Volume 15
Number 2 *Symposium on International Perspectives of Jurisprudence*
*pp.*409-451

Symposium on International Perspectives of Jurisprudence

The Indiana Death Penalty: An Exercis in Constitutional Futility

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THE INDIANA DEATH PENALTY: AN EXERCISE IN CONSTITUTIONAL FUTILITY

INTRODUCTION

The death penalty is one of the few areas of law about which almost everyone entertains some sort of an opinion. Debates on the death penalty inevitably end up with strong emphasis upon moral, religious, and political arguments.[1] Nonetheless, the premise of this note is not the moral or ethical issues of capital punishment, but rather the legal and constitutional.

Significantly, the major death penalty cases to be discussed have all occurred in the last thirteen years.[2] In this litigation, various constitutional theories have been advanced. In considering the constitutional validity of the Indiana death penalty, several fundamental issues must therefore be resolved.

The first, and perhaps most significant case to be recently decided by the United States Supreme Court was handed down in 1968. In *United States v. Jackson*,[3] the Court held that the relevant death penalty statute operated to needlessly burden a defendant's fifth amendment[4] right not to plead guilty, and his sixth amendment[5]

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1. *See generally*, H. BEDAU, THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY (2d ed. 1968); W. BOWERS, EXECUTIONS IN AMERICA: RECENT RESEARCH ON DISCRIMINATION AND DETERRENCE IN CAPITAL PUNISHMENT (1974); I. ISENBERG, THE DEATH PENALTY (1977); G. GOTTLIEB, CAPITAL PUNISHMENT (1967); F. BRESLER, REPRIEVE: A STUDY OF A SYSTEM (1965); G. MCCLELLAN, CAPITAL PUNISHMENT (1961).

2. B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979). These particular commentators suggest that the significant developments of recent constitutional theory are more attributable to the personalities of the members of the Court, rather than any logical extension of legal thought and analysis. It is more likely a combination of both factors.

Nevertheless, one can discern an evolution of constitutional thought beginning with the Warren Court's treatment of the death penalty in *United States v. Jackson*, *see* notes 3 and 149-57 *infra* and accompanying text, and continuing through the Burger Court's contribution of the 1970's. Only time will tell what constitutional developments will occur in the future.

3. 390 U.S 570 (1968).

4. The amendment reads in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

5. The amendment reads in full:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

right to a jury trial. The Court therefore struck down the death penalty in *Jackson* under a penumbra of fundamental rights theory.

For the next three years the Supreme Court was silent on the death penalty issue. In 1971, however, the Court in *McGautha v. California*[6] upheld a statute which allowed a judge or jury complete discretion on whether to impose a death sentence. The petitioner in *McGautha* unsuccessfully argued that discretionary death penalty statutes violated the due process clause of the fourteenth amendment.[7]

Only a year later came the landmark decision of *Furman v. Georgia*.[8] The discretionary death penalty statute under review in *Furman* was almost identical to the statute involved in *McGautha*. But the controlling aspect of *Furman*, at least in the view of five justices, was that discretionary statutes permitted the arbitrary application of the death penalty and therefore violated the eighth amendment prohibition against cruel and unusual punishment.[9] Thus, the sole distinguishing factor between *McGautha* and *Furman* was that the former asserted an unsuccessful due process claim while the latter found protection under the eighth amendment. As will be seen, subsequent death penalty cases utilize both constitutional theories.

From *Furman* in 1972 until the present, the death penalty as a constitutional penal sanction has continued to be of questionable validity. Although the Court dealt only with the statutes of Georgia[10] and Texas,[11] the practical effect and almost universal inter-

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accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

6. 402 U.S. 183 (1971).

7. The amendment reads in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ." U.S. CONST. amend. XIV, § 1.

8. 408 U.S. 238 (1972) (5-4 per curiam decision with all justices filing separate opinions).

9. The amendment reads in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

10. Furman v. Georgia, 408 U.S. at 239 (Furman convicted of murder in Georgia and sentenced to death). In a consolidated case, Lucious Jackson, Jr. was convicted of rape in Georgia and sentenced to death.

