DUE PROCESS FOR DEATH: *JUREK v. TEXAS* AND COMPANION CASES†

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On July 2d last, just two days less than two centuries since the United States of America sent its shining Declaration into the world, the Supreme Court declared itself on the matter of life and death.[1] After nearly 10 years, killing by law is to be resumed in the United States of America.

I oppose the penalty of death on many grounds, some rationally arguable and some not. Fully to argue those grounds which are arguable, and fairly to confess and to illustrate those sentiments which are not arguable, is not the work of this lecture. The Supreme Court has given us a much smaller subject to consider. Opinions in five cases, all decided on that same July 2d, give us the reasons for the Court's holding that infliction of death may be resumed under the statutes approved. I shall here say something of what I think about the sufficiency and coherency of these reasons, not travelling outside the opinions themselves.

For background, we need go no further than *Furman v. Georgia*,[2] decided in 1972. I will compress an oft-told tale. Looking over the five opinions on the prevailing side in *Furman*, the fair view would have to be that the minimal ground, on which all five could probably agree, lay somewhere in the area of the mode of administration of the death penalty, and that this defect in administration lay in the arbitrariness, the lack of what I may clumsily call rule-boundedness, of the choice, amongst all eligible defendants, of those who were to die.

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1. Roberts v. Louisiana, 96 S. Ct. 3001 (1976); Woodson v. North Carolina, 96 S. Ct. 2978 (1976); Profitt v. Florida, 96 S. Ct. 2960 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976); Gregg v. Georgia, 96 S. Ct. 2909 (1976).

2. 408 U.S. 238 (1972).

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So the matter was seen, in any case, by some two-thirds of the state legislatures. New death penalty statutes were widely enacted. These fell into two broad categories—the guide-to-discretion category and the mandatory-death category.

Five of these statutes came to the bar of the Court in its October 1975 Term, and these statutes, with the death sentences imposed under them, were the subjects of the five decisions of July 2d. All three of the "rules for discretion" statutes were upheld.[3] Both of the "mandatory" statutes were struck down.[4]

The "rules for discretion" cases were from Georgia, Texas, and Florida. Let us ask, then, what sort of system for guiding jury choice between life and death has been held to satisfy the Constitution of the United States.

For the answer, we must focus on *Jurek v. Texas*.[5] I say this because the Texas statute seems to me to be so much worse than either the Georgia or the Florida statutes, bad as these are, that it, and not they, sets the constitutional outpost, as that outpost can now be known. Throughout, I shall concentrate on the Texas case, relating it to the others.

The Court has here pursued a rhetorically ingenious approach, but I wonder if it may not be a little misleading. The Georgia decision is first announced, and the plurality opinion (read by Mr. Justice Stewart, for himself and Justices Powell and Stevens) points with something almost like pride to what are seen as the "clear and objective standards"[6] of the Georgia statute, and especially to its provisions for appellate review of the death sentence, not only for "error" but for consistency with practice in other cases in the state, and even for absence of passion or prejudice.

The third judgment announced is in the Florida case. The plurality opinion here (delivered, for the same three Justices, by Mr. Justice Powell) stresses the similarity of the Florida to the Georgia statute in the particulars just mentioned.

In between these two statutes, which are at least elegantly structured, walks (or is supported as it stumbles) the Texas statute. Let us look at it very closely, and at the plurality opinion (by the same Justices) upholding it, for it, as I have said, states the now-known requirements of constitutional

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3. Profitt v. Florida, 96 S. Ct. 2960 (1976); Jurek v. Texas, 96 S. Ct. 2950 (1976); Gregg v. Georgia, 96 S. Ct. 2909 (1976).

4. Roberts v. Louisiana, 96 S. Ct. 3001 (1976); Woodson v. North Carolina, 96 S. Ct. 2978 (1976).

5. 96 S. Ct. 2950 (1976).

6. 96 S. Ct. at 2936, *citing with approval* Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974).

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law, as opposed to mere beaming approval from the high bench. Georgia and Florida can tomorrow repeal all the features the Court so admires in their statutes, and copy the Texas statute verbatim, and still be within the law as the Court has declared it.

