Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty

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INTRODUCTION

This Note concerns the past and present of the Texas death penalty’s “future dangerousness” standard. One of three “special questions” in Texas’s original death penalty bill, the future dangerousness question asks “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”¹ An affirmative vote, under almost all circumstances, results in a death sentence.² And as many have recognized, the ambiguities in the question pose enormous problems for judges

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¹. TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(b)(1) (Vernon 2005).
². See infra Section II.A; see also infra note 15 (noting that although the Texas scheme employs multiple questions, the future dangerousness question is usually, in practice, the only question that determines the sentencing outcome).
and juries seeking to answer it in a principled way. At the same time, the apparently predictive nature of the inquiry has invited into the courtroom a kind of "expert testimony" on future criminal behavior so discredited that its practitioners have been expelled from the governing bodies of American psychiatry. These criticisms of the future dangerousness standard are not new, and indeed, they have failed to impress majorities of the highest courts of both Texas and the United States. Yet even with repeated stamps of court approval, the problems of future dangerousness remain and continue to contribute to judicial uneasiness with the Texas death penalty. The unique problems of the future dangerousness question are thus a special part of the drive for capital punishment reform in Texas. This Note seeks to add a new voice, sounding in historical concerns about democratic legitimacy and the legislative process that produced future dangerousness, to the chorus already calling for reform.

Research into primary sources shows that future dangerousness arose from a last-minute conference committee compromise that was never debated on the floor of either chamber of the Texas Legislature. The Texas House had passed a mandatory death penalty, while the Senate had passed a more discretionary bill on the model of the Model Penal Code. On the very last weekend of the legislative session, a conference committee was called to craft a resolution. On the very last morning, it floated its solution to both houses. Therein was a wholly new sentencing procedure with a wholly new animating standard concerned with the future dangerousness of the convicted defendant. Nothing of the sort had appeared in either of the bills upon which the conference committee was conferring. Nonetheless, the bill passed both chambers with almost no debate or opposition. No word having anything to do with future dangerousness ever escaped the mouth of any legislator on the floor of either house.

Drawing attention to this finding is not intended as an indictment of the

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3. See infra Section II.B.
4. See infra Section II.C.
8. Texas began recording legislative debates and committee meetings in 1973, the same year that the state legislature passed the new death penalty bill. However, coverage from the earlier years is spotty and many records are missing or incomplete. The gaps in the story must be filled in by local newspaper accounts and personal recollections. This Note appears to be the first to undertake this project.
9. At the time, the American Law Institute's Model Penal Code advocated a death penalty statute with a relatively long list of both aggravating and mitigating factors for the jury to consider. See MODEL PENAL CODE § 210.6 (1962). Georgia adopted a death penalty bill on this model, and it was upheld by the Supreme Court on the same day as the new Texas bill. See Gregg v. Georgia, 428 U.S. 153, 193 & n.44 (1976) (citing the Model Penal Code list).
10. See infra Part III.
1973 legislators who produced House Bill 200—Texas's post-Furman re-enactment statute. It was their situation, more than their actions, which accounted for this result. The problems they faced were indeed difficult: they were attempting to embody overwhelming popular support for the death penalty while facing review by a United States Supreme Court that spoke in nine distinct voices when it struck down the death penalty the year before. Thus, the fact that the entire Texas death penalty procedure and its future dangerousness standard were the product of great rush and some confusion is in fact quite standard fare for state legislation. A law is a law, and though the one that Texas passed in instituting future dangerousness was the product of very flawed processes, the ordinary answer is and should be: "So what? This sort of thing happens all the time."

As to that question, I have two modest observations to make in using this legislative history to point the way to reform. The first is that, given the important ambiguities in the future dangerousness standard, it is troubling to find no guidance in the legislative record. I should admit that I first turned to an investigation of H.B. 200's legislative history to try to resolve questions about what future dangerousness meant to those who chose it as Texas's ultimate standard for the ultimate sanction. That search proved to be futile. We cannot look to the record for interpretative advice because the plain truth is that Texas legislators then knew no more than judges and juries do now about how to understand the standard largely because they had not thought about it. As this Note shows, there are real ambiguities in how the provision should be interpreted and applied, and it is troubling to think that these questions simply escaped attention when the standard was created.

This leads to the second point. It may be true that much state legislation is produced with great hurry and with minimal introspection, but it seems natural to expect more where the death penalty is concerned—to demand a better legislative process for the death penalty because "death is different."
Texas Legislature is composed of busy people and they cannot be expected to spend each session second-guessing the statutorily enacted judgments of their predecessors. For that reason, the capital scheme of the 63rd Legislature has stayed on the books for over thirty years, with major changes only when the Supreme Court has called for them.\textsuperscript{15} Yet given the problems associated with future dangerousness, it seems especially relevant for legislators today to know the conditions under which it was forged, for that may convince them that it is finally time to revisit the issue. And at the very least, those who tend to view the death penalty as the product and embodiment of a special kind of communal moral judgment will know how ordinary this legislation really was.

It is possible, if unlikely, that this information will have an impact on federal and state court judges who routinely review claims about the future dangerousness standard. One of the reasons that legislative judgments are accorded special deference in court is the presumption that unelected judges suffer from a deficit of authority in the face of legitimately enacted democratic legislation.\textsuperscript{16} Yet not every judicial adventure into counter-majoritarian territory is an indefensible usurpation, and quite a lot of thought has been dedicated to defending judicial intervention in those situations when we have reason to believe that the democratic process has failed, or is likely to do so.\textsuperscript{17} In the main, attention in this regard has focused on rights of political participation, bars on discrimination against discrete and insular minorities, and the other democratic-process paradigms of post-New Deal judicial review.\textsuperscript{18} The central idea is that the courts are there to reinforce the structures of representation—that blind majoritarianism is not always democratic, and
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interventions are occasionally defensible to ensure the necessary preconditions and proper functioning of the democratic system.\textsuperscript{19} Yet a few brave scholars have suggested that more attention may actually be due to failings within the process of lawmaking itself, and that judicial action might be a principled response not only to the failures of democratic representation, but to the failures of democratic legislation-making as well.\textsuperscript{20} If this is so, then perhaps a more stringent paradigm of review should apply to statutory language that was never mentioned in any floor debate, and this research into Texas's legislative process might thereby affect the subsequent judicial receptions of the legislation.

This claim about failures of the lawmaking process reducing the need for judicial deference seems quite plausible. If the basis of the "counter-majoritarian difficulty" is the supposedly superior democratic authority of legislatures over courts, we should expect the degree of the difficulty to vary according to the underlying democratic legitimacy of the act of lawmaking in question. If a legislature enacted a law while it was collectively drunk, or if a large group of legislators believed they were voting for law X when they were really voting for law Y, the foundations of Bickel's famous puzzle would no longer seem so sturdy. In order for judicial review to suffer from a democratic legitimacy problem, it must really be an act of democracy under the judicial microscope. Thus, if the story of the Texas death penalty reveals sufficient doubts about the democratic functioning of the state's representative bodies, then perhaps judges will be justified in bringing a stricter form of scrutiny to bear. If the contours of the original debate were sufficiently distorted—whether such distortions were the fault of the legislators themselves or the Supreme Court—then perhaps judges should look closer, and even send the lawmakers back for their own fresh look.

But there is an enormous problem with this hope of a judicially mandated do-over for the Texas death penalty scheme—namely, that the doctrine does not work this way. However justified a reduction in judicial deference may be in light of problems during the legislative process, this is simply not part of judicial review as currently practiced. The use of legislative history in court at

\textsuperscript{19} See, e.g., Eskridge, supra note 18, at 1281 (describing Ely's project).

all remains controversial, and indeed, American doctrine contains some heavy presumptions against even the most plausible forms of “looking behind” a statute. Remanding an otherwise constitutional bill to the legislature for reconsideration in light of legislative process concerns is almost without precedent, and it is certainly distant from the way that the courts currently conduct their business. Striking down a law for failures of “due process of lawmaking” is an entertaining academic thought experiment but not a judicial practice.

That said, doctrine is one thing and judicial psychology another—and perhaps if judges know what lies behind the Texas death penalty the effect will be the same. Even if the language of everyday decisions does not speak in terms of process-failings and democratic legitimacy, surely judges are influenced by the realities of everyday life.

Even on the battlefield of judicial psychology, though, constitutional litigation against the Texas death penalty presents an uphill battle. The future dangerousness question has been in place for over thirty years, and bears repeated stamps of judicial approval. And not only years lie in the wake of the future dangerousness question—part of the reason that the Texas statute is so important and entrenched is that it has condemned far more people to death.

21. See William N. Eskridge, Jr., et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy 742-72 (3d ed. 2001) (discussing the “new textualism” and its rejections of legislative history). Evidence suggests that textualism may be past its peak, but it still exerts significant influence and continues to delegitimize introduction of legislative history. See Charles Tiefer, The Reconceptualization of Legislative History in the Supreme Court, 2000 Wis. L. Rev. 205.