11. *Id.* Elmer Branch was convicted and sentenced to death for the crime of rape in Texas. This case was also consolidated with Furman v. Georgia, 408 U.S. 238 (1972).

pretation of *Furman* was nothing short of total invalidation of all death penalty statutes then in existence.[12] Thus, in the intervening years the states have engaged in legislative experimentation. The goal was to interpret the directives of the nine separate opinions of *Furman*,[13] and implement a death penalty statute that corrected the corresponding defects.

This task was not so easy. In the post-*Furman* litigation of 1976, the Court upheld under the eighth and fourteenth amendments the constitutionality of the death penalty of Florida,[14] Georgia,[15] and Texas;[16] and held constitutionally infirm the statutes of North Carolina[17] and Louisiana.[18] Still later, the Supreme Court struck down the Ohio death penalty as defective under the eighth and fourteenth amendments.[19] Thus the validity of capital punishment as imposed by any particular state is far from a settled constitutional issue.[20]

Indiana has endured a rather typical experience in its attempt to enact a valid death penalty statute. As did the courts of most states, the Indiana Supreme Court upheld the pre-*Furman* Indiana

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12. More than 120 capital punishment cases then pending before the Supreme Court were remanded in light of *Furman* and its companion cases of Stewart v. Massachusetts, 408 U.S. 845 (1972), and Moore v. Illinois, 408 U.S. 786 (1972). *See* Memorandum Decisions, 408 U.S. 932-41 (1972).

13. 408 U.S. at 240 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 314 (Marshall, J., concurring); *id.* at 375 (Burger, C.J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

14. Proffitt v. Florida, 428 U.S. 242 (1976).

15. Gregg v. Georgia, 428 U.S. 153 (1976).

16. Jurek v. Texas, 428 U.S. 262 (1976).

17. Woodson v. North Carolina, 428 U.S. 280 (1976).

18. Roberts v. Louisiana, 428 U.S. 325 (1976).

19. Lockett v. Ohio, 438 U.S. 586 (1978); Bell v. Ohio, 438 U.S. 637 (1978). For text of eighth and fourteenth amendments, see notes 7 and 9 *supra*.

20. The exceptions are, of course, Florida, Georgia, and Texas. *See* notes 14-16 *supra* and accompanying text. With the execution of Gary Mark Gilmore on January 17, 1977, one would think that Utah has a constitutionally valid death penalty. The Utah statute, however, has never been scrutinized. In Gilmore's case, the Court has only ruled that a defendant can voluntarily and intelligently waive his right to challenge the constitutionality of a death sentence. The Court has also ruled that no one but the defendant has standing to challenge a death sentence. *See* Gilmore v. Utah, 429 U.S. 1056 (1977) (*aff'd mem.*, denied standing for the Latter-Day Saint Freedom Foundation); and Gilmore v. Utah, 429 U.S. 1012 (1976) (per curiam) (denied standing for defendant's mother) (Brennan and Marshall, JJ., dissenting, on the ground that a defendant cannot voluntarily be executed under a possibly unconstitutional statute).

death penalty as in compliance with all state and federal constitutional requirements.[21] The *Furman* decision, however, forced the state supreme court to reconsider and, consequently, the Indiana death penalty was invalidated.[22]

The Indiana legislature quickly responded with enactment of a mandatory death penalty.[23] This mandatory statute was thought to have corrected the eighth amendment-*Furman* defect of unguided sentencing discretion. The United States Supreme Court subsequently held to the contrary in *Woodson v. North Carolina*[24] and *Roberts v. Louisiana*.[25] As a result, the state supreme court invalidated the Indiana mandatory death penalty statute.[26]

The Indiana legislature again responded to the challenge and adopted a death penalty statute[27] modeled after the statutes upheld in the *Furman* progeny of *Gregg v. Georgia*,[28] *Proffitt v. Florida*,[29] and *Jurek v. Texas*.[30] The Indiana statute, however, is not identical to any of the statutes then under review by the Supreme Court. In fact, there exist two critical deficiencies in the Indiana death penalty statute.

The first and foremost defect is that the statutory scheme grants to individual prosecuting attorneys an unconstitutional degree of discretion. The statutory scheme therefore permits an Indiana prosecutor to exert impermissible burdens upon a defendant's fifth amendment right not to plead guilty, and his sixth amendment right to a jury trial. In other words, the Indiana statute contains a *Jackson* defect.[31]

The second infirmity of the statute is its failure to provide meaningful appellate review of the death sentences actually imposed in Indiana trial courts. This deficiency of the Indiana statutory scheme centers on the eighth and fourteenth amendment issues derived from *Furman* and its progeny.