The Texas sentencing statute occurs in a technical context newly weird and wonderful to me every time I look at it. Let me bridge it over by starting with the sentencing procedure, once a killing has been found to fall within one of the "capital" categories. The Court thus describes this:

> In addition, Texas adopted a new capital-sentencing procedure. See Texas Code of Crim. Proc., Art. 37.071 (Supp. 1975-1976). That procedure requires the jury to answer three questions in a proceeding that takes place subsequent to the return of a verdict finding a person guilty of one of the above categories of murder. The questions the jury must answer are these:
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> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
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> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
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> "(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Texas Code Crim. Proc., Art. 37.071(b) (Supp. 1975-1976).
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> If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three questions is yes, then the death sentence is imposed.[7]

Now this list will puzzle any law student who has had an elementary course in criminal law, because he will recognize Question 1 as inquiring about the actual or constructive intent to kill, without an affirmative finding on which nobody would have been convicted of first degree murder at all, and in Question 3 he will recognize an inquiry which in most cases must already have been answered by the jury, if raised by the evidence, in finding first degree murder rather than murder without malice or manslaughter. Inspection of the Texas statutes, with which I will not weary you, confirms these obvious points.[8]

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7. 96 S. Ct. at 2955.

8. TEX. PENAL CODE §§ 19.02, 19.04 (effective Jan. 1, 1974). The predecessor statutes, not for the present purpose materially different, are VERNON'S ANN. PENAL CODE §§ 1256, 1257b, 1257c (1961).

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The jury, therefore, is nearly always asked to make a "finding" on only one question not already answered. If, indeed, a jury answered "no" to either Question 1 or Question 3, I should think the conviction of first degree murder, to which the sentencing procedure is a sequel, would in any civilized system of justice have to be set aside, on the ground that it was obviously reached through misapprehension.

The second question, then, is, at the very least, almost always going to be the only one on which the jury actually decides anything it has not already decided. It is the life-or-death question.

Remember that the jury must find "yes" beyond a reasonable doubt on this question before a death sentence may be imposed. Remember, too, that the defendant is in any case going to the penitentiary for life, and can, beyond any doubt, reasonable or otherwise, be denied parole and kept indoors if the state's own agency thinks him a threat to society at large. Thus, in this context, the jury is being asked, "Is it true beyond a reasonable doubt that there is a probability that this defendant would commit criminal acts of violence that would constitute a continuing threat to society, while he is confined in the penitentiary, or years later, when he is released on parole—which need not happen if he has been seriously violent in the penitentiary or shown any threatening signs while there?"

I have said during this last year, before July 2d, that I did not see how any lawyer could at any time have upheld such a statute as against a due process objection. I should have thought that Mr. Justice McReynolds would have struck it down in 1925. Why have I been saying this? Let me particularize—for that which has seemed to me so obvious must now be searchingly, even tediously, examined.

(1) The concept of the existence of a "probability" "beyond a reasonable doubt" is and can be only puzzling—even mind-boggling—to a jury or to anybody. In strict mathematical terms, and in dealing with a subject strictly amenable to mathematical treatment, it is of course possible to assert that there "is a probability" not only "beyond a reasonable doubt" but to a certainty. But non-mathematicians neither use language nor think in such a way. The terms "probability" and "beyond a reasonable doubt" are repugnant and at war with one another in the common speech in which juries, like all of us, talk and think.

(2) The word "probability" is itself triply ambiguous, and vague in at least two of its possible senses. In the mathematical usage I have just cited, it means one thing—any chance, however small. There is, beyond any doubt, a probability that each of 100 successively tossed coins will come up heads—a probability, namely, of one in 2^{100}—and this has no necessary

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connection, by the way, with what will happen when you toss, for it is, to the mathematician, quite irrelevant that you may actually toss either far more or far less than 2^{100} sequences of 100 before all of one sequence are heads. All this may seem very technical. But if you think that in laymen's usage the word "probability" cannot sometimes mean "small probability," listen to the next weather forecast on television.