22. The rule of Marshall Field & Co. v. Clark, 143 U.S. 649 (1892), is that the Court will not review an enrolled statute signed by the President even to be certain that the bill signed by the President was actually the one passed by Congress. See also United States v. Munoz-Flores, 495 U.S. 385, 408-10 (1990) (Scalia, J., concurring) (declining to look behind the enrolled bill to determine whether it had originated in the House of Representatives as required by the Origination Clause, U.S. Const. art I., § 7).

23. A handful of disparate examples might be assembled (for example, Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)), but even their precedential value has been doubted. See Eskridge et al., supra note 21, at 390-98. Interestingly, Furman itself might be considered such a form of judicial remand, given that it sent the question of death-penalty procedure back to the states without announcing a bright-line rule against the death penalty or specific incarnations thereof. Akhil Amar has supported this interpretation. See Akhil Reed Amar, Concurring in Roe, Dissenting in Doe, in What Roe V. Wade Should Have Said 152, 157 (Jack M. Balkin ed., 2005).

24. The most highly parroted form of legal realism is the old saw that “law is only a matter of what the judge had for breakfast.” Ronald Dworkin, Law’s Empire 36 (1986); see also Alex Kozinski, What I Ate for Breakfast and Other Mysteries of Judicial Decision Making, 26 Loy. L.A. L. Rev. 993 (1993). Without subscribing to such a reductionist view, it is obvious enough in this age that one can impact judicial decision by invoking forms of argumentation not explicitly recognized by the doctrine. See, e.g., Jerome Frank, Law and the Modern Mind (1930); 2 Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 5-7 (1960). For a generally nuanced discussion of both the social-scientific and philosophical claims of legal realism, see Frederick Schauer, The Limited Domain of the Law, 90 Va. L. Rev. 1909 (2004).

25. Among many cases upholding the Texas scheme in multiple courts, the two most important are clearly Barefoot v. Estelle, 463 U.S. 880 (1983), and Jurek v. Texas, 428 U.S. 262 (1976).
than any other state death penalty statute. It would be quite the turnabout for the state or federal judiciary to now say—after so many years and so many executions—that it had really been mistaken about future dangerousness all this time. Thus, even if certain judges were subjectively concerned with questions of legislative process and secretly impressed by the evidence of process failings in the case of the Texas death penalty, it would still be difficult to imagine the judicial mind settling on the conclusion that the Texas statute needs a second legislative look. We should not think it impossible, or wrong, that the legislative story told here would have an impact on subsequent judicial examination of the future dangerousness question.

Thankfully, though, it is not only the courts that ought to show concern with the democratic legitimacy of past legislative enactments. Legislatures—even very busy ones—should themselves be concerned, as should their constituents. An enormous outpouring of scholarly work has focused on the notion that popular institutions should be able to interpret the Constitution for themselves and ought to receive some degree of deference when they do. Yet to merit deference in their own acts of constitutional interpretation, legislatures must show themselves to be attentive to constitutional concerns and responsive to their constitutional duties of representation. They should also do so to merit their constituency’s respect. In short, a question of reputation is at stake, and the opinions of both the reviewing judges and the voting public can be eroded by evidence that important statutes rest on shaky acts of lawmaking. Taking a fresh look at the flawed results of decisions long past could thus be both a good public relations move and a powerful act of institutional self-defense, be it a state or federal legislative reputation that is at stake. Given the national prominence of the death penalty, and with popular attention ever piqued by news stories and new legal developments, conscientious

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26. Justice Department statistics indicate that as of the end of 2004, Texas had executed 336 offenders—over 240 more than the next closest state and over one-third of the national total since 1977. See Bureau of Justice Statistics, Prisoners Executed Under Civil Authority in the United States, by Year, Region, and Jurisdiction (Jan. 18, 2006), http://www.ojp.usdoj.gov/bjs/data/exest.csv. The Texas Department of Criminal Justice maintains an on-line list of executed offenders together with hyperlinks to their last statements. This site indicates that Texas has executed an additional 32 offenders in the 18 months since. See Tex. Dep’t of Criminal Justice, Executed Offenders (Sept. 14, 2006), http://www.tdcj.state.tx.us/stat/executedoffenders.htm.


legislators have a great deal to gain in proving their attentiveness to the legislative process associated with this particular question—whatever result is reached in the end. This is to say that it need not be about the death penalty itself; revisiting capital punishment in light of old process failings might merely be a perfect vehicle through which the Texas Legislature can prove its mettle as a democratic decision-maker.

And even if, in the end, this is just a story about the ordinary forms of lawmaking that go into the making of the most extraordinarily important forms of legislation, it contributes greatly to a healthy self-reflection on the state of American democracy. The story of the Texas death penalty provides a kind of counter-point to the remarkable process that produced the Civil Rights Act of 1964—the story with which the preeminent textbook on legislation currently begins. In contrast to rare examples like the Civil Rights Act, America’s most lethal statute was born of a process full of serious structural flaws, and whatever institutional response this finding generates, it should at least give us pause and force us to question the underlying premises of our system of government. Even if this is just a story about a Supreme Court decision and a group of amateur lawmakers, it belongs among our paradigms for discussing how state legislators do their jobs, how they interact with court decisions, and how the democratic decisions affecting life or death issues are actually made.

Following this Introduction, this Note proceeds in four parts. Part I presents a very brief history of the death penalty in the Supreme Court in order to appropriately frame the background against which Texas legislators were acting and against which their actions must be judged. Part II introduces the future dangerousness standard as initially enacted and covers some of the most serious problems associated with its interpretation and application. Part III tells the legislative history behind the future dangerousness standard and attempts to demonstrate some of the ways that distortions in the debates over the standard affected the process and the final outcome. Part IV concludes with some thoughts on the future of future dangerousness.

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Mills, Did One Man Die for Another Man’s Crimes?: The Secret that Wasn’t, CHI. TRIB., June 27, 2006, at C1 (describing evidence of innocence in the case of Carlos De Luna); 12 Years After Execution, Evidence of Innocence, N.Y. TIMES, Nov. 22, 2005, at A18 (describing new evidence in the case of Ruben Cantu).

29. The decision invalidating the death penalty for individuals under eighteen, for example, was a lightning rod for public opinions about capital punishment and greatly increased the tenor of the public debate. See Roper v. Simmons, 543 U.S. 551 (2005).


31. See ESKRIDGE ET AL., supra note 21, at 1-23.
I. A BRIEF HISTORY OF THE DEATH PENALTY IN THE SUPREME COURT

The Texas death penalty, like the death penalty generally, has spent a great deal of time in court.32 Like all the other extant capital punishment provisions, it was born from the ashes left by Furman v. Georgia,33 which invalidated the death penalty as practiced in all states in 1972 and imposed a temporary moratorium on its imposition. At the heart of the nine-voiced decision were the opinions of Justices Stewart and White, who intimated a fear of the apparent capriciousness of the death penalty and the sentencer’s unfettered discretion.34 State legislatures sought to respond to these concerns with new statutes, and the execution chambers reopened in 1976 when the Court decided a set of cases on these statutes enacted in Furman’s aftermath.35 Three different discretionary models were upheld in Georgia, Florida, and Texas, while the mandatory models of North Carolina and Louisiana were struck down. The fate of Texas’s H.B. 200 was governed by Jurek v. Texas,36 a case that upheld the judgment of future dangerousness as both within the jury’s general competence37 and broad enough to allow jurors an appropriate amount of discretion for mercy.38 The Texas statute thus survived its first challenge in court precisely because it was not mandatory.39 Yet when the next major development came with Penry v. Lynaugh in 1989, the Court determined that although the future dangerousness question allowed the jury to consider some relevant mitigating factors, it violated the Constitution by failing to explicitly allow consideration of other essential mitigating factors at sentencing.40 The evolution of death penalty doctrine thus displays a major conflict that generated enormous confusion in the interregnum between Furman and Jurek: Discretion in death sentences...
appears to be an evil, but discretion-less schemes violate the Constitution as well. The balance struck has been to privilege the discretion for mercy, while tightly confining the discretion of jurors to vote for death.

All the judicial activity surrounding the death penalty—of which these cases are only a tiny sample—has been plagued by some early sources of interpretive dissonance. In 1971, in McGautha v. California, the Court held that even a statute that gave the jury completely unfettered discretion to impose life or death did not violate the Due Process Clause. This ruling foreclosed future death penalty decisions on due process grounds and shifted the debate to the content of the Eighth Amendment's prohibition against "cruel and unusual punishments." This development might not have been a problem, except that the jurisprudence that emerged one year later in Furman turned out to be heavily process-oriented. Thus, before the Furman moratorium even got off the ground, it had to face the fact that the most plausible avenue for a constitutional critique of death penalty procedure had already been blocked.

