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SIDEBAR

Consensus on Counting the Innocent: We Can't

By **ADAM LIPTAK**

A couple of years ago, Justice Antonin Scalia, concurring in a Supreme Court death penalty decision, took stock of the American criminal justice system and pronounced himself satisfied. The rate at which innocent people are convicted of felonies is, he said, less than three-hundredths of 1 percent — .027 percent, to be exact.

That rate, he said, is acceptable. "One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly," he wrote. "That is a truism, not a revelation."

But there is reason to question Justice Scalia's math. He had, citing the methodology of an Oregon prosecutor, divided an estimate of the number of exonerated prisoners, almost all of them in murder and rape cases, by the total of all felony convictions.

"By this logic," Samuel R. Gross, a law professor at the University of Michigan, wrote in a response to be published in this year's Annual Review of Law and Social Science, "we could estimate the proportion of baseball players who've used steroids by dividing the number of major league players who've been caught by the total of all baseball players at all levels: major league, minor league, semipro, college and Little League — and maybe throwing in football and basketball players as well."

Joshua Marquis, the Oregon prosecutor cited by Justice Scalia, granted the logic of Professor Gross's critique but not his conclusion.

"He correctly points out," Mr. Marquis, the district attorney in Clatsop County, Ore., said of Professor Gross, "that rape and murders are only a small percentage of all crimes, but then has absolutely no real data to suggest there are epidemic false convictions in, say, burglary cases."

What the debate demonstrates is that we know almost nothing about the number of innocent people in prison. That is because any effort to estimate it involves extrapolation from just two numbers, neither one satisfactory.

There have been 214 exonerations based on DNA evidence, almost all of them in rape cases, according to the Innocence Project at the Cardozo School of Law. But there is no obvious control group to measure these exonerations against.

Virginia, though, has discovered thousands of closed rape files from 1973 through 1988, many with untested biological evidence. DNA testing of a preliminary sample of 31 of them yielded two wrongful convictions. Those numbers are too small to be reliable, of course, but they would suggest a false conviction rate of 6

percent.

Even that rate may be low, said Shawn Armbrust, the executive director of the Mid-Atlantic Innocence Project. Ms. Armbrust said investigators in Virginia were able to get results in only 22 of the 31 tests, suggesting a false conviction rate of 9 percent.

The other important number comes from death row. According to the Death Penalty Information Center, 127 death row inmates have been exonerated.

Here we do have a control group. There have been more than 7,000 death sentences since the Supreme Court reinstated the death penalty in 1976.

But exoneration in the capital context is a funny concept. It suggests complete vindication but its real meaning is generally narrower.

DNA evidence in a rape case can provide something like categorical proof of innocence. Death row exonerations, on the other hand, can be based on all sorts of things, like, say, prosecutorial misconduct. In other words, it is possible to wrongfully convict a guilty defendant.

Mr. Marquis, the Oregon prosecutor cited by Justice Scalia, says the number of authentic death row exonerations is more like 30. Many people exonerated in the legal sense, he said, in fact committed the crime but could not be proved guilty beyond a reasonable doubt.

Professor Gross thinks the number of guilty people released from death row is very small.

Professor Gross concluded that the false conviction rate for death row inmates has ranged from 2.3 percent to 5 percent. Were even the lower end of that range applied to people who received prison sentences of a year or more in the last three decades, he wrote, it would suggest that about 185,000 innocent people have served hard time.

But extrapolating from capital crimes to felonies generally is problematic whatever the number of exonerations.

On the one hand, there is some reason to think that homicide cases yield what Justice David H. Souter, dissenting in that same death penalty decision two years ago, called "an unusually high incidence of false conviction, probably owing to the combined difficulty of investigating without help from the victim, intense pressure to get convictions in homicide cases and the corresponding incentive for the guilty to frame the innocent."

On the other, as Justice Scalia responded, capital cases "are given especially close scrutiny at every level."

We are left with an uneasy agreement between Professor Gross and Mr. Marquis on at least one point. "Once we move beyond murder and rape cases," Professor Gross wrote, "we know very little about any aspect of false conviction."

But a few general lessons can be drawn nonetheless. Black men are more likely to be falsely convicted of rape

than are white men, particularly if the victim is white. Juveniles are more likely to confess falsely to murder. Exonerated defendants are less likely to have serious criminal records. People who maintain their innocence are more likely to be innocent. The longer it takes to solve a crime, the more likely the defendant is not guilty.

Justice Scalia, for his part, focused on what he saw as good news. "Reversal of an erroneous conviction," he wrote, "demonstrates not the failure of the system but its success."

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