Quite another usage would define "probability" as "more than a 50 percent likelihood of occurrence." This may be a more widely diffused usage. But then, what does it mean to predicate, of a presently existing person, that it is beyond a reasonable doubt more than 50 percent likely that under radically altered circumstances he will do certain unlawful things? Does anybody think that you, or I, or a jury of 12 good persons and true, can otherwise than arbitrarily make that fine-grained a prediction? What technique of prediction is being referred to? Does anybody think that a jury understands the words this way unambiguously—or has any reason to?

Finally, though I doubt the commonness and even the correctness of this usage, "probability" may, and perhaps sometimes does, mean "high probability"—converging on a prediction "beyond a reasonable doubt" as a limit. If that is what is meant, then the term "probability" is wholly or partially short-circuited and the jury is asked to do something close—just how close we know not—to finding that the defendant will "beyond a reasonable doubt" do these things. But there are two things wrong with this. First, the jury is not told this. Second, there very surely exists no science of predicting human behavior which can reliably make such a prediction as to human beings "beyond a reasonable doubt." Any group of, say, nine mature persons ought to know that, even if this question were asked clearly, as it is not, no jury really can predict "beyond a reasonable doubt" that X will cut up rough in the penitentiary.

(3) "Criminal acts of violence that would constitute a continuing threat to society" is a phrase composed of hopelessly vague terms. "Criminal" as a blow with the fist is criminal? "Violent" as such a blow is violent? A "threat" of what? "To society" in what sense, since the person is to be in prison, under whatever restraints the state finds necessary, and need not be released until the state is satisfied, to whatever degree it desires to be satisfied, that he is not a threat to society? If you think all this farfetched, then what do you do about the fact that this same plurality pointed with unequivocal approval, on this same July 2d, to the fact that the Georgia court had held "impermissibly vague" the phrase "substantial history of serious assaultive criminal convictions?"[9]

9. 96 S. Ct. at 2939, *citing* Arnold v. State, 236 Ga. 534, 540, 224 S.E.2d 386, 391

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I have been dissecting this statute verbally with the aim, I suppose, of giving some scientific precision to its plain shabbiness, to its self-speaking insufficiency as law. A year ago, I would have thought that unnecessary. I would have thought that the trained intuition of any seasoned lawyer would recognize at once, in this grimly silly statute, something far beyond serious consideration—much as one can tell that a batter has struck out without calculating the number of nitrogen molecules between the bat and the ball. But I do not think I have made a point amiss; I think I have partly shown why, as ought to be obvious without all this, a jury must either resolve all these verbal puzzles for itself, without sufficient grounds for the resolution chosen, or else proceed in puzzlement to its own standardless decision—or do a bit of both.

What does the plurality opinion do with all this? Well, nothing. The staggering fact is that this plurality opinion, having clearly stated that defendant's counsel had argued that Question 2 was "so vague as to be meaningless," then embarks upon and finishes a paragraph which says nothing, absolutely nothing, about this contention.[10] It vanishes from sight. Read if you doubt, as well you might.

This is the way not of reason but of fiat—the fiat of silence. I make bold to say that this way was chosen because there is not and cannot be any satisfactory answer as to the vagueness of this Texas statute. If it is to be upheld, the difficulties about its vagueness must be ignored, not discussed at all, and that is the path, I truly regret having to say, that the plurality opinion in *Jurek* selects. If reason, opened to public scrutiny, is the soul of law, and if the decision for death is the most solemn decision law can make, then I am right in thinking that this paragraph records one of the most disturbing and sorrowful moments in the long history of American constitutional judgment. Lest there be any question of inadvertence, let me add that the vagueness problem, far from being a mere off-spark of the fevered professorial brain, was earnestly and most ably presented by the two judges on the Texas Court of Criminal Appeals who dissented from the affirmance of the death penalty in *Jurek* when the case was in that court.[11] The Supreme Court plurality opinion does not even mention the existence of these dissents. They should, nevertheless, be read with care by anybody who thinks this vague-

(1976). This citation, in context, is by way (it seems) of removing what would else be a possible obstacle to the Georgia affirmance. How is it thinkable, then, that the problem in Texas Question 2 is not even worth mention, particularly since, in *Jurek v. Texas*, the "yes" answer to Question 2 was an indispensable step in the path to death, while the corresponding question was not directly raised in *Gregg*?