Perhaps for this reason, the Furman "decision" was a tangled morass of disagreement, overlap, and general opacity. Each Justice authored his own opinion, and what emerged was a 5-4 majority for the proposition seemingly defeated in McGautha only the year before—namely, that existing death penalty procedures were unconstitutional. Not only was there no agreement on what exactly caused the existing constitutional defects, but there was no guidance offered by any Justice as to what might alleviate the current constitutional shortcomings. All that seemed clear was that there was a spectrum of opinion in which Justices Brennan, Marshall, and Douglas were the most opposed to capital punishment, Justices White and Stewart were the most ambivalent, and the four Justices appointed by President Nixon supported the death penalty as it already stood. Legislatures which sought to reinstate their death penalty statutes after Furman were thus essentially in the business of courting Justices Stewart and White.

This posture gave rise to one of the big questions of Furman, which was left unresolved and hotly debated by legislatures until the Court next took up the death penalty in 1976—that is, mandatory death penalty schemes. Because both Justices White and Stewart appeared to be concerned with unfettered jury discretion and irregularity in the application of the penalty, many believed

42. U.S. CONST. amend. VIII.
43. Justice Stewart famously complained that the process by which some people got the death penalty was too similar to "being struck by lightning." Furman v. Georgia, 408 U.S. 238, 309 (Stewart, J., concurring).
44. Furman begins with a short statement of the facts and the order remanding for further proceedings, and then proceeds to inform the reader that five Justices filed separate opinions in support and four Justices filed separate dissents. Id. at 239-40.
45. See id. at 310 (Stewart, J., concurring); id. at 310-11 (White, J., concurring).
that a statute that took all discretion out of the jury’s hands would satisfy the swing Justices. Mandatory death penalties seemed to be the easy way out.

This proved to be incorrect, though for an unexpected reason. Although Justice White voted in favor of the mandatory schemes presented in *Woodson v. North Carolina* 46 and *Roberts v. Louisiana*, 47 in 1976 Justice Powell changed sides from *Furman* and opposed these mandatory schemes. 48 Whatever the difficulty in understanding how mandatory death penalty statutes failed to cure *Furman*’s complaint of excessive jury discretion—a paradox that fell to Justice Stewart to explain 49—the first true bright-line rule emerged from the 1976 opinions: mandatory death penalty statutes would not stand. *Furman* had resulted from an excess of some kind of discretion, but it had become clear that it was not an excess of discretion for mercy that made the difference.

The question in *Jurek* was thus whether or not Texas had enacted a mandatory death penalty scheme— a question finally answered in the negative by Justice Stevens’ plurality opinion. 50

This interpretation of *Furman* was further cemented by the 1989 ruling in *Penry v. Lynaugh*, 52 which held the Texas scheme unconstitutional because it did not vest the jury with sufficient discretion to consider various mitigating factors. Specific to that case was the issue of the defendant’s mental retardation, and whether the Texas system allowed for adequate consideration thereof. 53 The Court held that it did not. *Penry* made clear that those who had advocated for a mandatory death penalty after *Furman* not only misinterpreted the course that death penalty jurisprudence would chart, but were radically off-base. After *Penry*, *Furman* stands for the principle that the jury must be tightly

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47. 428 U.S. 325 (1976).
48. Research indicates that the authority in all five cases coalesced around Powell, Stewart, and Stevens, who replaced Justice Douglas after his stroke. Powell and Stewart realized that by combining their forces, they could determine the outcome of every case, and Powell strongly believed that “mandatory capital punishment was a step backward.” JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 425, 425-27 (2001). Most interestingly, it appears that the troika bargained among themselves in what they believed to be the closest cases, Texas and Louisiana. It seems that Powell was able to trade his vote against Louisiana’s statute for Stevens’ and Stewart’s upholding of the Texas law. Id. at 427. The principle that governed the three center Justices seems clear from behind the scenes: “Mandatory death sentences would be forbidden, but discretionary capital punishment would be allowed, so long as the states made some effort to articulate appropriate standards.” Id.
49. See id. at 427 (noting that while squaring the Georgia, Florida, and Texas decisions with *Furman* was relatively easy, defending the striking down of the mandatory schemes was “the greatest challenge” because it was a “paradoxical[]” position).
50. 428 U.S. 262, 272 (1976) (“[T]he constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.”) (Stevens, J., plurality opinion).
51. Id. at 273-74 (holding that, because a judgment of future dangerousness could incorporate a wide variety of factors, the jury has discretion to consider mitigating circumstances in making its sentencing determination).
53. Id.
constrained in its ability to impose the death penalty, but widely free to consider factors militating against the ultimate sanction. In short, subsequent case law has shown that it was the exact opposite of the mandatory death penalty that best cured *Furman* error.

This is noteworthy, because the idea of mandatory capital punishment dominated and distorted the Texas death penalty debate. As will be seen, the Texas House actually passed a mandatory bill, and numerous senators—many of whom ended up on the decisive conference committee—believed that to be the superior option. This means that the Texas Legislature was operating under a strong misconception as to the meaning of *Furman*, leading to inevitable and important distortions in the nature of the debate. Their misperception meant that when they believed they were steering toward a constitutional safe harbor, they were actually sailing out into dangerous waters. Future dangerousness was designed as an all-but-mandatory form of capital punishment, and a misunderstanding of *Furman* made it so.

In 1976, in *Jurek*, the Court held that the future dangerousness standard was broad enough to allow the jury to make the required individualized assessment of whether the crime merited life or death.\(^{54}\) Although that view was eroded by *Penry*, it certainly remains strong.\(^{55}\) That said, the breadth of the future dangerousness consideration is actually quite problematic, because its vague language causes major difficulties of interpretation. As detailed in the next Part, future dangerousness has been plagued from its inception by problems of vagueness, and these have in turn yielded questions about whether expert testimony on future behavior is consistent with the statute or appropriate in court. This is to say that while the manifold possible meanings of future dangerousness helped Texas to avoid the fate of North Carolina and Louisiana in 1976, they also contributed to a subsequent history full of uncertain meanings and questionable applications. It is to those problems of future dangerousness that I now turn.

II. SOME DANGERS OF FUTURE DANGEROUSNESS

The problems of the future dangerousness standard are serious, manifold, and too well-documented to merit extensive reprint here.\(^{56}\) To frame the discussion, however, it is important to understand a few of the most serious

\(^{54}\) 428 U.S. at 276.

\(^{55}\) See *Johnson v. Texas*, 509 U.S. 350 (1993) (holding that the future dangerousness question is capacious enough to authorize the jury to consider the defendant's youth).

\(^{56}\) There have been literally hundreds of scholarly articles written on the problems of the future dangerousness standard, many originating in the law-and-psychology community. For one basic entrance into the contemporary literature, see Eugenia T. La Fontaine, Note, *A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases are Unconstitutional*, 44 B.C. L. REV. 207 (2002).
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issues it has created. To that end, I will briefly discuss both interpretive and practical problems. Before I do so, however, it is crucial to note that when H.B. 200 made future dangerousness one of the special questions—and essentially still today—it was in practice the only question upon which turned the question of life or death.

A. The Centrality of Future Dangerousness

For capital cases in Texas, H.B. 200 enacted the now-familiar “bifurcated trial” system in which the jury first determines guilt or innocence and then sentences after hearing additional evidence. Per its instructions, the guilt-phase jury first determines whether or not the defendant committed a “capital murder”—defined as a premeditated murder committed under certain specific, factual conditions. The lines between capital and noncapital murder in Texas are mostly objective, including, inter alia: (1) whether the victim was a police officer; (2) whether the victim was a correctional officer; and most often (3) whether the murder was committed during a kidnapping, robbery, or rape. As H.B. 200 originally conceived it, if a capital murder was found, the jury moved to a sentencing phase during which it would answer three “special questions.” If all were answered in the affirmative, the defendant was sentenced to death.

A brief examination of the questions shows, however, that only the “future dangerousness” question provided any real chance of escape from the ultimate sanction.

This is so because, of Texas's three original special questions, an affirmative answer to two appears to be logically included in the guilty verdict itself. As the statute stood in 1973, the questions were as follows:

(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;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(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.

Clearly, a verdict of murder with malice aforethought would be unlikely—capital case or not—if the jury believed that the murder was not unreasonable in light of some provocation, or not even committed deliberately. The guilty verdict thus logically contains a yes answer to both question (1) (on

57. See TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(a)(1) (Vernon 2006).
58. See TEX. PENAL CODE ANN. § 19.03 (Vernon 2003).
59. See TEX. CODE CRIM. PROC. ANN. art. 37.0711 (Vernon 2006).
61. Id.
deliberateness) and question (3) (on provocation). Indeed, today those two questions no longer appear at all. In the hard core of cases, then, the future dangerousness question determines the defendant’s future.

B. The Uncertain Meaning of Future Dangerousness

With the future dangerousness question so central to the sentencing of the capital defendant, it is especially troubling that no one knows exactly what it asks. This is because it presents two enormous interpretive problems: the “what future” problem, and the “a probability” problem.

