

Houston Philosophical Society Dinner Meeting Minutes of 614th Meeting, January 18, 2007

CALL TO ORDER: 8:00 p.m.

President James L. Kinsey called the meeting to order. Guests were introduced.

Jim Kinsey introduced the speaker: David Dow, Distinguished University Professor, University of Houston Law Center, J.D., Yale 1985, founder of the Texas Innocence Project, and author most recently of *Executed on a Technicality*. Professor Dow spoke on “Is a Just Death Penalty Regime Possible?”

Professor Dow argues that a just death penalty regime is not possible. He recounted that when he joined the UHLC faculty in 1984, he taught procedure and constitutional law, of which a subset is habeas corpus, the mechanism that allows people in government custody to challenge the legality of their confinement, which has become very complicated. Professors can spend no time or two-thirds of a course on it. He falls in the latter category.

In the late 1980’s there were 2000 people on death row, mostly without lawyers because criminal defendants are not entitled to a lawyer after the first, or direct, appeal. The habeas corpus process is still open, but no defendant can navigate his way through. Therefore, Congress has funded resource centers to find volunteer lawyers to represent the people on death row. Professor Dow knew some of these volunteers and decided to learn death penalty law for his habeas corpus course.

Dow went to death row in Huntsville with an attorney friend, met 6-8 inmates, and toured the facility. On the way home, his friend asked him to represent an inmate, telling him only poor people get the death penalty. The death penalty was abolished by the Supreme Court in 1972 in *Furman v. Georgia*, which held it violated the Eighth Amendment. It was reinstated in 1988. In 1972 there were 334 people on death row; in 2007, there were 3343. John Moore, Dow’s client, who was executed January 16, was the 380th person executed since 1988 in Texas, which executes about 14 people a year.

Professor Dow turned against the death penalty because of what was happening in his cases, which he considered “grotesquely unjust.” He gave the example of Johnny Joe Martinez, executed in May, 2002. After drinking from 2:00 p.m. to 11:00 p.m., Martinez stabbed 11 times a convenience store clerk whom he and an older man had robbed. After stabbing the clerk, he picked up the pay phone outside the store, dialed 911, and waited for police. He told them what he had done and asked about the condition of the man he had stabbed, who had bled to death. Martinez was tried for murder and sentenced to death. His attorney had never handled a habeas corpus case and did not know the exhaustion requirement, *i.e.*, that federal courts will not entertain ideas not previously presented to the state court. He did not raise a single argument on Martinez’s behalf in state court. Dow came in for the federal habeas corpus, but no argument could be raised.

Two weeks before his execution, Martinez met with the mother of the man he had stabbed through the “Victim Mediation Program.” She told him during the trial she had seen his grandmother in the ladies room, and she didn’t want her to have to bury a son as she had. Martinez asked her to write the governor’s office to tell them that, and she said she would think about it. After the meeting, Dow gave her a clemency petition and asked her to call him if she decided she wanted to seek clemency, which she did. The Board of Pardons and Paroles, which had 17 members, must authorize the governor to commute a death sentence. By a 9 to 8 vote, they turned down the commutation request.

Two principal things happened in the Martinez story that happen in virtually every death penalty case in the United States. First, the jury never heard facts that might cause it to believe Martinez should spend his life in prison rather than get the death penalty, including Martinez's remorse and his mother's heroin addiction, because the trial lawyer never tried to learn the details. Second, because the state habeas corpus attorney did not do his job, Dow could not do his. Almost all capital defendants have strong arguments that are not heard because the lawyer did not do his job.

In human society, a single norm has always existed: 'Thou shalt not kill.' There are always exceptions specific to the culture. Therefore, the burden is on the person seeking to overcome the norm to prove it should be overcome in that case. Here, it costs twice as much to execute someone than to keep him in prison for life. There is no data supporting deterrence despite searches for at least 40 years. Retribution is an impulse people have, but it is not an argument for execution.

In response to questions, Professor Dow stated that he opposes life without parole, which has become law in Texas in the last two years, although Texas effectively had it previously in that a person sentenced to life had to serve 40 calendar years before being eligible to seek parole and most people do not live 40 years in prison. Dow believes people who kill in youth and get out much later are not likely to do it again. He cited a survey of 200 released murderers, of whom 2 murdered again.

Professor Dow would still oppose the death penalty even if all defendants had effective representation because he believes the purpose is to make us safer, and it does not. He believes the death penalty will be abolished in his son's lifetime simply because of the high cost of execution, *i.e.*, \$380,000,000 to execute 380 people. Then the United States will be able to position itself differently in international law, where we are lectured by countries like Mexico that torture but do not have the death penalty.

The average length of time between crime and execution in Texas is now 7 years because of the 1996 "Anti-Terrorism and Effective Death Penalty Act," which placed strict time limits on execution. Every state but Texas has a laundry list for whether a defendant should be sentenced to life or death. In Texas, the only question is whether the defendant will be dangerous in the future, which is not predictable and wildly wrong, but there is no forum in which that argument can be made. The actuality is that Texas treats people differently on the basis of wealth, which is wrong.

The meeting was adjourned at 9:10 p.m.

Submitted,

Evelyn Keyes
Recording Secretary