10. Jurek v. Texas, 96 S. Ct. 2950, 2957-58 (1976).

11. Jurek v. State, 522 S.W.2d 934, 943, 946 (Tex. Crim. App. 1975) (Roberts, J., joined by Odom, J., dissenting).

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ness question was insubstantial enough to be waved away without so much as a word of answer.

(Franz Kafka might have imagined, though here it is the solemn truth, that Mr. Justice White, in his concurring opinion, joined by the Chief Justice and Justice Rehnquist, says of the vagueness objection, "I agree with the plurality that the issues posed in the sentencing procedure have a common sense core of meaning and that criminal juries should be capable of understanding them."[12] The plurality opinion says nothing to which this *oratio obliqua* could refer. I feel some comment should be made about this, but I cannot devise any that seems condign.)

Having alluded separately to the defendant's vagueness contention and to his contention that "it is impossible to predict future behavior," the plurality opinion addresses itself only to the latter contention;[13] this is how the vagueness problem was made to get lost. The "prediction" contention is answered by pointing, with examples, to the fact that predictions of behavior are and must be made elsewhere in the criminal justice system. The examples chosen (and I hope we can assume that on a matter of this deadly seriousness they are not lightly chosen) are admission to bail, determination of the kind and duration of punishment other than death, and admission to parole. In pointing to these three areas, the plurality opinion is pointing to three disaster areas in law as it stands. Who is satisfied with the law's performance in any of these fields? Does this performance justify the conclusion that prediction of future behavior "beyond a reasonable doubt"—not a requirement in any of these three areas—really is feasible? But deeper than that, what has happened now to the uniqueness of the death penalty? Has this eternal uniqueness somehow vanished since Mr. Justice Stewart spoke of it, as of a thing well known, in 1972?[14] Does the plurality really want to espouse the proposition that that which will do for admission or nonadmission to bail will do for death? If not, then is not the bail example merely diversionary, dust in the eyes?

What is wanted, and wanting, is an example, one single example in the whole range of civilized law outside of this one statute, that explicitly and

12. 96 S. Ct. at 2955.

13. *Id.* at 2957-58.

14. Furman v. Georgia, 408 U.S. 238 (1972):

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Id. at 306 (Stewart, J., concurring).

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in terms makes a person's cruel death depend on a prediction of that person's *future* conduct.

Now let me draw your minds into another thing about this judgment and opinion. The plurality opinions in the Florida and Georgia cases, between which this Texas case is supported, make much—very much—of the appellate review in those states.[15] That review, say the writers of the plurality opinions, is a review for statewide consistency over time in the use of the death penalty. It is a fact proudly paraded that the appeals courts in these two states may and do set aside death sentences as disproportionate, or as out of line with general practice.

When we get to Texas, the plurality opinion says:

> By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law.[16]

It is paradoxical that one must sometimes hope that carelessness is present in a judicial utterance, but I do hope this sentence was careless. If it was, it was very careless. For there is no reason to think that the Court of Criminal Appeals in Texas reviews for anything like death sentence proportionality or consistency, or for anything other than "error," normally defined, in the very case. That which was so praised in the two other cases, to the point of its presence's seeming to be geared into the *ratio decidendi*, is apparently not necessary at all, not even as a grace-note, as a matter of constitutional law.

Another appalling thing about this Texas case cannot be understood unless we turn briefly to the Louisiana and North Carolina cases.[17] In these cases the Court struck down the two statutes at bar on the grounds:

(1) That mandatory death sentences for murder violate the eighth amendment, because society has evolved a judgment that death should be reserved for the worst offenders, as evidenced by the many statutes giving juries discretion in sentencing—the statutes invalidated in *Furman*.[18]

(2) Clearly as an independently sufficient ground, that the making mandatory of the death penalty would result in jury evasion, taking the form either of acquittal or of a verdict of "guilty" of a lesser offense, whatever the

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15. Profitt v. Florida, 96 S. Ct. 2960, 2967 (1976); Gregg v. Georgia, 96 S. Ct. 2909, 2939-40 (1976).