The question of “whether ... the defendant would commit criminal acts” in the future can only truly be answered with another question: “in what future world should I, as a juror, consider this question?” The possible answers are endless. Perhaps the jury is to consider whether the defendant will likely commit any more crimes in the future, no matter where he ends up. This plausible interpretation would make the question into a literal prediction of future behavior. It seems a somewhat unlikely construction, however, because the term “would” suggests the presence of an unspoken, logical predicate—of something that would happen if $X$ were the case. Yet if we commit ourselves to some manner of counterfactual inquiry, we open a Pandora’s Box of possibilities. Should the jury consider whether the defendant would likely commit additional crimes if he were released today? Or should the jury perhaps consider whether the defendant would likely commit additional crimes in prison if sentenced to life instead of death? Should they factor in the likelihood of parole, and at what date? These are hard interpretive questions—so hard, in fact, that they have never been remotely settled by any Texas court.

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62. Justice Blackmun made precisely this point in dissent in *Barefoot v. Estelle*, 463 U.S. 880, 917 & n.1 (1982) (Blackmun, J., dissenting) (“It appears that every person convicted of capital murder in Texas will satisfy the other requirement[s]...”).

63. See *TEX. CODE CRIM. PROC. ANN.* art. 37.071(2)(b)(1) (Vernon 2006); see also supra note 16.

64. Although this “what future” question seemed to be presented in *Jurek v. State*, 522 S.W.2d 934 (Tex. Crim. App. 1975), the Texas courts did not answer it. They have ruled that the “a probability” problem I discuss next does not render the statute vague, see, e.g., *Granviel v. State*, 552 S.W.2d 107 (Tex. Crim. App. 1977), but they have treated the “what future” problem in only the most cursory and unsatisfying way. See, e.g., *Morris v. State*, 940 S.W.2d 610, 613 (Tex. Crim. App. 1996) (“[A] jury considers not only free society, but also prison society.”). At best, we know that the list of factors enumerated by the Court of Criminal Appeals in *Jurek* appears to go as much to “badness” or culpability as it does future dangerousness per se (for example, a young age may make one less culpable but more dangerous, and it is treated as mitigating). See 522 S.W.2d at 940. We may thus infer that the court has endorsed the “bad person” construction discussed below. Such inferences are unhelpful, however, in determining whether, in the final analysis, certain forms of evidence such as expert predictions of future behavior ought to be admissible. The “bad person” construction would ostensibly make these troubling “factual” predictions irrelevant to the real normative inquiry, but in fact courts continue to view the task as at least partially predictive in the factual sense. For a fascinating account of the operation of this “what future” problem in Virginia, another future dangerousness state, see Jessica M. Tanner, “Continuing Threat to Whom?: Risk Assessment in Virginia Capital Sentencing Hearings,” 17 *CAP. DEF.* J. 381, 391 (2005).
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A hypothetical example might serve to concretize the importance of these interpretive ambiguities. Consider the following case: Jim, age 35, is convicted of capital murder. At sentencing, it is revealed that Jim has been to prison on multiple occasions. Many of his convictions are for violent crimes. Remarkably, however, Jim’s record inside is spotless: he has never run afoul of the authorities; he is a productive participant in jailhouse life; he takes classes and works hard while incarcerated. The reason, it seems, is that Jim responds very well to authority, but has a very hard time controlling himself in unstructured, everyday life. In this example, because we know Jim has already been convicted, we know most of his future lies in jail, where we can be relatively certain that he will commit no future crimes. Whether Jim is “likely to commit future acts of violence” is thus entirely dependent upon whether we consider him inside or outside of his actual future environment—that is, jail.65 For Jim, the answer to the “what future” question colors all evidence presented at his sentencing and perhaps means the difference between life and death.66

It might be argued that this problem is illusory because the future dangerousness question has a certain “commonsense” or “core” meaning that would not escape the lay juror forced to consider it.67 That meaning might be something like the following: is this defendant the sort of person who if left to her own devices would hurt or kill again—a bad person? One of the original drafters of the standard, former state senator Jack Ogg, now seems to admit that he imagined an inquiry along these lines.68 But this common-sense construction is really a conflation of two distinct questions: the “bad actor” question, and the “future dangerousness” question itself. It is simply and irrefutably true that not all those likely to be future dangers are very bad actors, and vice versa. For example, someone with a mental problem or prone to fits of uncontrollable rage is ordinarily understood to be less culpable—less bad of an actor—even though he or she may be much more “dangerous” than a one-time, cold-blooded killer. The statutory phrasing is deeply ambiguous in such cases because this “core” non-predictive view does not square with the question posed by the plain language of the text.

And the ambiguities of the “what future” problem are only multiplied by

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66. This hypothetical bears a close resemblance to Bible v. State, 162 S.W.3d 234 (Tex. Crim. App. 2005). There, the defendant had a very good prison record earned while serving a previously imposed, unrelated life sentence, but the court (and ostensibly the jury) did not see that fact as ultimately relevant. Id. at 245-46.
67. Jurek v. Texas, 428 U.S. 262, 279 (White, J., concurring in the judgment) (stating that “the issues posed in the sentencing proceeding have a common-sense core of meaning” that juries should be able to understand).
the "a probability" problem. The second special question literally asks "whether there is a probability that the defendant would commit violent acts" in the future. This offers no insight on how much of a probability is required for an affirmative answer. The inherent confusion of this wording was cogently summarized by Judge Odom of the Texas Court of Criminal Appeals, dissenting as to the first death sentence ever meted out under the aegis of H.B. 200:

What did the Legislature mean when it provided that man's life or death shall rest upon whether there exists a "probability" that he will perform certain acts in the future? Did it mean, as the words read, is there a probability, some probability, any probability? We may say there is a twenty percent probability that it will rain tomorrow, or a ten or five percent probability. Though this be a small probability, yet it is some probability, a probability, and no one would say it is no probability or not a probability. It has been written: "It is probable that many things will occur contrary to probability," and "A thousand probabilities do not make one fact." The statute does not require a particular degree of probability but only directs that some probability need be found. The absence of a specification as to what degree of probability is required is itself a vagueness inherent in the term as used in this issue. Our common sense understanding of the term leaves the statute too vague to pass constitutional muster.

Odom hits the nail on the head: not only is H.B. 200 ambiguous as to the frame of reference for the future dangerousness prediction, it also offers absolutely no guidance as to the level of certainty required for an answer of "yes." We might consider 10% a reasonably high probability, but we might also require 51% (i.e., more likely than not) or 95% (something like "beyond a reasonable doubt"). As it stands, that question—like the "what future" question—is left to the jury, and the evidence suggests that they are as confused about it as everybody else.

These interpretive ambiguities of the Texas death penalty are of special significance to this project because the legislative history is ordinarily a good place to turn to resolve them. In this case, however, the record is silent. In fact, there is no record at all. Because not a word was spoken on future dangerousness, there is no place to turn to resolve its original meaning. The paucity of legislative thought on the standard has thus affected its precision in two ways: it prevented the draftsmen from crafting clearer language, and, as we will see, it keeps us today from ever filling the holes that their work has left.

71. See Rad Sallee, The Death Penalty: Uneven Punishment in Local Courts Brings Calls for Change in the Law, HOUSTON CHRON., Apr. 4, 1976. In this report, the jury asked for a dictionary to help them settle the meaning of "probability." Denied by the judge, they sent the following note: ""There is no probability that we will ever be able to answer the question of Sierra's probable future behavior." Id. Defense counsel in this case also appeared to have raised the "what future" question discussed above. See id.
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C. Practical Problems of Future Dangerousness

These abstract interpretive questions pale in importance next to the most serious problem of future dangerousness in practice: predictions of future behavior by prosecution psychologists. In most cases, the State calls an expert witness—before his retirement, it frequently called a psychiatrist named James Grigson (nicknamed “Dr. Death”)—who testifies as to whether, in his “expert medical opinion,” the defendant is likely to commit future acts of violence.\footnote{72} These experts often testify without ever having interviewed the defendant or using any information other than the prosecution’s description of the crime.\footnote{73} Much has been written about the evident problems with this practice: scholars, judges, psychologists, and activists alike declaim its unreliability, its prejudicial effects, and its lack of a basis in scientific fact.\footnote{74} And as for the draftsmen of the future dangerousness standard, it is certainly not anything that they thought about at the time.\footnote{75}

The practice of having “experts” testify as to the future dangerousness of a defendant has been tested before the Supreme Court and was upheld in \textit{Barefoot v. Estelle}.\footnote{76} The reasoning hinged on the fact that \textit{Jurek} had upheld the future dangerousness “prediction” as within the competence of the jury. If an untrained jury could make a reasonable determination as to whether or not a person would be a danger in the future, reasoned Justice White, then certainly a trained psychologist could make at least an equal, if not a better, judgment. The “expert” evidence was therefore deemed admissible.\footnote{77}

Yet this reasoning ignores the prejudicial effects of expert testimony, even as to facts that we believe laymen are competent to judge. Consider the following counter-example. We believe that the jury is the ultimate judge of credibility, and we consider jurors capable of making determinations about believability solely based on human intuition. We also recognize that certain techniques, such as using lie-detector tests and sodium pentothal, can be more

\footnote{72. Grigson was especially famous for his role. See Dan Rosenbaum, \textit{Travels with Dr. Death}, \textit{Vanity Fair}, May 1990, at 141.}
\footnote{73. \textit{Id.} at 143.}
\footnote{75. See Telephone Interview with Jack Ogg, \textit{supra} note 68.}
\footnote{76. \textit{Id.} at 880 (1983).}
\footnote{77. \textit{Id.} at 906.
reliable than such intuition.\textsuperscript{78} Still, we do not admit lie-detector tests or allow the use of sodium pentothal in court because we consider it enormously prejudicial and inappropriate to take the determination of credibility out of the jury’s hands by appealing to technocratic expertise. The same prejudice inheres in appealing to the expertise of a psychologist in this instance. And the prejudice only increases when you have repeat players like Dr. Grigson, when the evidence is that such predictions are unreliable, and when it is deceptive to claim that this “expert medical opinion” has any claim to expertise at all.

