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US death row study: 4% of defendants sentenced to die are innocent

Deliberately conservative figure lays bare extent of possible miscarriages of justice suggesting that the innocence of more than 200 prisoners still in the system may never be recognised

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The single largest group of innocent death row inmates are neither exonerated and released nor executed, the study suggests. Rather, they are left in limbo. Photograph: Pat Sullivan/AP

At least 4.1% of all defendants sentenced to death in the US in the modern era are innocent, according to the first major study to attempt to calculate how often states get it wrong in their wielding of the ultimate punishment.

A team of legal experts and statisticians from Michigan and Pennsylvania used the latest statistical techniques to produce a peer-reviewed estimate of the “dark figure” that lies behind the death penalty – how many of the more than 8,000 men and women who have been put on death row since the 1970s were falsely convicted.

The team arrived at a deliberately conservative figure that lays bare the extent of possible miscarriages of justice, suggesting that the innocence of more than 200 prisoners still in the system may never be recognised.

The [study](#) concludes that were all innocent people who were given death sentences to be cleared of their offences, the exoneration rate would rise from the actual rate of those released – 1.6% – to at least 4.1%. That is equivalent in the time frame of the study, 1973 to 2004, of about 340 prisoners – a much larger group than the 138 who were exonerated in the same period.

“This is a disturbing finding,” said Samuel Gross, a law professor at the University of Michigan law school who is the lead author of the research. “There are a large number of people who are sentenced to death, and despite our best efforts some of them have undoubtedly been executed.”

The research team deployed statistical devices to put a figure on the proportion of cases of hidden innocence. In particular, they deployed a technique known as “survival analysis”, to calculate the percentage of prisoners who have been taken off death row but who might still be innocent.

They also applied “sensitivity analysis”, to take into account possible cases of exonerations where the released prisoner is nonetheless guilty, and to ensure that the overall findings erred on the side of caution.

The study, published in a prestigious journal, the Proceedings of the National Academy of Sciences, does not solve perhaps the greatest single riddle of the death penalty: how many innocent people have actually been put to death in modern times. That remains a haunting unknown.

But Gross is clear that such final and irreparable injustices have occurred.

“If you look at the numbers in our study, at how many errors are made, then you cannot believe that we haven’t executed any innocent person – that would be wishful thinking.”

Richard Dieter, executive director of the Death Penalty Information Center, which supplied some of the data on which the study depends, said “every time we have an execution, there is a risk of executing an innocent person. The risk may be small, but it’s unacceptable”.

The ballpark figure of at least 4.1% innocence is higher than previous studies looking at exoneration rates that had smaller sample sizes and were more restricted in their remit. It is also considerably higher than the estimate given in 2007 by the conservative US supreme court justice Antonin Scalia, who wrote that American criminal convictions generally had an “error rate of .027% – or, to put it another way, a success rate of 99.973%”.

The authors comment tartly with respect to Scalia’s skills as a statistician: “That would be comforting, if true. In fact, the claim is silly.”

The single largest group of innocent death row inmates are neither exonerated and released nor executed, the study suggests. Rather, they are left in limbo, somewhere in between those two extremes of fortune.

Gross and his co-authors estimate that 36% of all those sentenced to death between 1973 and 2004 – some 2,675 people – were taken off death row after doubts about their convictions were raised. But they were then put on new sentences, usually life without parole, that mean they will almost certainly die in prison.

The study concludes chillingly that “the great majority of innocent defendants who are convicted of capital murder in the United States are neither executed nor exonerated. They are sentenced, or resented to prison for life, and then forgotten”.

Gross said that this explains the 200 or so missing people highlighted by his study – men and women who are innocent and yet have not been exonerated. In most cases, they have probably been moved off death row.

Because they are no longer under the threat of execution, they are no longer treated as priorities within the criminal justice system. They can no longer draw upon the help of experienced legal teams, and they may not be entitled to appeals. As a result, their chances of clearing their names plummet.

“The best efforts of the judicial system are only devoted to prisoners when they face execution,” Gross said. “In many cases when people are released from death row, little or nothing is done to deal with the equally bad injustice they now face – that they will spend the rest of their lives in prison for a crime they didn’t commit.”