16. Jurek v. Texas, 96 S. Ct. 2950, 2958 (1976).

17. Roberts v. Louisiana, 96 S. Ct. 3001 (1976); Woodson v. North Carolina, 96 S. Ct. 2978 (1976).

18. 96 S. Ct. at 3006 (*Roberts*); 96 S. Ct. at 2983-90 (*Woodson*).

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state of the evidence, which would be the functional equivalent of full discretion, condemned in *Furman*.[19]

The first of these grounds, it is important to note, stands up, in the Court's mind, whether or not the mandatorily capital offenses are narrowly defined, as in Louisiana.[20]

Now the Louisiana categories of capital murder are not altogether identical with the Texas categories, but these differences, I submit, cannot be of constitutional significance. Thus the Texas case stands as the extreme in not one but two series. On one view, it is the extreme to which states may constitutionally go in setting up, or perhaps I should say in not setting up, "standards" or "guides." In its second aspect, it stands as the limit in the "mandatory" line, for it materially differs from the condemned Louisiana statute only in its requirement of "yes" answers to the Texas questions, which I have just thoroughly discussed, as a prerequisite to a death sentence. Louisiana need only amend its statute so that it asks the three Texas questions, just as I have shown them to you, and its defect is cured.

Let me turn now to another facet of confrontation between the Texas case —as well as the Georgia and Florida cases—and the "mandatory" cases. In the Louisiana and North Carolina cases, the Court clearly says that a separate deficiency of the statute is that (in brief paraphrase) it encourages jury refusal to convict, or to convict of a lesser offense, whatever the evidence. The point is made several times, but strikingly in the following sentences from the North Carolina case:

> It is argued that North Carolina has remedied the inadequacies of the death penalty statutes held unconstitutional in *Furman* by withdrawing all sentencing discretion from juries in capital cases. But when one considers the long and consistent American experience with the death penalty in first-degree murder cases, it becomes evident that mandatory statutes enacted in response to *Furman* have simply papered over the problem of unguided and unchecked jury discretion.
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> . . . .
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> In view of the historic record, it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict. North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to

19. 96 S. Ct. at 3007-08 (*Roberts*); 96 S. Ct. at 2990-91 (*Woodson*).
20. 96 S. Ct. at 3004-06.

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> check arbitrary and capricious exercise of that power through a review of death sentences. Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in *Furman* by resting the penalty determination on the particular jury's willingness to act lawlessly.[21]

But these lawless juries, whose lawlessness will taint and bend a mandatory system, are the very same juries who are going to follow with patient care the intricacies of the Georgia and Florida statutes, and the unfathomed mysteries of the Texas statute, and base their answers on nothing but sound discretion guided by law. Of course the institution of the jury undergoes no such metamorphosis at a state line, or between one function and another. If you cannot even trust a jury to follow the evidence in finding what degree of murder has occurred, or indeed whether the accused is guilty at all, then it is cruelly preposterous to trust a jury to apply a law-guided and unperturbed "discretion" in that assessment and counterweighing of "aggravating" and "mitigating" circumstances required in Florida and Georgia. If "jury lawlessness" is a problem—and the history adduced by the plurality opinions in the Louisiana and North Carolina cases seem to establish this beyond doubt—then what do you expect of a jury that is trying to make out and apply the "law" of Question 2 in the Texas statute? Such a jury, perhaps, cannot be "lawless," for there is no law to follow, but it can be as wayward, as obedient to its own obscure impulses, as it wishes to be.

I move now to a pervading point in all these cases. I take you back to Mr. Justice Stewart's phrase in *Furman*: "a legal system."[22]

A principal contention of all the defendants in the July 2d decisions was that even if (as was not the case, in their view and mine) the Texas, Georgia, and Florida cases met the *Furman* standard as to the sentencing stage, the "legal systems" for administering the criminal law, in all American states, contain, at not one but at a number of crucial points, too much arbitrary discretion to make them suitable, or decently usable, for the processing of the question, "Who is to die?" This discretion exists as to the prosecutor, who decides, without constraints, what to charge, and who holds in his hands control over the enormously important decision whether the accused person is to be allowed to plead guilty to a lesser charge. It exists in the jury's virtually uncontrollable power to find "not guilty" or "guilty" of a lesser offense—a power the reality and importance of which was recognized and made a ground for decision even by the Supreme Court plurality that prevailed in the July 2d Louisiana and North Carolina cases. It exists in the decision

21. 96 S. Ct. at 2990-91.
22. 408 U.S. at 309, 310.