The testimony of a witness like Dr. Grigson, cloaked in the mantle of science and well-practiced through repeat play in the system, is all but insurmountable for the average defendant. Judge Odom of the Texas Court of Criminal Appeals has decried it as “prejudicial beyond belief,”\textsuperscript{79} and a later and more quotable dissenter on the same court, Judge Teague, has described exactly the repeat play “expert” problem that Dr. Grigson represents:

This is another case in which Dr. James P. Grigson, who has earned the nickname “Dr. Death” because of the number of times he has testified on behalf of the State . . . , testified.

After having read many records of capital murder cases in which Dr. Grigson testified at the punishment stage of the trial, I have concluded that, as a general proposition, when Dr. Grigson speaks to a lay jury, or an uninformed jury, about a person who he characterizes as a “severe” sociopath, which a defendant who has been convicted of capital murder always is in the eyes of Dr. Grigson, the defendant should stop what he is then doing and commence writing out his last will and testament—because he will in all probability soon be ordered by the trial judge to suffer a premature death.\textsuperscript{80}

Clearly the transformation of the future dangerousness question into a psychological issue represents an impossible barrier for defendants, because they will always be up against well-practiced state “experts” who are adept at speaking to juries and who can claim with impunity that they “have been proven to be right in [their] prediction of individuals continuing to kill.”\textsuperscript{81}

\textsuperscript{78} One might dispute the reliability of these techniques, but suffice it to say that the scientific pedigree of lie-detectors and truth-serum is much better than that of expert predictions of future dangerousness. \textit{See Brief for Am. Psychiatric Ass’n as Amicus Curiae at 12, id., 463 U.S. 880 (No. 82-6080).} As Justice Blackmun correctly noted in dissent, the APA’s best estimate is that psychiatric predictions of future behavior are wrong at least two out of every three times they are tried. \textit{Barefoot, 463 U.S. at 920} (Blackmun, J., dissenting); \textit{see also TEX. DEFENDER SERV., supra note 7.} On polygraph evidence and its relative reliability, see George M. Dery III, \textit{Mouse Hunting with an Elephant Gun: The Supreme Court’s Overkill in Upholding a Categorical Rejection to Polygraph Evidence in United States v. Scheffer, 26 AM. J. CRIM. L. 227, 243-44 (1999); on sodium pentothal and other technological methods of analyzing truthfulness, see LAWRENCE TAYLOR, SCIENTIFIC INTERROGATION: HYPNOSIS, POLYGRAPHY, NARCOANALYSIS, VOICE STRESS AND PUPILLOMETRICS 303-12 (1984).}


\textsuperscript{80} \textit{id. at 231-32.}

\textsuperscript{81} \textit{id. at 232 (citation omitted).}
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Senator Ogg, an original drafter of the standard, now worries whether this transformation prejudices defendants—especially indigent ones—because they have little chance of securing an expert competent enough in court to refute the likes of Dr. Grigson. If we believe Judge Teague, it seems to be the state’s expert who decides, in the great majority of cases, which defendants shall live and which shall die.

All this would not be so disconcerting if there were a shred of scientific basis for allowing expert testimony as to future dangerousness. There is none. The American Psychiatric Association has discredited and disowned Dr. Grigson because it is of the opinion that psychological experts simply cannot predict future behavior with anything near the 100% accuracy that Grigson claimed—something it communicated to the Supreme Court in an amicus brief in Barefoot. Predictions of future behavior are inherently unreliable, with some success rates scientifically pegged at less than 33%. In fact, the Texas Defender Service conducted a study to see how many of those deemed future dangers—who, by definition, now reside on death row—went on to perform acts of violence in prison. According to this data, despite the fact that death row “future dangers” had nothing more to lose by committing another crime, only 5% of them were documented as having committed serious assaults while in prison. Thus it seems that predictions of future dangerousness are not only inherently unreliable as a matter of scientific theory, but also empirically unreliable as a matter of scientific fact. If we consider the question an actual prediction, jurors and experts simply are not getting it right.

Of course, we do not know whether the question is supposed to be an actual prediction or not, which brings me back to where I began. For not only does the introduction of expert testimony create the problems and prejudicial effects that I have just documented briefly, but it is also premised upon an interpretation of the future dangerousness standard—that is, a quasi-scientific, predictive interpretation—which is only one choice among many plausible views of its ambiguous language. This means that all the problems that inhere in the introduction of this “expert” testimony may be utterly divorced from the spirit behind the original statute.

This brief discussion about the problematic transformation of the future dangerousness standard into a question for psychological experts is relevant to our inquiry for two reasons. The first is that it shows that all is not well with the

82. Telephone Interview with Jack Ogg, supra note 68.
83. Laura Beil, Groups Expel Texas Psychiatrist Known for Murder Cases, DALLAS MORNING NEWS, July 26, 1995, at 21A.
84. See Brief for the Am. Psychiatric Ass’n, supra note 78.
85. See id. at 14, 22.
86. TEXAS DEFENDER SERV., supra note 7, at 23.
87. See infra Part III.
Texas death penalty. But the expert-ization of future dangerousness also lays bare a second, slightly more nuanced problem more directly related to the troubled legislative history I discuss next—the problem of “deliberateness” and democratic legitimacy. It seems fair to say that the closer the implementation of a statute is to what the legislature intended, the more legitimate it is from a democratic point of view. In other words, if the legislature anticipated and sought to validate psychological testimony of this kind, we might feel less concerned about it. We might even abide it as an unintended and unfortunate side-effect of a deliberate and well-deliberated policy choice if there were evidence that future dangerousness was a standard that really mattered to Texans or to their representatives. In short, a claim that future dangerousness had deep democratic roots would make the problems it creates somewhat easier to accept.

The evidence I discuss next suggests, however, that the future dangerousness standard cannot make such a claim. First of all, there is no evidence to suggest that the second special question was intended to be one for psychological experts, or that the legislature ever imagined the psychological adventure that the sentencing phase of the contemporary Texas capital trial has become. Second, no deference is due for “deliberateness” because future dangerousness was hardly deliberated at all. In democratic terms, Dr. Death’s dubious testimony is a phenomenon that traces back to little more than a single day in May when seven conferees decided that the future dangerousness question could resolve their differences over which of Texas’s two proposed death penalty bills might—in the words of one—“pass constitutional mustard.”

III. ONE DAY IN MAY—A LEGISLATIVE HISTORY

The legislative history of the future dangerousness standard can be summarized as follows. Beginning in January 1973, committees and subcommittees began hearing testimony and thinking about a new death penalty in Texas. On May 10th, the House gave its best interpretation of Furman and passed a mandatory death penalty bill. Two weeks later, the Senate debated between that mandatory bill and a more discretionary approach, finally opting for the latter. With only Memorial Day weekend to go before adjournment, the House called a conference committee to resolve the differences between the two bills. On the very last day, the conferees presented a scheme which appeared in neither the House nor the Senate bill, along with newly minted language about “a probability” that the defendant would be a “continuing threat.” That same day, both houses passed the committee report

88. Telephone Interview with Jack Ogg, supra note 68.
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by huge margins without specifically considering the new language on future dangerousness. Out of this hurried and somewhat confused process were born all of the problems just recounted.

A. The Call to Action

There is little question that the majority of Texans wanted the death penalty reinstated after Furman. Indeed, as early as September 1972, at least one legislator was calling on the Governor to open a special legislative session for consideration of a new death penalty statute—a request that Governor Preston Smith honored a few weeks later. Although no consensus was reached by the end of the special legislative session, it was not for lack of a popular mandate, or for lack of trying. In fact, the Senate managed to pass a new death penalty bill within a few short days, although it failed to achieve the four-fifths majority necessary to suspend the rules and fully pass it in time. Furthermore, there is every indication that the public wanted such immediate action. Many called for reinstatement of the death penalty after Furman, and many articles cited, with apparent approval, the actions of other states and foreign jurisdictions in passing new laws and carrying out new executions. Moreover, it appears from the record of the House debate that questionnaires on the death penalty had been circulated to local constituencies in Texas. The returns favored re-imposition by a huge margin and the legislators knew it. The people of Texas were clamoring against Furman from very early on, and the legislature was listening and responding.