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21. Adams v. State, 259 Ind. 64, 271 N.E.2d 425 (1971).
22. Adams v. State, 259 Ind. 164, 284 N.E.2d 757 (1972).
23. 1973 Ind. Acts, Pub. L. No. 328, § 1 (repealed 1976).
24. 428 U.S. 280 (1976).
25. 428 U.S. 325 (1976).
26. French v. State, 266 Ind. 276, 362 N.E.2d 834 (1977).
27. IND. CODE § 35-50-2-9 (Supp. 1979).
28. 428 U.S. 153 (1976).
29. 428 U.S. 242 (1976).
30. 428 U.S. 262 (1976).
31. 390 U.S. 570 (1968). *See* notes 149-77 *infra* and accompanying text.

Considered separately, each of these defects provides ample basis for holding the statutory scheme unconstitutional. Considered together, the practical effect of the statutory scheme, "rather than resulting in the selection of 'extreme' cases for [the] punishment [of death], actually sanction(s) an arbitrary selection. . . . In other words, our procedure [is] not constructed to guard against the totally capricious selection of criminals for the punishment of death."[32]

The purpose of this note is to point out the two major statutory defects of the Indiana death sentence: prosecutorial discretion and standardless appellate review. To achieve this, it is necessary to analyze the major death penalty cases of recent years.[33] It is also essential to compare the Indiana statute with other statutory schemes; more particularly, the Indiana death penalty as compared to the statutes upheld and those struck down by the Supreme Court. Finally, recommendations will be made as to how to correct the defects inherent in the statutory scheme of the Indiana death penalty.

FURMAN AND THE STATES' RESPONSE

The eighth amendment prohibition against cruel and unusual punishment applies to the states through the fourteenth amendment.[34] The United States Supreme Court, however, has never precisely defined what constitutes cruel and unusual punishment.[35] In-

32. Furman v. Georgia, 408 U.S. at 295 (Brennan, J., concurring).

33. Lockett v. Ohio, 438 U.S. 586 (1978); Roberts v. Louisiana, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); McGautha v. California, 402 U.S. 183 (1971); United States v. Jackson, 390 U.S. 570 (1968). The purpose of this note is an analysis of the constitutionality of the Indiana death penalty, and not an evolutionary analysis of constitutional thought concerning capital punishment. Therefore, the cases cited above will not be considered in chronological order. For example, *Jackson* is a major case decided in 1968, but it will be the last case discussed. *See* notes 149-77 *infra* and accompanying text. Although an evolutionary analysis would be insightful, it does not comport with the format of this note.

34. Robinson v. California, 370 U.S. 660 (1962). *Compare* Louisiana *ex rel.* Francis v. Resweler, 329 U.S. 459 (1947) (in which it was assumed, but not specifically stated by eight justices that the eighth amendment applied to the states) *with In re* Kemmler, 136 U.S. 436 (1890) (in which Chief Justice Fuller states for the Court: "It is not contended, as it could not be, that the eighth amendment was intended to apply to the states. . . ." *Id.* at 446).

35. *See, e.g.*, Trop v. Dulles, 356 U.S. 86 (1958), in which Chief Justice Warren stated for the majority that "[t]he exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court." *Id.* at 99.

deed, until *Furman*, the Supreme Court had adjudged only three punishments to be in violation of the eighth amendment prohibition.[36] Of these three instances, the most succinct test advanced by the Court was to apply "evolving standards of decency that mark the progress of a maturing society."[37] But this vague standard proved unworkable, and only two of the concurring justices in *Furman* utilized it in holding the death sentence unconstitutional.[38] Significantly, both of these justices were the only members of the Court to conclude that the substantive nature and the historically arbitrary application of the death penalty made it unconstitutional in *all* circumstances. Moreover, both justices have consistantly held this position throughout post-*Furman* litigation.[39]

The opinions of the remaining three concurring justices did not extend so far as to invoke an analysis of the contemporary standards of decency. Rather, Justices Douglas, Stewart, and White looked to the procedures utilized by the states in their respective applications of death sentences.[40] The controlling opinions objected to the unbridled discretion of judges and juries to inflict death as a penal

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36. *See* Weems v. United States, 217 U.S. 349 (1910) (sentence of fifteen years at hard labor and to be restrained for the duration by chains for the crime of falsifying a public record constituted cruel and unusual punishment); Trop v. Dulles, 356 U.S. 86 (1958) (expatriation for wartime desertion constituted cruel punishment); Robinson v. California, 370 U.S. 660 (1962) (imprisonment for narcotic addiction was cruel and unusual). *See also* Rummel v. Estelle, 445 U.S. 263 (1980) (Court held 5-4 that life sentence under habitual offender act was not cruel and unusual punishment for three unrelated convictions totaling $229.11).