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on insanity—a decision for the making of which the law has notoriously failed to provide intelligible standards. It exists in the administration of clemency. The net effect of all this is that, quite aside from the step formally devoted to a sentencing decision, the actual selection of persons for death is made by a series of choices not governed by any articulated standards. It is not meant that persons exercising discretion at each of these stages behave lawlessly in any pejorative sense of that word. The point, rather, is that they are given —and perhaps can be given—no law to follow.

It would be ostentatiously and uncharacteristically self-effacing of me not to mention that I published a book a couple of years ago on this aspect of the administration of the death penalty.[23] The main reason, however, for my mentioning this book is that, as far as I have seen—and I read reviews as eagerly as the next author—no reviewer, whether approving or disapproving of the *conclusion* I reached, has even attempted to fault my *description* of the criminal justice system, as one simply saturated with uncontrolled discretion and proneness to error.

In all the cases decided on July 2d, it was urged upon the Court that such a system was unsuitable for making the choice for the "unique and irreversible" penalty of death. I now urge upon you that the Court's answer to this contention was insufficient. This answer is scattered throughout the opinions, but is perhaps best summed up in the Georgia case's plurality opinion:

> The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.[24]

This reply is defective. First of all, it makes the resolution of the problem hinge on whether prior decisions, especially *Furman*, compel the acceptance of the argument; that undoubtedly commends itself as the easier way out (though not, in my view, open even on its own merits), but it is a way out

23. C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974).

24. 96 S. Ct. at 2937.

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that is not even relevant to an argument which is—as this one was, and as so many successful constitutional arguments have been—genuinely new. The question is not whether *Furman*, or any other prior decision, *compels* the acceptance of this new argument, but whether it is convincing in itself.

I think, however, that the dismissal of *Furman*, as not speaking at all to the question, was wrong. I would be surprised if anyone were willing to espouse, in clear terms, the view that uncontrolled discretion in a jury, when it comes to selecting a death sentence, is wrong, while uncontrolled discretion at all the other strategically located stations on the way to the electric chair is right. That kind of constitutional law is formal and trivial, and protects nothing of substance.

Moreover, in the passage I have cited the plurality twists the issue in a manner that might tempt one to suspect a desire to avoid it. For the question posed is not whether "the decision to afford an individual defendant mercy violates the Constitution." The question, very clearly raised by counsel, and very clearly put by my own book, is whether a "legal system," which regularly, and in great numbers, runs the death question through a gauntlet of decisions in no way even formally standard-bound, so that, at the end of the process, no one can say why some were selected and others were not selected for death, rises to due process. That is not a trivial question, and it cannot be answered by squeezing it down to a question about an individual defendant or by a caricature of its tenor.[25] Nor is it answered by calling it, as Mr. Justice White does, "in final analysis an indictment of our entire system of justice."[26] If it is that, it is an indictment pleading to which would present some difficulty, for it is hard to find informed persons today who think very well of our "entire system" of criminal justice. But death is unique, and the procedures we must use, having no better, in our entire system of justice—and that is really the kindest thing one can say of that system—may still not be good enough for the death choice. The Court has not really focused on and answered that question—in reason, I mean, and not by fiat.

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25. The caricature (96 S. Ct. at 2937 n.50) consists in the imagination of a sort of automatized movement of persons toward death. That would, indeed, be horrible. So is the papered-over arbitrariness now sanctioned by the Court. To show that one is horrible has no tendency, logical or pragmatic, to show that the other is not. Perhaps what is really brought to light here is the dilemma into which society is brought when it resolves on official killing. This dilemma may be—I think it is—quite insoluble. Whatever the answer to this wider question, the system we *now* have is as it is, and the Texas, Florida, and Georgia procedures are as they are, and they are not made any better by imagining horrible alternatives—which need not be adopted, because a much simpler solution is at hand.

