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.027 RULES!

How many wrongful convictions have there been? A lot more than what's known!

By Julius (Jay) Wachtel. "Better that ten guilty persons escape than that one innocent suffer." Known to first-year law students as the "Blackstone ratio", these words by legal scholar William Blackstone were intended to frame critical legal decisions within a moral context and remind prosecutors of the need to exercise restraint when invoking an admittedly imperfect process.

Were he alive today Blackstone would be appalled that his numerical ratio has been turned on its head and used to justify serious miscarriages of justice. Unfortunately, that's exactly what's happened. Consider, for example, Supreme Court Justice Antonin Scalia's concurring opinion in Kansas v. Marsh (no. 04-1170, 6/26/2006):

> Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an *insignificant minimum*.

Scalia was upset at an academic study on wrongful conviction authored by Samuel Gross, a law professor at the University of Michigan. Examining 340 exonerations between 1989 and 2003, a number that they took pains to emphasize represented only a fraction of the wrongfully convicted, Mr. Gross and his colleagues concluded that these unfortunate events were not rare. Anxious to undermine their findings, Justice Scalia referred to a *New York Times* opinion piece by Clatsop County, Oregon D.A. Joshua Marquis deriding Gross' work, going so far as to insert a substantial chunk of the op-ed into the Court's written opinion:

> Let's give the professor the benefit of the doubt: let's assume that he understated the number of innocents by roughly a factor of 10, that instead of 340 there were 4,000 people in prison who weren't involved in the crime in any way. During that same 15 years, there were more than 15 million felony convictions across the country. That would make the error rate .027 percent--or, to put it another way, a success rate of 99.973 percent.

Leaving aside for now D.A. Marquis' estimate of their prevalence, dividing wrongful convictions by all convictions seems an appallingly wrongheaded way to

estimate the accuracy of the adjudication process. A goodly number of felony convictions -- probably a clear majority -- are what police call "slam-dunks". When officers find someone standing over a dead body, holding a smoking gun, or, more realistically, listen to a spouse tearfully admit they killed their partner, and so forth, the chances of prosecuting let alone convicting the wrong person are zero. When we choose a hospital for critical surgery, we're not interested in its record for treating hangnails; if we're interested in how well the system discriminates between the innocent and guilty *when it really counts*, cases where the evidence is essentially uncontested don't belong in the pool. Here's what the formula *should* look like:

$$\text{Accuracy of the process} = \frac{\text{Wrongful convictions}}{\text{All convictions subject to significant processing}}$$

What constitutes "significant processing" is something for another time. For now let's turn to the numerator, the number of wrongful convictions. According to the Innocence Project, which handles only DNA-based cases, there have been 215 post-conviction DNA exonerations in the U.S. How did they come to be? Many can be blamed on faulty eyewitness identification. Other major causes include suggestive witness interviewing, false and coerced confessions, lying informants and junk science. Actually, since DNA is recovered in only a small proportion of violent crime, mostly rape and murder, these exonerees were in a sense "lucky", as once someone is adjudged guilty the burden of proof shifts to them to demonstrate their innocence, something that's awfully hard to do without DNA.

In a recent column a *New York Times* writer reported that the adjudicative system's opacity makes it impossible to estimate the prevalence of wrongful conviction. That hasn't stopped those who seem determined to make the issue go away. Only days ago D.A. Marquis posted a blog entry regurgitating his criticisms of Mr. Goss' work, and particularly the researcher's definition of "exoneration," which includes (the very few) instances where a convict was retried and acquitted. According to the D.A., "such a definition would seriously wound if not torture the true definition of exonerated, a word of great power that most people equate with actual innocence."

That, sadly, is how many prosecutors see it. Happy enough to convict based on a legal construct (beyond a reasonable doubt) that has sent innocents to prison, and a few probably to death, D.A. Marquis has the cheek to demand that the few who get a second bite of the apple and are found not guilty must somehow prove themselves "factually innocent" -- meaning, to his satisfaction -- before he'll add them to his formula's numerator. But not to worry, he coos, "Americans should be far more worried about the wrongfully freed than the wrongfully convicted."

.027 rules!