37. Trop v. Dulles, 356 U.S. at 101. It is important to note that an "evolving standard of decency" analysis involves four corollaries: First, there are certain punishments that a civilized citizenry does not tolerate because of the physical pain involved, *e.g.*, burning at the stake or public dissection, O'Neil v. Vermont, 144 U.S. 323 (1892); second, a punishment that was simply unknown prior to the adoption of the Bill of Rights should be construed as unusual, Furman v. Georgia, 408 U.S. at 332 (Marshall, J., concurring) (dicta); third, an excessive punishment that serves no valid legislative purpose, Weems v. United States, 217 U.S. 349 (1910), *see also* note 36 *supra*; and finally, a punishment that public sentiment condemns even though it is not excessive and it serves a valid legislative purpose, *see, e.g.*, Furman v. Georgia, 408 U.S. at 332 (Marshall, J., concurring) (dicta).

38. Furman v. Georgia, 408 U.S. at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring). Significantly, the dissenting justices, Blackmun, Burger, Powell, and Rehnquist, applied the "evolving standards of decency" test and arrived at the opposite conclusion, *i.e.*, that the death penalty is a constitutional punishment, and that it was constitutional as imposed in *Furman*.

39. *See, e.g.*, dissents of Brennan and Marshall in Lenhard v. Wolff, 444 U.S. 807, *rehearing den.*, 444 U.S. 1301 (1979); Gilmore v. Utah, 429 U.S. 1056 (1977); Gilmore v. Utah, 429 U.S. 1012 (1976).

40. *See* note 13 *supra*.

sanction, rather than a substantive objection to death as a punishment. What the swing justices found cruel and unusual, was not the nature of capital punishment, but the capricious and discriminatory application of the penalty.[41]

The controlling opinions were essentially derived from a procedural analysis of sentencing systems. Nevertheless, in the separate concurring opinions one is hard pressed to find any practical suggestions as to how a state could permissably inflict death as a criminal punishment.[42] A fairly accurate conclusion, however, is that to satisfy the eighth amendment the states must develop limits on discretion which assure that death sentences are not imposed arbitrarily.[43]

Although *Furman* settled very little constitutional doctrine, the import of the decision was the plurality's condemnation of the capricious and discriminatory application of capital punishment. Sentencing discretion in the trial court, by judge or jury, was perceived as the evil to be eliminated. Thus it was interpreted by state legislatures that there were three avenues of response.[44] First, the states could simply abolish capital punishment.[45] Secondly, sentencing discretion could be completely eliminated through the enactment of mandatory death penalty statutes: that is, upon conviction an automatic sentence of death is imposed.[46]

The third alternative was the adoption of a statutory scheme with guidelines intended to structure and reduce sentencing discre-

41. Tao, *Beyond* Furman v. Georgia: *The Need for a Morally Based Decision on Capital Punishment*, 51 NOTRE DAME LAW. 722 (1976).

42. *See, e.g.*, Furman v. Georgia, 408 U.S. at 257, where Justice Douglas concludes his opinion by stating that "[w]hether a mandatory death penalty would otherwise be constitutional is a question I do not reach." *See also id.* at 310, in which Justice Stewart states: "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *See also id.* at 314, Justice White stating: "In my judgement what was done in these cases violated the Eighth Amendment."

43. Note, *Discretion and the Constitutionality of the New Death Penalty Statute*, 87 HARV. L. REV. 1690 (1974).

44. England, *Capital Punishment in the Light of Constitutional Evolution: An Analysis of Distinctions Between Furman and Gregg*, 52 NOTRE DAME LAW. 596 (1977).

