

# Dan Markel: No more mistakes

One wrongful Texas execution is too many

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Two years ago, Hollywood released *The Life of David Gale*. Its fictional protagonist is a professor and anti-death-penalty activist in Austin who – after a couple of bizarre events – finds himself mistakenly convicted of killing a fellow activist and on Texas' death row.

Mr. Gale decides to reveal his innocence to a journalist, but only in the days preceding his scheduled execution. He realizes that the machinery of death will not halt until and unless an innocent person is executed. Seeing that his cause will be better served by his execution than his exoneration, Mr. Gale decides to sacrifice himself upon this altar.

For a long time, death-penalty abolitionists have feared that a real David Gale would report for duty. And as detailed recently in the *Houston Chronicle*, compelling evidence now indicates that Texas executed an innocent man named Ruben Cantu 12 years ago.

But unlike David Gale, Ruben Cantu was not ready to die. Notwithstanding Mr. Cantu's protestations of innocence, Texas executed him for his alleged role in a murder-robbery. Whether this mistaken execution will throw a wrench into that machinery of death turns on our willingness to admit that such errors are, in the main, unforgivable.

According to the *Chronicle*, Mr. Cantu should never even have been convicted – a fact on which the prosecutor, defense attorney, sole eyewitness and the head juror involved with the case all agree. They now attribute Mr. Cantu's fate to two causes: first, the extraordinary police pressure exerted on immigrant Juan Moreno – the crime's sole surviving witness – to finger Mr. Cantu in testimony; and, second, the failure of Mr. Cantu's co-defendant, David Garza, to speak up earlier to clear Mr. Cantu's name. (Mr. Garza and Mr. Moreno have since said someone else actually committed the crime.)

As the head juror said, "We did the best we could with the information we had, but with a little extra work, a little extra effort, maybe we'd have gotten the right information. ... The bottom line is, an innocent person was put to death for it."

The jury convicted Mr. Cantu – who was admittedly no Eagle Scout – on the basis of eyewitness testimony, which is, especially during any period of great trauma, notoriously unreliable. Thus, without physical evidence, no confession and no other government evidence – aside from now-recanted testimony – Mr. Cantu was eventually executed for a crime he did not commit.

Maybe this seems like the perfect confluence of random coincidences. But those familiar with the criminal justice system – like the former district attorney in Mr. Cantu's case – see this as business as usual, precisely because there are "so many places where [the evidence] could break down."

The new facts about Mr. Cantu's case have made the Bexar County district attorney's office anxious enough to reopen the investigation. Understandably so, since, if the *Chronicle's* reporting is correct, Mr. Cantu's case would represent the first wrongful execution since 1976, when the Supreme Court reinstated the death penalty.

Since that year, 122 men and women have been exonerated while awaiting execution. That means 122 inmates already convicted by a jury beyond a reasonable doubt were later found innocent.

The nontrivial risk of error and the irrevocable nature of the death penalty are only two reasons policymakers sympathetic to retributive justice should oppose the death penalty. The state should refuse to impose a punishment that prevents it from later acknowledging – and making amends for – its own wrongful acts to its own unintended victims. We have found our David Gale. It's time to call a moratorium on executions. Absent compelling evidence that executions (even of innocents) are saving lives through deterrence, one lost innocent is too many. Any more would be a crime.

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