Meanwhile, Furman had been less than clear on what changes would be required to make the death penalty constitutional. Each Justice authored a separate opinion and thus offered little collective guidance for fixing the death penalty as it stood. Marshall and Brennan made it plain enough that they

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93. See, e.g., Another Execution?, DALLAS MORNING NEWS, Oct. 20, 1972, at D2 (editorializing against Furman and asserting that the fall of the death penalty would lead to increased violent crime); Carter Revives Death Penalty, DALLAS MORNING NEWS, March 31, 1973, at A6 (noting with apparent approval the restoration of a death penalty in Georgia); City Council Urges Capital Punishment, DALLAS MORNING NEWS, July 11, 1972, at D1; Death Penalty Returns, DALLAS MORNING NEWS, May 5, 1973, at A4 (noting with apparent approval the enactment of a mandatory death penalty in Connecticut and Nevada); Terry Kliewer, Tower Raps End to Death Penalty, DALLAS MORNING NEWS, July 11, 1972, at A10 (noting the opposition of a U.S. Senator to Furman); Oklahoma OKs Death Penalty, DALLAS NEWS, May 12, 1973, at A18 (noting with apparent approval the enactment of a mandatory death penalty in Oklahoma).
94. Transcript of Floor Proceedings on H.B. 200, Texas House of Representatives (May 8, 1973) (on file with author) [hereinafter House Transcript] (citing questionnaires showing 80% popular support for the death penalty).
believed the death penalty was per se unconstitutional, and while Douglas’ opinion on racial disparities stopped short of announcing a per se rule, it was clear that his vote would be the next hardest to get. Stewart and White voted with those three to declare existing statutes unconstitutional, but based their opinions on the “wanton” and “freakish[ ]” imposition of the death penalty, and on the failure of judges and juries to impose the sentence with any regularity. Their opinions, however, had little to say as to how their complaints about discretion might be answered. On the other side, Burger, Blackmun, Powell and Rehnquist would not have struck down the death penalty. Blackmun took pains to point out, though, that one perceived solution to unfettered discretion—a mandatory death penalty—might, for him, create a constitutional problem rather than solve one. State legislatures were thus forced to count noses and interpret a nine-voiced court in an attempt to gauge what, if anything, could make a capital punishment statute constitutionally acceptable.

These two conditions—overwhelming popular support and some constitutional uncertainty—drove the Texas death penalty debate. In honoring the voters’ demands, legislators had to be careful about crossing constitutional lines, but it was no easy task to discover where those lines actually were. Legislators had to search carefully through the Furman opinions for a form of death penalty that a majority of the Court could support, worrying whether the steps they were taking were toward the lines, away from them, parallel to them, or over them entirely. In the House, the lines were accidentally crossed.

B. The House’s Unconstitutional Proposal

At its inception, H.B. 200 was an unconstitutional, mandatory death penalty scheme. We know now that the Court would have struck down H.B. 200, as it invalidated similar laws in North Carolina and Louisiana when it next took up the question of capital punishment. Yet this was far from clear at the time. In fact, the vote against the mandatory death penalty in those subsequent cases was a narrow 5-4 split, with both Justices White and Powell switching sides.

95. See Furman v. Georgia, 408 U.S. 238, 305 (1972) (Brennan, J., concurring); id. at 371 (Marshall, J., concurring).
96. See id. at 257 (Douglas, J., concurring) (noting that even a mandatory death penalty may not prevent unconstitutional discrimination).
97. Id. at 310 (Stewart, J., concurring in the judgment)
98. See id. at 310-11 (White, J., concurring in the judgment).
99. See id. at 375-470 (writing separately to dissent from the majority).
100. See id. at 413 (Blackmun, J., dissenting) (fearing the mandatory legislation that states might pass to comport with the White and Stewart opinions). It should be noted, however, that Blackmun did not end up voting against the mandatory death penalty in either Woodson v. North Carolina, 428 U.S. 280, 307-08 (1976), or Roberts v. Louisiana, 428 U.S. 325, 363 (1976). It was, instead, Justice Powell who changed sides.
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from the positions they took in *Furman*. Like lawmakers around the country, Texas legislators were under the impression that *Furman* error resulted from an excess of discretion in the process, and thus, to avoid a death penalty that was like "being struck by lightning," they attempted to make the outcome more regular and certain. It was an honest mistake for which they bore no blame, but it was nonetheless a foundational misconception upon which the entire H.B. 200 debate was built.

In fact, the belief that a mandatory death penalty was the best way to cure *Furman* error was so pervasive that the House appears to have only considered mandatory bills. The two options that were the focus of hours and hours of committee mark-ups, public hearings, and floor debates appear to have differed only in the types of murder for which the mandatory death penalty could be assessed. When Representative Dean Cobb first submitted H.B. 200, it allowed the death penalty for many kinds of murder, whereas Representative Frank Lombardino’s proposal, House Bill 229, applied only to killings of police officers and firefighters. Though the House Committee on Criminal Jurisprudence worked toward a compromise between Cobb’s breadth and Lombardino’s narrow approach, it does not appear to have considered any proposal which would have allowed the sentencer—be it judge or jury—to weigh individual factors before affirmatively voting for life or death. That is because, in Cobb’s own words, it was "felt that a statute prescribing mandatory penalties of death . . . would be in line with [*Furman*] and would withstand constitutional attack."

Two constitutional misconceptions held by Texas lawmakers have thus already emerged: (1) the worry that only narrow classes of murders could constitutionally warrant the death penalty, and (2) the belief that only a mandatory death penalty could constitutionally sentence the perpetrators of those murders to death. These misconceptions were, of course, quite understandable in light of the confusion of the time—for which *Furman*’s nine different opinions are largely responsible. Indeed, given the difficulty of assembling majorities for any prospective proposition in *Furman*, the Texas House should be applauded for working hard to meet the concerns of the Constitution. But they nonetheless made mistakes in locating the constitutional lines, and those errors importantly prevented lawmakers from voting and acting

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102. *Furman*, 408 U.S. at 309 (Stewart, J., concurring)
105. Although the Texas House expressed great concern that making all felony murders death-eligible would render the statute unconstitutional, the Supreme Court has in fact placed little to no emphasis on narrowing the scope of eligible murders, and certainly has not barred the death penalty for felony murders generally. See, e.g., *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding a statute imposing the death penalty for any first degree murder). Only some non-murders, such as aggravated rape, have been rendered ineligible. See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977).
as they otherwise might have.

Indeed, the legislators were quite explicit about the way that their concerns with the Supreme Court altered their behavior. Representative Doyle had this to say about H.B. 200 before amendments were to be offered expanding the range of covered crimes:

I agree that the bill is not exactly as I wish—the bill is not exactly as anybody wishes, but we're not concerned primarily with what we want in this bill, we're concerned with an attempt to draft a death penalty statute which has some hope of being held constitutional by the Supreme Court of the United States. And that is how we drew the bill.\(^\text{106}\)

Thus, not only had the House somewhat misinterpreted the constitutional lines, but they also let those misperceived lines shape the debate. As Doyle points out, meeting the demands of the Constitution was undoubtedly their chief priority—so much so that many of their other policy concerns might have been sacrificed to that end. In short, the mandatory bill passed by the House was not the bill they thought “best” in any political or moral sense, it was only the bill they thought was most likely to satisfy five Justices of the Court.

In sum, then, it is clear that the House was doing neither of the two things we would hope for a legislature: (1) attending to policy preferences; or (2) attending to the actual demands of the Constitution. The House was undoubtedly trying to do the latter—so much so that it became nearly impossible for its members to do the former—but the confusion surrounding *Furman* led them to believe, wrongly, that a mandatory death penalty was the only way to do so. Thus, even in their strong attempt to follow the strictures of the Court, they were going somewhat astray. It was by no means their fault, for they had the unenviable position of trying to cook up a solution with nine chefs each offering a recipe for the soup. When we look back today, it is important to understand that this misperception about mandatory death was among the most important sources of the specific capital procedures that emerged. In this way, the confusion surrounding *Furman* served to substantially undermine both the quality of the H.B. 200 debate and the content of its product.

C. *Justice v. Discretion*—The Senate Fix

The Senate saved the Texas death penalty from another defeat in Washington by substituting the House’s mandatory bill with a more discretionary one. Yet even there, a core group of supporters advanced the mandatory model, not as the ideal policy choice, but as the most constitutionally sound solution. A confrontation arose between Senators Adams and Meier: the former trumpeted the mandatory death penalty because of an outsized fear of discretion born of the White and Stewart opinions; the latter

\(^{106}\) House Transcript, *supra* note 94, at 21 (emphasis added).
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advocated jury sentencing after a weighing of aggravating and mitigating factors because of his astute analysis of the Blackmun opinion. They faced off with Adams as the defender of the Constitution and Meier as the defender of, in his own words, "justice," even though it was in fact Meier who had the constitutional question right. And although Meier—one of Texas Monthly's "top ten" legislators—ended up being able to persuade the Senate to vote with him, this debate shows precisely the ways in which the legislators' constitutional confusion prevented them from fully reaching the deep moral issues that could have been at stake in an ideal debate about ideal capital punishment policies.