45. *Id.* Significantly, none of the states followed this route. Nine states had abolished capital punishment before *Furman*. These states were: Alabama in 1957; Hawaii in 1957; Iowa, 1965; Maine, 1887; Michigan, 1847; Minnesota, 1911; Oregon, 1964; West Virginia, 1965; and Wisconsin, 1853.

46. Indiana chose this route. *See* 1973 Ind. Acts, Pub. L. No. 328, § 1 (repealed 1976).

tion.[47] Basically the guidelines consist of a legislatively defined list of aggravating and mitigating circumstances weighed against each other. Death may be imposed if the conclusion of the sentencing authority is that the aggravating circumstances outweigh any mitigating circumstances.

The states that adopted mandatory death penalty schemes merely repeated history. Mandatory death sentences were common practice amongst the states at the time the eighth amendment was adopted in 1791.[48] Death was the automatic punishment for crimes such as murder, rape, robbery, burglary, and sodomy.[49] Yet, in consideration of circumstances of the offense and characteristics of the defendant, many juries revolted against such harsh penal sanctions by a refusal to convict.[50] Gradually the states responded by first narrowing the category of crimes to which death was a mandatory punishment. Finally, by 1963 all of the states had replaced mandatory death statutes with discretionary schemes.[51] Indiana replaced its mandatory death penalty with a discretionary statutory scheme in 1941.[52]

The Supreme Court has on several occasions commented favorably on this trend by the states to abandon mandatory death statutes. As early as 1899, the Court stated that the "hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a capital conviction, have induced American legislatures, in modern times, to allow some cases of murder to be punished by imprisonment, instead of by death."[53] Still later, the Court noted that "[t]his whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions. . . ."[54]

Dissenting in *Furman*, Chief Justice Burger foresaw the possibility that the states may return once again to mandatory death sentences. The Chief Justice even warned "that mandatory

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47. *See* notes 80-82 *infra* and accompanying text.

48. *See* H. BEDAU, THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY 5-6, 15, 27-28 (2d ed. 1968).

49. *Id.* at 6.

50. Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 BUFFALO L. REV. 32 (1974). *See generally* Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953).

51. W. BROWN, EXECUTION IN AMERICA 7-9 (1974).

52. *Id.*

53. Winston v. United States, 172 U.S. 303, 310 (1899).

54. Williams v. New York, 337 U.S. 241, 247 (1949).

sentences of death, without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violated the Constitution."[55] Moreover, taking *Furman* as a whole, six justices,[56] while one reserved judgment,[57] indicated a belief that mandatory death sentences were unconstitutional. Yet in light of essentially clear and unambiguous dicta, and its own historical experience, the Indiana legislature adopted a mandatory death sentence.[58]

The Indiana Response to Furman

Indiana's legislative response to *Furman* was the adoption of the second available alternative: a mandatory death sentence. The statute provided that "[w]hoever perpetrates any of the [designated] acts is guilty of murder in the first degree and, on conviction, shall be put to death."[59] The acts designated to trigger an automatic death sentence were: 1) the killing of a police officer, corrections employee, or fireman acting in the line of duty; 2) killing by explosives; 3) killing while committing or attempting to commit rape, arson, robbery or burglary by a defendant who had a prior unrelated conviction of one of these felonies; 4) killing during the course of a kidnapping; 5) killing during the course of a hijacking of an airplane, bus, train, ship, or other commercial vehicle; 6) killing by a defendant lying in wait, hired to kill, or who had been serving a life sentence or who had a previous conviction for murder.[60] Thus, the Indiana legislature classified certain acts and certain characteristics of the defendant as so inherently dangerous and socially undesirable as to warrant, upon conviction, an automatic sentence of death. The statute provided for neither the consideration of any mitigating circumstances surrounding the crime, nor the recognition of any socially redeeming characteristics of an individual offender. By leaving no room for mercy, this statutory scheme was

55. 408 U.S. at 402 (Burger, C.J., Blackmun, Powell, and Rehnquist, JJ., dissenting). The Chief Justice warned: "If [a mandatory death sentence] is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition." *Id.* at 401.

56. 408 U.S. at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring); *id.* at 401 (Burger, C.J., Blackmun, Powell, and Rehnquist, JJ., dissenting); *id.* at 414 (Powell, J., dissenting).

