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Tipping the scales: Supreme Court fails to recognize danger of executing the innocent

Author: Richard C. Dieter

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In deciding a narrow issue about an obscure part of Kansas' death penalty law, the Supreme Court last week revealed a chasm of differing opinions regarding the fundamental reliability of capital punishment in this country. Although the opposing views were widely divergent and sharply expressed, the court did us all a service by identifying the key problem that may decide the future of the death penalty in this country in coming years.

The issue before the court was simply whether Kansas juries should be required to impose the death penalty when they believe that the aggravating and mitigating factors in a case are exactly equal. In a close vote, the court held that it is permissible to allow a tie to go in favor of the state's request for death. The decision, however, is likely to be remembered for a much different debate within it.

Justice David Souter, writing for the four justices in the minority, voiced a strong concern about the dangers of executing innocent defendants. We should not be imposing death sentences in close cases, he noted, because we now have voluminous evidence that many people have been wrongly convicted in death penalty cases. Since "death is different" from every other punishment, we should err on the side of caution.

Justice Antonin Scalia, agreeing with the majority regarding Kansas' law, but writing only for himself, took strong exception to the four justices' concerns about innocence. For one thing, he said, he knew of no recent case where an executed person had been shown to be innocent. If there were such a case, he noted, it would have been "shouted from the rooftops." Moreover, he said, even in cases where inmates had been freed from death row, the problem of innocence was greatly overstated.

Both assertions by Scalia deserve a response. With respect to executing the innocent, Scalia seems not to be fully informed. Just days before his opinion was published, and for the fourth time in the past two years, such a case was indeed being shouted from the rooftops. The story about the probable innocence of Carlos DeLuna, who was executed in Texas in 1989, appeared on "ABC World News," "Nightline" and the front pages of the Chicago Tribune. Major stories and series about two other Texas cases of probable innocence, those of Ruben Cantu and Cameron Willingham, and one case from Missouri, that of Larry Griffin, have also appeared repeatedly in other major papers and wire reports.

Scalia is correct that none of the many DNA exonerations over the past decade have involved someone who was already executed. Unfortunately, DNA evidence is often allowed to

deteriorate over time. Moreover, some states have refused to allow access to such evidence after an execution has occurred. So there is not yet incontrovertible proof of such a fatal mistake. But given the thoroughness of the four investigations mentioned above, the probability that such an execution has occurred is high.

Scalia's second assertion is that even cases involving people who have been officially cleared of all the charges that sent them to death row are not a cause for concern. He particularly mentions the cases on the Death Penalty Information Center's innocence list as examples of sounding an unnecessary alarm.

DPIC's list of 123 cases is not the product of subjective judgments about innocence. Rather, it is an objective record of people who have been sentenced to death, whose convictions were overturned, and who were then cleared of all related charges and freed by the justice system. For Scalia, it is improper to call these defendants "innocent." He cites a few cases in which the original prosecutor, or a court reviewing a civil claim for wrongful conviction, expressed a belief that the defendant might still be guilty.

The implications of denying such people the status of innocence are far reaching. The principle that you are innocent until proven guilty is a bedrock principle of our criminal justice system, and it has been a fundamental tenet of every respected judicial system for centuries, going back to biblical times. If a person's status of innocence can be taken away merely because a prosecutor suspects the person of a crime but never proves it in a fair trial, then the state assumes dangerous powers at the expense of the people. No one should have to prove his innocence.

However one may label the people who have been freed, their cases should indeed raise alarms across the country. In all 123 cases, the justice system unanimously convicted the individual and then expressed such certainty in its decision that it sentenced the person to death. This same justice system then reviewed the cases and concluded that each person could not even be convicted of the slightest offense, and they were set free. For every eight individuals who have been executed since 1973, one person has been exonerated and freed from death row. That ratio reflects a terrible record and is ample cause for the court's concern.

Justice Scalia makes one more claim that has been heard often from proponents of the death penalty: that exonerations from death row prove that the system works. In some cases, that is, thankfully, true. But in many other cases, it was only the fortuitous advent of scientific DNA testing that freed the individual, or the dogged work of journalism students, or the pro bono work of a large law firm - services available only to a handful of the thousands of individuals on death row - that saved these lives.

Justice Scalia was certainly right on one point. He said the death penalty has become an "incoherent" system. The faulty construction of much of that system is largely the court's responsibility. But with all its complications, this system too often fails to get the most fundamental job done right: being certain of guilt before anyone is deprived of life. The issue of innocence is very serious and deserves our utmost attention.

Richard Dieter is executive director of the Death Penalty Information Center in Washington, D.C.

Caption:
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