The Senate debate was a choice between two bills: the House's mandatory bill introduced by Senator Ogg and a Model Penal Code-style bill introduced by Senator Meier. The Senate Jurisprudence Committee, of which both Ogg and Meier were members, decided that they would not choose between these bills themselves, but would instead report both bills out of committee and allow the Senate as a whole to determine which one was more likely to satisfy the Court.

Satisfying the Court was by far the dominant concern. Even at the committee level, "[m]ost of the debate was concentrated on legal ramifications rather than moral arguments, as both Meier and Ogg touted their respective proposals as the most likely to meet constitutional guidelines." When Senator Ogg defended his bill to the press, he went directly to the constitutional point: "On paper, I guess it does sound cold... but what we're trying to do here is meet constitutional muster. I'm not arguing the conscious [sic] part of it, I'm arguing the constitutional part." From the committee level on, Ogg would push his argument that the House's mandatory proposal was the most likely to survive without ever confronting the plain moral and policy problems associated with a "cold" and mandatory death penalty.

It was thus Ogg who started the Senate floor debate by introducing the mandatory death penalty as the clear constitutional answer. He first offered his analysis of Furman:

I think the thread running through the Furman case, all the way through it, was that in the past when there has been defendants tried in like or similar situations and in too many instances there is a wide range of punishment given and those who are of minority classes, either economically or socially, have been afforded the death penalty when other people in the same or similar circumstances have not and that it

107. The Ten Best And, Sigh, the Ten Worst Legislators, TEX. MONTHLY, July 1973, at 34, 37.
110. See Transcript of Floor Proceedings on Death Penalty, Texas Senate 2-5 (May 23, 1973) (on file with author) [hereinafter: Senate Transcript].
112. Id.
was the great variance in penalties that the Court was speaking to in the Furman case . . . And the Court said—it talked about discrepancy. Two of the Justices who voted with the prevailing side against the present death penalty said that they would only—or indicated that they would only vote for a death penalty if it were mandatory.113

This was met immediately with a prescient question from the Senate floor, pressed by Senator Meier: "[Does] any one of the Justices feel insured, or Justice White, whom you [are talking] about say anything about accepting a death penalty if it is mandatory because I don’t read that into the decision?"114 A dispute followed between Senators Meier and Ogg over whether a mandatory death penalty would pick up the necessary fifth vote given the fact that although it might appeal to White and Stewart, it would risk alienating Blackmun and Burger.115 The Senate was clearly engaged in a much more nuanced discussion of Furman’s dictates than was the House.

Yet Meier’s response to Ogg sounded in two distinct registers: constitutional and moral. Meier led with his constitutional rhetoric, suggesting that a mandatory death penalty had little chance of success with the Court:

[If you vote to require a mandatory penalty in the face of these words by the Justices of the Supreme Court [Blackmun and Burger], you are just ignoring what they are saying and you are just doing nothing more than putting a statute on the books that is going to be held unconstitutional the first opportunity that comes up to the Court.116

Next, however, a biting assault by Senator Adams on the “discretion” in this model forced Meier to make a more moral, or policy-oriented, argument. The exchange is extremely illuminating, especially as to what is absent from the rest of the debate:

ADAMS: Senator Meier, now as I understand the way you have explained your bill, after the merits of the crime have been decided and the defendant is found guilty of those merits, then at that point, the judge or jury in an advisory capacity will make a determination as to punishment either by death or by term imprisonment, or by life. Is that correct?

MEIER: Life imprisonment.

ADAMS: Now what do you call that, Senator? Discretion.

MEIER: I call that justice.

ADAMS: You call that discretion, don’t you, Senator?

MEIER: What I call that is justice. What I call this is not putting a man in a situation where the trial lawyer can lean over the bench and point to the jury and say, “And ladies and gentlemen of the jury, if you have a reasonable doubt in your mind and you find this man guilty, he is going to get the electric chair period.

113. Senate Transcript, supra note 110, at 3.
114. Id. at 4.
115. Id. at 12.
116. Id.
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ADAMS: You call that discretion, do you not, Senator?
MEIER: I call that justice, Senator, is what I call it.
ADAMS: Well, why did you call it discretion a while ago?
MEIER: I said that in approaching this problem—
ADAMS: They had discretion.
MEIER: They had an opportunity to balance factors.
ADAMS: And exercise discretion in punishment, do they not?
MEIER: They have the—
ADAMS: Come on, Senator, say it. It won’t hurt.
MEIER: The have discretion to the limited—
ADAMS: That’s right, they have discretion.

This is by far the most passionate and policy-oriented exchange of the entire debate. But then, it was only Meier who was making a policy point—arguing that mandatory death might be unjust, constitutional or not. Adams, meanwhile, was hewing closely to his (again, misperceived) constitutional course. It was thus not much of a policy “exchange” at all.

Hence, even though Meier won in the end, the Senate debate shows just what the House debate showed: the shaping of the conversation by a misperceived constitutional cure—the mandatory death penalty—which was both ultimately unconstitutional and perhaps not the preferred policy of any of the relevant legislators. Again, it is in principle a good thing for senators to care about the constitutionality of their choices, for it is the duty of legislators to try to uphold the Constitution. In this case, however, confusion for which they could not be blamed was causing them to push an unconstitutional solution under this banner, and thereby ignore their policy intuitions as to what was “cold” and what was “just”. Thus, although Meier’s more discretionary, substitute proposal carried the day, it did so without another word of discussion on its relative justice as compared with mandatory death. Perhaps such a discussion is not required, but it is part of the democratic ideal, and in a context as pregnant with meaning as the death penalty, such concerns of justice are at the very least conspicuous in their absence.

Also conspicuously absent up to this point in the debate was future dangerousness. With only one business day to go in the legislative session, it was still wholly absent from the record and from the legislators’ minds.

117. Id. at 12-13.
118. Meier carried the day when Ogg’s bill was tabled by a vote of 20-9. See id. at 16-17.
D. The Mysterious Birth of Future Dangerousness

An unrecorded conference committee produced the future dangerousness standard on May 27, 1973, and for that reason, its emergence is shrouded in mystery. All we can know about it must be inferred from news reports, the composition of the committee, and the recollections of the one living Senator who agreed to discuss it. Given how little time and debate went into the issue, however, it is quite possible that we know all there is to know about what the future dangerousness question was originally intended to ask. That is to say, no one legislator had a more robust understanding then than we do now.

One thing we do know is that the overwhelming majority of committee members originally favored a mandatory scheme. The House rejected the Senate’s nonmandatory bill by an enormous majority, and a ten-man conference committee was appointed to resolve the differences. Two members of that committee, however, Senator James Wallace and Representative Craig Washington, opposed the death penalty and refused to sign the conference committee report in an apparent protest. Senator Max Sherman’s signature was also absent, as he was not interested in any scheme in which the jury did not “squarely face” the responsibility of sentencing the defendant. That eliminated two of the Senate’s five representatives. Of the remaining three, two had been the chief advocates for the House’s mandatory approach on the Senate floor: Adams and Ogg. The latter had even reiterated his support for a mandatory scheme in the press on the morning of the first committee meeting. That left only Meier for his nonmandatory scheme—initially trailing six-to-one.

Public opinion seems to have been behind the constitutional prospects of the mandatory death penalty as well. The Dallas Morning News, one of the state’s most prominent papers, delivered this exhortation under the headline: “Make It Straight Death:” “If the Senate keeps its eye on the main consideration—getting a law acceptable to the high court—it will vote with the House to impose death in all cases of conviction.” In contrast, the Dallas Times Herald, after calling the Meier bill more “civilized,” offered the following tepid endorsement of the Senate plan: “The House, we think, might just as well adopt the Senate approach and see what happens, Constitutionally

121. Lawmakers Reinstate Death for Five Types of Murder, DALLAS MORNING NEWS, May 29, 1973. Sherman apparently objected to the fact that the judge would impose the sentence, even if he was bound to follow the command of the jury’s verdict. See id.
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speaking.” The implication is relatively clear: The mandatory death penalty was regarded as the safe bet, even if there were reasons to prefer the public policy decisions embodied in the Meier bill.

Starting from this six-to-one split, the conference committee failed to reach a compromise at its first meeting. A number of the members, it seems, were holding out for mandatory death—especially the House delegation. On Saturday morning, the American Statesman reported that the previous night’s attempt at negotiations had stymied, with nothing more resolved than to meet again the next day to discuss three drafts: one mandatory, one with jury sentencing, and one with the jury providing only an advisory opinion.

The committee’s next meeting seemed to produce a compromise, though it was more an act of technical legislative savvy than an agreement on substance. The idea originated with Meier. He suggested that the bill make the death penalty mandatory, but allow “exceptions” in certain circumstances. The bill would then include a severability clause which would allow the Court to strike down the exceptions clauses if they were unconstitutional while still leaving intact the mandatory punishment scheme. Meier left the Saturday afternoon meeting confident that he had found the constitutional solution.