57. 408 U.S. at 257 (Douglas, J., concurring). *See* note 42 *supra.*

58. 1973 Ind. Acts, Pub. L. No. 328, § 1 (repealed 1976).

59. *Id.* § 1(b).

60. *Id.* These acts by the defendant that triggered an automatic sentence of death essentially became the designated aggravating circumstances listed in the current statute. *See* IND. CODE § 35-50-2-9 (Supp. 1980), note 107 *infra.*

thought to correct the *Furman* evil of unbridled sentencing discretion.

The mandatory death sentence scheme adopted by Indiana was soon put to rest. In *Woodson v. North Carolina*[61] and *Roberts v. Louisiana*,[62] the United States Supreme Court struck down as violative of the eighth and fourteenth amendments mandatory death sentences imposed under schemes similar to the one adopted in Indiana.[63] In those cases, North Carolina and Louisiana argued that the eighth amendment-*Furman* evil of unchecked sentencing discretion was corrected by total elimination of all sentencing discretion. The plurality[64] rejected this argument by invoking contemporary standards of decency to "assure that the states' power to punish is 'exercised within the limits of civilized standards'."[65]

Through its analysis, the plurality looked toward society's historical aversion to automatic sentences of death.[66] The return to mandatory death sentences, which both states had rejected long ago,[67] led the majority to conclude that the eighth amendment "simply cannot tolerate the reintroduction of a practice so thoroughly discredited."[68] Therefore, North Carolina and Louisiana departed markedly from contemporary standards of decency, and mandatory death sentences were ruled to be within the prohibition of the eighth amendment.[69] In *French v. State*,[70] the Indiana Supreme

61. 428 U.S. 280 (1976).

62. 428 U.S. 325 (1976).

63. *See* Woodson v. North Carolina, 428 U.S. at 285 n.4; Roberts v. Louisiana, 428 U.S. at 329 n.3.

64. In both *Woodson* and *Roberts*, the opinion of Justice Stewart, joined by Justices Powell and Stevens, delineated the plurality's analysis. Justices Brennan and Marshall concurred but stood by their original position in *Furman* that capital punishment was unconstitutional under all circumstances.

65. Woodson v. North Carolina, 428 U.S. at 288.

66. *See* notes 48-56 *supra* and accompanying text.

67. North Carolina rejected its then existing mandatory death sentence in 1949 by adopting a discretionary scheme. Louisiana rejected mandatory death sentences in 1846. *Compare* Woodson v. North Carolina, 428 U.S. at 300, *and* Roberts v. Louisiana, 428 U.S. at 336, *with* 1973 Ind. Acts, Pub. L. No. 328, § 1 (repealed 1976).

68. Roberts v. Louisiana, 428 U.S. at 326.

69. In *Woodson*, the plurality noted that a possible exception was the mandatory infliction of death upon a life-term prisoner who subsequently committed murder. In *Roberts*, the plurality again noted that a murder committed by a prisoner serving a life sentence presented a unique problem that might justify a mandatory death sentence statute. The Court has not yet had the opportunity to rule on this question.

70. 266 Ind. 276, 362 N.E.2d 834 (1977).

Court followed suit and accordingly struck down the Indiana mandatory death sentence.

To summarize, *Furman v. Georgia*[71] struck down the death penalty statutes then under review on the ground that there existed too much sentencing discretion. *Woodson v. North Carolina*[72] and *Roberts v. Louisiana*[73] invalidated mandatory death sentences on the ground that such statutory schemes eliminated too much sentencing discretion. Thus, the Court had drawn the lines: too much discretion in the hands of sentencing authorities was impermissible, and not enough discretion was equally impermissible. Moreover, the *Jackson* Court ruled that statutory schemes could not be structured so as to place impermissible burdens upon a defendant's fifth and sixth amendment rights.[74]

Still, the Court had not provided any clear guidelines as to how a state could constitutionally impose a sentence of death. The guiding principle was simply that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death."[75] Hence, the third alternative, that is, a death penalty with standards to guide and regularize the penalty decision was the next logical