26. 96 S. Ct. at 2949. Mr. Justice White goes on to say, "Mistakes will be made and discriminations will occur which will be difficult to explain." Yes.

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Now there is a great deal more to say about these decisions than can be said within the limits of one lecture. I think I have done right in focusing mainly on the Texas case, for it is the case that counts, as a matter of law and not as a matter of approved embellishment. But let me just make a few more rather sparely stated points, which you might want to check out in the opinions.

First, the Georgia and Florida sentencing statutes are not nearly as good as the Court makes them sound. In Georgia, underneath all the verbiage of the statute, the fact is that the jury, on no grounds or on any grounds, articulated or not articulated, can spare any defendant's life either by refusing to sentence to death though "aggravating circumstances" be found, or, as is more likely, simply failing, whatever the evidence, to find aggravating circumstances—both being unreviewable actions. The strictly logical corollary is that the jury may, within the same field of death eligibles, fail to spare some others, and need give no reason for the difference. Arbitrary lenience equals arbitrary harshness, by an iron law of sheer identity. This is not, after all, so different even from *Furman*—and I remind you that the plurality's reference to "jury lawlessness" as to a thing known, in the "mandatory" cases, brings this possibility within the high probability range. The Florida situation, while differing technically, is not substantially different.

Secondly, the Florida case, on its facts and findings, is virtually a textbook illustration of the total malleability of these "circumstances" statutes. The worst factual case possible, on the evidence, was that the defendant had broken into the deceased's house, stabbed the deceased with a knife, hit the deceased's wife (the only other person present) with his fist, and fled. On this record, the trial judge supported his death sentence with four "findings" of statutory "aggravating circumstances," two of which were that "the murder was especially heinous, atrocious and cruel" and that "the petitioner knowingly, through his intentional act, created a great risk of serious bodily harm and death to *many* persons."[27] These "findings" stood up in the Florida appellate court, though, as to the first, that court had previously seemed to confine this "circumstance" to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." The Supreme Court plurality opinion tries to deal with all this by invoking the technicalities of "error."[28] But nothing can exorcise the facts: (1) that a typical stabbing, not shown to be any more than that, may be found (or of course *not* found) to be "especially

27. 96 S. Ct. at 2964 (emphasis added).

28. 96 S. Ct. at 2968 n.13. The assumption behind this footnote is that, since there was enough evidence of one aggravating circumstance at least, it didn't matter about the others. This is, charitably, a bizarre application of the concept of "weighing."

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heinous, atrocious or cruel," and (2) that "*many* persons" may in Florida mean *two* persons, one of whom was not even shown to be threatened with death or great bodily harm. Who could ask for a better illustration of the totally standardless discretion these new statutes afford?

Thirdly, the treatment of the deterrence question is plainly unsatisfactory. Correctly, and quite clearly, the plurality opinion in *Gregg v. Georgia*[29] notes that the question remains quite unsettled amongst the people competent to settle it. Then it proceeds to some pure conjecture of its own. Finally, it genuflects to federalism:

> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.[30]

Now that is nothing but sheer fiction. How could it be possible, in fact and not in fiction, that state legislatures really possess some superior capability of resolving correctly, in application to their own populations, a question on which the most competent students utterly disagree? I intend nothing derogatory in this—I only attribute to the legislatures an ignorance which the Court, rightly, attributes to mankind, and to which I cheerfully confess in myself. The law, to be sure, is full of fictions, but a fiction known to go in the face of fact ought to play no part, not the slightest, in deciding whether the state may rightly take a life.