Though this compromise would be replaced by the special questions scheme late Sunday night, the latter model was already emerging. What had vanished was the ability of the jury to impose life rather than death based on a “weighing” of various factors. What filled the place of this discretion were a few “exceptions” which, if found, would necessarily save the defendant and which, if not found, would necessarily condemn him. The shape of this compromise is thus strongly similar to the shape of the special questions scheme which eventually emerged, as both equate the finding of certain conditions with certain death. And, importantly, this shape is conceptualized by the committee as more or less a mandatory death penalty scheme. The procedure that Ogg had called “cold” was quickly becoming an icy reality.

In the end, though, it was not Senator Meier but Dallas Representative Robert Maloney who authored the final compromise, complete with its three special questions. Agreement on the special questions model was reached, in principle, late on Sunday night when the committee met for the third time, but the final language for the questions was not cemented until a last meeting at 10:15 on Monday morning, the last day of the legislative session. Indeed, on

124. In Search of a Formula, supra note 122.
126. Death Penalty Joint Panel Fails To Reach Compromise, supra note 120, at 5.
128. Id.
Monday morning the American Statesman reported that there were four questions in the bill—the additional one being whether or not the defendant’s act was performed with the reasonable expectation that a death or injury would result. Time pressure was especially intense at this point—with the key deliberations on the language of the questions taking place the morning of the final votes—but it had been pressing down on the legislature for many weeks. By Monday morning, the clock had clearly run out.

Representative Maloney, who forged the last-minute compromise, had supported the mandatory death penalty from the start—which leads one to believe that the final product was intended to lean heavily to that side. As Senator Ogg remembers it, Meier had worked throughout the process to convince him that some discretion had to be built into the process, and then the two of them had tried to convince Maloney of the same. Still, according to the Houston Post, “Maloney and the other conferees hoped such a system would permit such a small degree of jury discretion that the U.S. Supreme Court would uphold its legality.” Under the pressure of the final bell, it appears that the compromise that was reached strongly incorporated the House’s insistence that the jury be limited in its capacity for mercy. Meier did convince the others to abandon the mandatory death penalty, but perhaps not by much.

Indeed, looking at the final compromise as a whole, H.B. 200 looks more and more like a mandatory death penalty bill. As has been said, its two other questions—the “deliberateness” question and the “provocation” question—are all but logically contained within the guilty verdict itself. One gets the impression that the future dangerousness question was intended as a rarely applicable safety valve as well—as a way that the extraordinarily sympathetic killer might be spared rather than the method through which the extraordinarily evil murderer would be condemned. Ogg seems to recall understanding the statute this way at the time. And, in fact, an initial report on the operation of the new statute which appeared in the Houston Post in 1976 noted that “[o]ver half of capital murder cases [were] destined for death row,” with 70% of convictions earning the death penalty. Perhaps by design and certainly in effect, the future dangerousness question condemned the ordinary capital murderer rather than only the worst of the worst.

In one weekend, then, six-to-one for mandatory death became seven votes

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130. Id.
131. See House Transcript, supra note 94, at 54-55 (offering an amendment to add crimes for which the mandatory death penalty would be available).
132. Telephone Interview with Jack Ogg, supra note 68.
134. Telephone Interview with Jack Ogg, supra note 68.
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for a limitedly discretionary scheme in which a capital sentence could be
avoided only if the jury found that the defendant would not be a future danger.
The conferees were hoping that this would present “such a small degree of jury
discretion” that the Supreme Court would uphold it, and indeed, the Court
would later do so. But though they had the Court in mind, their neigh-
mandatory compromise was not ultimately organized around the correct
constitutional principle. Subsequent case law would clarify that the Court had
hoped to limit the discretion of juries to impose the death penalty, not their
discretion to grant mercy. The conferees could not have known it, but in
choosing to remain very close to a mandatory death penalty, they did not avoid
the constitutional lines but came very close to crossing them. Future
dangerousness was thus the product of a flawed process that both enacted a
constitutional misperception (the need for a near-mandatory scheme) and, at the
same time, crowded out a healthy policy debate about just what kind of scheme
would be the most preferred and the most just.

E. Final Passage

Even with the brand-new future dangerousness language, the conference
committee’s proposal sailed through both houses. The combined pressures of
time and massive support for the death penalty prevented either chamber from
debating the compromise with any real purpose. The effect of the conference
committee’s decision to add new language never before debated was thus to
transform themselves into a seven-person state legislature, for it was impossible
for either house to alter the bill without dooming it and unlikely that either
would vote to kill it. Future dangerousness thus became law without a word.

Both houses rapidly ratified the committee report, and though it was at least
the object of minor attention in the House, neither chamber discussed the new
language on future dangerousness. The Senate rubber-stamped the measure,
“expend[ing] not one word of debate,” and voting in favor of it by a margin of
27-4. House adoption similarly came as a matter of course, although
objections by Representatives Spurlock and Washington served to bring into
focus the extent to which the conference committee had elided the ordinary role
of the legislature in forging statutory solutions. Spurlock decried the fact that
the mandatory death penalty had been abandoned, calling for a new
conference committee. His argument suggests the extent to which last-
minute ground-breaking by the conference committee had obviated all the prior
work of the House and Senate. Washington made the point even more

138. See id.
139. See 1973 TEX. H.R. JOUR. 4985.
emphatically, raising a point of order against the conference report because of its new language. When the chair overruled him, he led a last-ditch effort against the death penalty's reinstatement. He quickly failed, and the Maloney model was approved 114-30.

The entire structure of the Texas death penalty thus owes its existence in part to Bill Meier and in a larger part to Robert Maloney, who creatively constructed the eleventh-hour compromise out of new, unprecedented language. Though there were hours of debate in the House and Senate over the form of capital punishment that might best satisfy the Constitution, those debates bear little if at all on the language that the conference committee eventually produced. The legislature does not appear to have had a considered view on how future dangerousness would work in practice, or really, to have thought about it at all, because as a body, they never really had a chance to think about it.

The many process flaws this analysis has illuminated are important, even if they are hallmarks of ordinary state legislation. All of the rushing, the mistakes of constitutional law, the lack of extended policy discussion, and the enormous power wielded by the conference committee are run-of-the-mill problems with state legislative work. Yet that does not make it unproblematic, especially here. The courts have recognized that there is something special about the death penalty, both because of the awesome finality of the sentence and the capacity of capital punishment to express community norms. H.B. 200 was not an omnibus spending bill or pork-barrel legislation affecting narrow interests in small Texas counties. Instead, it is thought that the legislative determination of death penalty procedures represents a considered judgment about who merits death and who life. If any bill is supposed to have meaning, it is the death penalty—and the point of the discussion so far has been to show that the combination of factors at work in Texas's post-Furman experience prevented the bill from having this meaningful character. Thus, even if one wants to argue that there were no special problems associated with the passage of H.B. 200, he must then admit, at his peril, that the Texas death penalty was only "ordinary" legislation at very best.

IV. CONCLUSION—A NEW PAST AND PRESENT FOR FUTURE DANGEROUSNESS

I have sought to make two simultaneous points that I hope will impress upon contemporary Texans the need for reform. The first is the now-familiar observation that the future dangerousness standard is problematic in practice: giving birth to interpretive confusion and to the phenomenon of Dr. Death. The second, newer point is that these problems should not be accepted in the name

140. See id. at 4984-85.
141. See id. at 4985.
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of legislatures past because those who voted for the standard were confronted with the confusion of *Furman*'s nine voices, the pressure of time, and a last-minute conference committee compromise with language they had never seen before. The thirty-three-year-old work of the 63rd Legislature was the product of circumstances rather than the considered judgment of the legislators, and yet over and over again, in courtrooms from Lubbock to Laredo, defendants are condemned to die by predictions of future dangerousness made by the most dubious of possible "experts." In this way, Maloney's conference committee compromise is renewed each legislative session, and with serious consequences, despite the fact that it was born of a confusion that thirty-three years of experience has since dispelled. The time is ripe for reform, and the chance to do better by confronting the issue more democratically should encourage conscientious legislators to heed the call.

Were they to revisit the issue, Texas legislators could make more informed and deliberate decisions on multiple issues. They could choose their standard free from the misconception that a more mandatory death penalty is the more constitutional solution. And even if they were to decide that they truly believe in future dangerousness, they could think longer and harder about what the standard should mean in court, and whether "psychological" prediction should be excluded or allowed. With three decades of doctrinal evolution and empirical experience on their side, they could also directly confront the unforeseen problems that future dangerousness has created for indigent defendants, the racial inequalities the system has created, and the like. This would replace the somewhat embarrassing birth certificate of future dangerousness with new democratic credentials.

The choice of death penalty procedure matters enormously, and I have endeavored to show that not only did Texas choose a standard with problematic consequences, but it reached that decision in a problematic way. I have traced the Dr. Death phenomenon back to the moment when future dangerousness was born, and have found it lacking in (at least idealistic) democratic roots. Confusion about *Furman*—not democratic procedures of anything close to an ideal form—created future dangerousness, which as a standard had no more content to those who chose it than it has to the judges and juries who must try to interpret its ambiguities today. By rethinking the outcome of 1973's confused push toward reenactment, today's legislators could cure not only the problems of future dangerousness in application, but also the democratic deficits of its conception.