry*, 465 F.3d 1249, 1256 (11th Cir. 2006) (affirming denial of federal habeas petition), *cert. denied*, 551 U.S. 1145 (2007); *Davis v. Terry*, 625 F.3d 716, 717–18 (11th Cir. 2010) (summarizing subsequent procedural history of Davis's case).

however, that this does not attest to the metaphysical accuracy of the result reached in those proceedings.

But Troy Davis received something more—something almost no convicted defendant in America receives—an evidentiary hearing to present new evidence challenging his guilt after he had exhausted all usual avenues of appeal and collateral review. While Justice Scalia and Justice Stevens debated the philosophical meanings of guilt and finality, the Supreme Court ordered Davis’s case transferred back to the federal trial court to determine “whether evidence that could not have been obtained at the time of trial clearly establishes [Davis’s] innocence.”²⁴¹ The flag was waved and Davis was turned around to go back before the tribunal to reconsider the question of his guilt.

The district court heard Davis’s new evidentiary claims and rejected his actual innocence argument.²⁴² The district court began its seventy-page decision with a twelve-page review of the evidence marshalled in the original investigation,²⁴³ a five-page review of Davis’s probable cause hearing,²⁴⁴ a seventeen-page review of the evidence presented at Davis’s trial,²⁴⁵ and a two-page review of Davis’s motions for post-trial relief.²⁴⁶ Then, after reviewing the evidentiary standards for establishing a claim of actual innocence, the district court reviewed for twelve pages the subsequent evidence purportedly calling Davis’s guilt into doubt, including witness recantations²⁴⁷ and evidence proffered to directly establish Davis’s innocence.²⁴⁸

After hearing and considering Davis’s new evidence, the district court concluded “that while executing an innocent person would violate the United States Constitution, Mr. Davis has failed to prove his innocence.”²⁴⁹ To Davis’s argument that his

241. *In re Davis*, 557 U.S. 952, 952 (2009).

242. *In re Davis*, No. CV409-130, 2010 WL 3385081, at *61 (S.D. Ga. Aug. 24, 2010) (ruling that “a complete review of the record in this case does not require the reversal of the jury’s judgment”).

243. *Id.* at *1–12.

244. *Id.* at *12–17.

245. *Id.* at *17–34.

246. *Id.* at *35–37.

247. *Id.* at *46–54.

248. *Id.* at *54–58.

249. *Id.* at *1.

case “involves credible, consistent recantations by seven of the nine state witnesses,”²⁵⁰ the district court responded:

Two of the recanting witnesses neither directly state that they lied at trial nor claim that their previous testimony was coerced. . . . Two other recantations were impossible to believe, with a host of intrinsic reasons why their author’s recantation could not be trusted, and the recantations were contradicted by credible, live testimony. . . . Two more recantations were intentionally and suspiciously offered in affidavit form rather than as live testimony, blocking any meaningful cross-examination by the state or credibility determination by this Court. . . . Moreover, these affidavit recantations were contradicted by credible, live testimony.²⁵¹

The district court did credit the recantation offered by one witness. However, in light of the fact that it considered his original trial testimony “patently false, as evidenced by its several inconsistencies with the State’s version of the events on the night in question,” the district court did not believe his testimony was “important to the conviction,” thus “rendering his recantation of limited value.”²⁵²

As to the affirmative evidence purporting to bolster Davis’s innocence claim, the district court stated that Davis had “vastly overstate[d] the value of his evidence of innocence.”²⁵³ The district court found that a witness who identified a different shooter was “not credible.”²⁵⁴ It deemed an uncorroborated hearsay confession, testified to by several witnesses, to be untrustworthy, noting that even one of the witnesses who recounted the confession doubted its truth.²⁵⁵ The district court did not consider the other proffered evidence to be exculpatory or relevant to Davis’s conviction and considered much of it to be “too general to provide anything more than smoke and mirrors.”²⁵⁶

Given the procedural history of every adjudication that had been made before, the district court noted that “[t]he burden was

250. *Id.* at *54.

251. *Id.*

252. *Id.*

253. *Id.* at *59.

