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Innocents Lost

Who needs David Gale when you have Ruben Cantu?

By Dan Markel
 Posted Tuesday, Nov. 29, 2005, at 12:45 PM ET

Two years ago, Hollywood released [The Life of David Gale](#). Its fictional protagonist, Gale, played by Kevin Spacey, is a professor and anti-death-penalty activist in Austin, Texas, who—following a couple of bizarre events—soon finds himself mistakenly convicted of killing a fellow activist and on Texas' death row. Gale decides to reveal his innocence to a magazine journalist, but he does so only in the last three days preceding his scheduled execution. Gale realizes that the machinery of death will not halt until and unless an innocent person is executed. Seeing that his abolitionist cause will be better served by his execution than his exoneration, Gale decides to sacrifice himself upon this altar.

For a long time, death-penalty abolitionists have feared (and perhaps secretly hoped) that a real David Gale would report for duty. And as detailed in [last week's Houston Chronicle](#), compelling evidence now shows that Texas executed an innocent man named Ruben Cantu 12 years ago. But unlike David Gale, Ruben Cantu was not ready to "go gentle into that good night." While on death row, Cantu wrote, "My name is Ruben M. Cantu and I am only 18 years old. I got to the 9th grade and I have been framed in a capital murder case."

Notwithstanding Cantu's protestations, Texas executed him at the age of 26 for his alleged role in a murder-robbery. (Because he was [only 17](#) at the time of the crime, Cantu would have been spared execution had the situation arisen [more recently](#).) Whether Cantu's mistaken execution will throw a wrench into that machinery of death—as was the hope of Gale—turns on our willingness to admit that such errors are, in the main, unforgivable.

According to the *Chronicle*, 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 Cantu's fate to two causes: first, the extraordinary police pressure exerted on immigrant Juan Moreno—the crime's sole surviving witness—to finger Cantu in testimony; and second, the failure of Cantu's co-defendant, David Garza, to speak up earlier to clear Cantu's name. (Garza and Moreno have since cleared Cantu, saying someone else actually committed the crime.) As the head juror, Miriam Ward, said, "We did the best we could with the information we had, but with a little extra work, a little extra effort,

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maybe we'd have gotten the right information. ... The bottom line is, an innocent person was put to death for it."

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Cantu's story is typical of how errors in the criminal justice system occur, and occur frequently. For one thing, the jury convicted Cantu on the basis of Moreno's eyewitness testimony, which is, especially during any period of great trauma, [notoriously unreliable](#). Second, like many arrestees, Cantu was no Eagle Scout. Indeed, on the night of the robbery-murder for which he was convicted, Cantu appears to have been [stealing pickups](#) in nearby Waco with three friends who feared prosecution for their other crimes. Unsurprisingly then, Cantu's counsel was never able to secure their alibi testimony. And though he was young, Cantu had long been entangled with drugs and car thefts and even the shooting of an off-duty police officer. But because of murky circumstances—the cop was apparently a [thug himself](#), and the shooting allegedly happened in self defense—and a botched investigation, Cantu was never charged with that shooting.

Unfortunately, that officer proved a bitter witness at the penalty phase of Cantu's trial for the murder-robbery. And who presided over the investigation of that murder-robbery? A friend of that same cop. Thus, without any physical evidence, no confession, and no other government evidence—aside from eyewitness Moreno's now-recanted testimony—Cantu was convicted, then executed, for a crime he did not commit. Maybe this just seems like the perfect confluence of random coincidences. But those familiar with the criminal justice system—like the former district attorney in Cantu's case—see this as business as usual, precisely because there are simply "so many places where [the evidence] could break down."

The new facts about Cantu's case have made the Bexar County [District Attorney's Office anxious enough to recently reopen](#) the investigation. Understandably so, since, if the *Chronicle's* reporting is correct, Cantu's case would represent the first innocent person wrongfully executed since 1976, when the Supreme Court reinstated the death penalty.

A supporter of the death penalty might say that as bad as Cantu's fate was, the fact that Cantu was the first innocent to be executed speaks well for the administration of the death penalty in general. But that would be wrong for two reasons. First: We shouldn't rely upon organizations opposing the death penalty to spend their time trying to clear the names of those who have already been killed. Organizations are far more likely to expend scarce time and resources trying to clear the names of those who are still *alive* and on death row. Thus, there is little likelihood that we'll ever know whether Cantu was the first or the 20th wrongly executed defendant. Second, and more troubling, since 1976, 122 men and women have been exonerated while awaiting execution. That means 122 men and women already convicted by a jury beyond a reasonable doubt were later determined to be innocent of their crimes. These numbers will likely rise, especially in light of the [revelations regarding the extensive mishandling of DNA evidence at the police lab](#) in Harris County, Texas. In other words, serious error infests even the "modern" administration of the death penalty—notwithstanding all the procedural safeguards supposedly in place.

The nontrivial risk of error and the irrevocable nature of the death penalty are only two reasons policy-makers sympathetic to the tropes of retributive justice should oppose the death penalty. As I've argued [elsewhere and at greater length](#), retributivists are properly obsessed with accurately sorting the innocent from the guilty. It follows that the state committed to the virtues of impartial retributivism (rather than mere hotblooded revenge) should favor not only sobriety and restraint, but also modesty in punishment. 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.

Unfortunately, when the guillotine drops, that opportunity for apology and compensation to the now-dead innocent is forfeited. When less-restrictive alternatives of social condemnation and protection of society are available, including lifetime incarceration, executions are—at least where the guilt of the defendant is contested—immodest state actions, incompatible with the sense of fallibility and spirit of open-mindedness characteristic of liberal democratic politics.

Looking forward, Cantu's tragic end might well accelerate the gradual dismantling of the death penalty. Other factors—such as the [economically](#) forbidding cost of capital punishment and [newly galvanized](#) Catholic opposition to executions—are also sure to contribute. Indeed, just last week, a report from New Jersey [revealed that the state](#) has spent a quarter of a *billion* dollars on its death-penalty system even though it has yet to execute anyone. Perhaps that's a sign of success; but \$250 million is a lot of money that might have been better used to [prevent and prosecute other crimes](#).

This week the 1,000th person since the "modern period" of execution began in 1976 is scheduled to be killed. How many of those 1,000 were in fact truly guilty may never be known. (Aside from Cantu, serious doubts about [two other](#) cases have recently been raised.) But we have found our David Gale. And unlike the movie character,

Ruben Cantu was not a willing martyr. It's time for Texas and other states to call a moratorium on executions. It's time to renew the national conversation about whether the costs and consequences of the death penalty are compatible with, and expressive of, the benchmark established long ago by the Supreme Court, namely, "the evolving standards of decency that mark the progress of a maturing society." 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.

Dan Markel teaches criminal law, procedure and policy at Florida State University College of Law. He is the founder of [PrawfsBlawg](#), a blog by law professors about law, culture, and politics.


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