I am sure I weary you, without beginning to exhaust my subject. I want to close with a concreteness, taking you back to my native Texas. Down there a young man named Smith is awaiting execution. Smith was party to a filling station robbery, in the course of which an attendant was killed. The uncontradicted evidence showed that Smith did not kill the attendant—a confederate did that. There was contradictory testimony as to whether Smith even attempted to; the evidence against him on this issue was an "oral confession" contradicting his trial testimony—with all the confidence such a confession inspires. He had once been convicted on a charge of possessing marijuana; that was his whole criminal record. A psychiatrist examined him for an hour and a half in all, administering a battery of tests, and testified to the opinion that Smith felt no remorse, that his conduct in the future would not change, and that he was a "sociopath." He was shown to have a poor employment record.

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29. 96 S. Ct. 2909 (1976).
30. 96 S. Ct. at 2931.

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The Texas Court of Criminal Appeals affirmed a death sentence[31] over scathing dissent. The dissent, uncontradicted by anything adduced elsewhere, pointed out that the psychiatrist's entire diagnosis and prognosis rested on one judgment alone, namely, that Smith, at the critical point in the testing, showed no "remorse." The majority said, in its brush-forward opinion: "Of extreme importance"—I repeat—"Of extreme importance is his apparent surrender to misfortune following his marijuana conviction." This on the issue of life or death!

Now in this case the jury answered "yes" to Question 1: "Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result," although no conduct of the defendant, in the strict sense, could be said to have caused death. It answered "yes" to Question 2—under "reasonable doubt" instructions, mind you—on the evidence I have summarized.

That is where we stand in Texas. Where does the *Smith* case stand in the Supreme Court? Well, it's not there yet, technically, but the plurality opinion in *Jurek*, in what to me is a stunningly prejudicial gesture, reaches out to embrace it, giving it as an illustration of the approved dealings of the Texas court and inferentially of Texas juries. In its brief summary, the plurality does not find time to mention that Smith had not killed anybody, though it does find time to speak of "his apparent willingness to kill" and "his lack of remorse after the killing." And one phrase occurs which has, to me, a haunting importance, symptomatic if not intrinsic. Referring to what we know, if we read the Texas dissent, was a "five year probated sentence for possessing marijuana," the plurality opinion speaks (and listen to this) of "his prior conviction on narcotics charges."[32]

I would have thought—and evidently I have much to learn—that we live in a world where evidence of prior conviction for the possession of marijuana would be simply excluded, as totally lacking probative value on the Question 2 issue, and as potentially prejudicial. That is the world inhabited in desire, I am proud to say, by my two dissenting fellow-Texans down in Austin. In

31. Smith v. State, No. 49,809 (Tex. Crim. App. 1976). This opinion was withdrawn pending petition for rehearing but was reinstated and the dissents withdrawn, following the Supreme Court's July decisions. *See* Smith v. State, 540 S.W.2d 693, 700 (Tex. Crim. App. 1976). All this of course, does not bear on the meaning of the Supreme Court's treatment of the case, (described in the text, *infra*), which was as of the time of the citation first given here—but it does show how plainly the Supreme Court was taken to have decided the *Smith* case before a certiorari petition had been so much as filed.

32. 96 S. Ct. at 2957.

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their world, as in mine, failure to seek employment—*failure to seek employment*—would be excluded on the same grounds, with, I should think, a rebuke to the prosecutor who dared adduce it.

But we really live in another world. We live in a world where, in our highest Court, the most trivial of all possible drug offenses, one rather plainly on its way to decriminalization, is hidden behind the imposing phrase, of sinister suggestion, "prior conviction on narcotics charges." I have essayed some examination of some of the reasonings of the July 2d opinions; if I had in brief to illustrate their tone I would point to this transformation.

I invite you to consider whether statutes which need such reasonings and such tonalities to uphold them are not in truth—in that truth no Court can alter—conspicuous illustrations of the fact that our legal system, after years of travail since *Furman*, cannot produce a procedure fit for choosing people to die. If you go on from that to a still wider judgment on the capacity of man's justice, I welcome you.

For many reasons of respect and affection, I accepted the invitation to give this lecture at a time when I was really too busy. But the reason that most swayed my heart was that the series bears the name that is to me the most sanctified name of the century into which I was born. I know I have spoken with anger; in this case, I would be ashamed not to be and steadfastly to remain angry. But I hope and wish that I may have said nothing unworthy of a series bearing that name.

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