254. *Id.*

255. *Id.*

256. *Id.*

on Mr. Davis to prove, by clear and convincing evidence, that no reasonable juror would have convicted him in light of the new evidence.”²⁵⁷ One need not engage in a Talmudic digression by elaborating on the factual merits of the case for or against Troy Davis. Suffice it to say that the district court tasked with considering Davis’s new factual claims compared the original evidence used to establish his guilt at trial with the new evidence presented on Davis’s behalf and concluded that “Mr. Davis’s new evidence does not change the balance of proof from trial.”²⁵⁸ The district court explained: “Ultimately, while Mr. Davis’s new evidence casts some additional, minimal doubt on his conviction, it is largely smoke and mirrors. The vast majority of the evidence at trial remains intact, and the new evidence is largely not credible or lacking in probative value.”²⁵⁹ The district court concluded: “[T]he evidence produced at the hearing on the merits of Mr. Davis’s claim of actual innocence and a complete review of the record . . . does not require the reversal of the jury’s judgment that Troy Anthony Davis murdered City of Savannah Police Officer Mark Allen MacPhail on August 19, 1989.”²⁶⁰

The district court asserted: “If there is a principle more firmly embedded in the fabric of the American legal system than that which proscribes punishment of the innocent, it is unknown to this Court.”²⁶¹ It claimed to find such a principle enshrined in the United States Constitution, “including,” but presumably not limited to, “the Eighth Amendment” and its prohibition of “cruel and unusual punishments.”²⁶² The district court’s faith in the purported principle against punishing the “innocent” can only be understood within the American legal system’s reliance on finality. The district court acknowledged that “Mr. Davis’s guilt was proven at trial beyond a reasonable doubt, but not to a mathematical certainty.”²⁶³ And yet, Troy Davis could be

257. *Id.*

258. *Id.* at *59–60.

259. *Id.* at *61.

260. *Id.*

261. *Id.* at *41.

262. *Id.*; see also U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

263. *In re Davis*, No. CV409-130, 2010 WL 3385081, at *45 n.44 (S.D. Ga.

executed, because he was not innocent. He was guilty. It had been determined.

A little over a year later, the *New York Times* reported: “Proclaiming his innocence, Troy Davis was put to death by lethal injection on [September 21, 2011], his life—and the hopes of supporters worldwide—prolonged by several hours while the Supreme Court reviewed but then declined to act on a petition from his lawyers to stay the execution.”²⁶⁴ As far as the American courts were concerned, the matter was closed. No petition from the far end of the world would be heard.

VI. Conclusion

The rabbis of the Talmud were inspired by a “fierce urge to arrive at the absolute truth.”²⁶⁵ Yet, they also recognized: “If You seek to have a world, strict justice cannot be exercised; and if You seek strict justice, there will be no world. . . . If You do not relent a little, the world will not endure.”²⁶⁶ Even divine justice is imperfect, recognizing that “there are those who are swept away without justice.”²⁶⁷ While Jewish tradition holds that G-d’s presence is found in a court’s judgment, this can be conceived of in many ways. One can believe “that every judgment that is decided by a legitimate judge is divine regardless of its content,” or one can believe that “only true judgment” is divine and a judgment’s divinity “depends on its content and on its truthfulness.”²⁶⁸

In the American legal system, appellate courts do not exist to ensure certain discovery of the truth. Appellate courts exist to

Aug. 24, 2010).

264. Kim Severson & John Schwartz, *Georgia Inmate Executed; Raised Racial Issues in Death Penalty*, N.Y. TIMES, Sept. 22, 2011, at A1.

265. STEINSALTZ, *supra* note 30, at 205.

266. THE BOOK OF LEGENDS, *supra* note 133, at 35–36.

267. See Adam Kirsch, *If Even the Angel of Death Makes Mistakes, Where is There True Justice?*, TABLET (Sept. 16, 2014), <http://www.tabletmag.com/jewish-life-and-religion/184273/daf-yomi-98> (last visited Sept. 21, 2016) (“In Chagiga 4b, Rav Yosef quotes a verse from Proverbs, ‘But there are those who are swept away without justice,’ and questions it: ‘Is there one who goes before his time?’”) (on file with the Washington and Lee Law Review).

268. Shapira, *supra* note 13, at 327–28 (quotation marks omitted).

ensure that we seek the truth through a fair trial. Accuracy is balanced with finality, but this is not finality for its own sake. It is not simply that we must bring litigation to an end; it is the belief that accuracy is best achieved through a fair process, not by repetition. We do not believe that a best two-out-of-three trial system would be any more accurate than one fair trial ensured through appellate review. If you ask me whether Troy Davis was guilty, I would ask you why my answer would be any more reliable than the trial judge who heard the new evidence. We can recognize the moral necessity of holding open the courthouse doors for an actual innocence claim, while understanding that someone still has to make a decision as to whether the defendant met his burden to establish his innocence claim.

Yet we must also acknowledge that metaphysical truth is impossible to achieve in any human-designed and human-managed system. This does not relieve the courts of their responsibility to be part of the search for truth. Acceptance and recognition of the fact that metaphysical certainty is not possible should ensure that appellate judges stay mindful of their responsibility to oversee the safeguards in the system through which we strive towards the truth.

*“Tzedek, tzedek tirdof.”*²⁶⁹ “Justice, justice shall you seek.” Seek, not find. The American legal system seeks justice—a justice that lies somewhere between accuracy and finality.

269. *Deuteronomy* 16:20.