An essay by Professor David Dow regarding the death penalty and the recent execution of Troy Davis appeared on the Beacon Broadside website on September 22, 2011.


Troy Davis: Why Poster Boys Don't Matter

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There were hundreds of protestors outside the prison. From the sky the streets looked tiled with satellite dishes. There was live coverage on CNN, and a front-page story in The New York Times. The national conversation about capital punishment had finally begun.

That’s what I wrote ten years ago, talking about two executions in Texas: Karla Faye Tucker, who was guilty but repentant; and Gary Graham, who was unrepentant but almost certainly innocent. Troy Davis was like Gary Graham all over again, but with an additional decade of internet connectivity. Where a few hundred people wrote the Texas Board of Pardons and Paroles urging clemency for Graham in 2000, upwards of half a million wrote the Georgia Board urging that Davis’s life be spared. Nobody was tweeting during the Graham execution, and Karla Faye Tucker, for all her photogenic appeal, did not have a Facebook page.

Over at Slate, the always insightful Dahlia Lithwick thinks the Davis case is the tipping point, but I don’t think so. I think the Davis case only tells us what we already know: that a solid minority of Americans oppose capital punishment, and that some capital punishment supporters believe we should not be executing someone if there is uncertainty about his guilt.

The problem with the former group is that they are, to repeat myself, a minority. The problem with the latter group is that they don’t really believe what they say; if they did they’d be against virtually all executions. I’ve been a death penalty lawyer for more than twenty years. I know a lot of executed offenders who might have been innocent. Because most death penalty cases are not DNA cases, some degree of uncertainty is the norm. States have been trying for decades to perfect the machinery of death and insure that only the guilty get convicted and only the worst of the worst sent to the gurney, but both quests run headlong into one simple ineradicable fact: human beings err. Every inmate who has been exonerated was sent to prison because twelve people were sure about his guilt.
Death penalty supporters endorse an immoral punishment, but they are not morons. They know human beings make mistakes. If someone (a) knows human beings err, and (b) supports the death penalty anyway, we can safely say that person has determined that the cost of taking an innocent life every now and again is a price worth paying.

Be careful about rising too fast to argue with that calculus, because at some level we all believe it. That’s why we support the building of interstate highways, space exploration, and search for alternative fuels, not to mention urban warfare in Afghanistan, even though we know with actuarial certainty those government programs will cause innocent people to lose their lives. What’s different about the death penalty? Morally speaking, the answer is probably nothing.

Troy Davis is just the newest chapter in the quixotic abolitionist effort to end the death penalty on the shoulders of a single prisoner. The problem is, no matter how many “I am Troy Davis” t-shirts you print, the only people who wear them are people who were already against the death penalty before they’d heard of Troy Davis. Rick Perry and his supporters don’t think they are Troy Davis. You can ask them, What if you were the innocent prisoner caught in this snare? And their answer will be, Airplanes crash, but I fly anyway.

People do not abandon the death penalty because they suddenly realize human beings make mistakes (see, for example, Gary Graham), or because a single death row inmate strikes them as redeemed (see, for example, Karla Faye Tucker). People abandon the death penalty because they realize it is an obscene waste of resources, or because they acknowledge quite simply that it is wrong for the state to kill.

Perhaps a few people, bombarded for weeks by the Davis media spectacle, reached one of those conclusions or the other. But four hours before Davis was put to death Texas executed Lawrence Brewer, and the day after Davis died Alabama executed Derrick Mason. Davis didn’t save either of them, and his death won’t save anybody else either, because you can’t change a death penalty supporter’s mind with posterboys. America will indeed abandon capital punishment, but it won’t happen until the majority believes that killing even an unquestionably guilty murderer is wrong.