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71. 408 U.S. 238 (1972). *See* notes 34-58 *supra* and accompanying text. *Furman* struck down discretionary death penalty statutes under the eighth amendment. McGautha v. California, 402 U.S. 183 (1971), upheld an almost identical statute under a due process challenge under the fourteenth amendment. But another distinguishing factor of *McGautha* was that it involved a unitary trial procedure. The petitioner alleged that such a procedure put him in the irreconcilable position of either incriminating himself during the trial, or waiving his opportunity to submit evidence of mitigating circumstances in an attempt to avoid a death sentence. Otherwise, *McGautha* and *Furman* are indistinguishable. *But see* Gregg v. Georgia, 428 U.S. at 196 n.47: "*McGautha* was not an Eighth Amendment decision, and to the extent it purported to deal with Eighth Amendment concerns, it must be read in light of the opinions in *Furman v. Georgia*. While *Furman* did not overrule *McGautha*, it is clearly in substantial tension with a broad reading of *McGautha's* holding." *See also* Comment, *Resurrection of Capital Punishment—The 1976 Death Penalty Cases*, 81 DICK. L. REV. 543 (1977), in which the writer suggests that the failure of the *Furman* Court to overrule *McGautha*, a case decided the previous year, was due to the Court's traditional allegiance to the doctrine of *stare decisis*.

72. *See* notes 61-69 *supra* and accompanying text.

73. *See* notes 62-69 *supra* and accompanying text.

74. *See* notes 3-5 *supra* and notes 148-76 *infra* and accompanying text. The fifth and sixth amendments are quoted in notes 4 and 5 *supra*.

75. Woodson v. North Carolina, 428 U.S. at 304.

step for Indiana,[76] as well as all other jurisdictions that sought the retention of capital punishment.

Supreme Court Upholds Death Penalty Statutes with Guidelines

On the same day of the *Roberts* and *Woodson* decisions, the Supreme Court upheld the statutory schemes of Georgia,[77] Florida,[78] and Texas.[79] In those cases, the death penalty statutes were quite similar.

Texas had narrowed the category of murders for which the death penalty was an available sentencing option.[80] The Florida[81] and Georgia[82] schemes provided for a determination based on aggravating or mitigating circumstances. In those states, if the sentencing authority finds the existence of an enumerated aggravating circumstance, it is then required to weigh against that circumstance, any mitigating circumstances brought out in the penalty phase of the trial. As in Texas, the Florida and Georgia schemes provide death as an available sentencing option if upon the specific finding of the sentencing authority the existence of any aggravating circumstances outweigh the mitigating circumstances. Thus, although the schemes of Georgia and Florida are essentially different from that of Texas, each serves much the same purpose in that all three statutes require the "sentencing authority to focus on the particularized nature of the crime."[83]

The Court also favorably emphasized that the death penalty statutes of all three states held two other aspects in common. First, each state made provisions for a bifurcated trial.[84] That is, the statutes require two phases of a trial: a guilt phase and a penalty phase. In the guilt phase, the only matter to be considered by the jury is the guilt or innocence of the defendant. The defendant is accorded all constitutional protections: the most important of which is his fifth amendment protection against self-incrimination.[85]

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76. *See* notes 80-82 and 107 *infra*.
77. Gregg v. Georgia, 428 U.S. 153 (1976).
78. Proffitt v. Florida, 428 U.S. 242 (1976).
79. Jurek v. Texas, 428 U.S. 262 (1976).
80. *Id.* at 265 n.1. The current law in Texas is substantially similar. *See* TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974).
81. *See* Proffitt v. Florida, 428 U.S. at 248 n.6.
82. *See* Gregg v. Georgia, 428 U.S. at 165 n.9.
83. Jurek v. Texas, 428 U.S. at 271.
84. *See* notes 80-82 *supra*.
85. *See* note 4 *supra*. *See also* note 71 *supra*.

Upon a finding of guilt, the court reconvenes for the penalty phase. At this stage all information relevant to punishment is admissible. Thus, among other things, a defendant can now take the stand and offer evidence of mitigating circumstances. Through this tactic the defendant necessarily implies his guilt of the original charge and, of course, he is eventually subjected to cross-examination. Therefore, a bifurcated proceeding allows a defendant to fully utilize his fifth amendment right to not incriminate himself during the guilt phase, and yet it further allows him to submit during the penalty phase mitigating evidence in an attempt to avoid a death sentence.

A bifurcated proceeding therefore allows the trial court to admit important information relevant to the aggravating and mitigating circumstances of the particular offense.[86] After all evidence has been admitted, the jury deliberates on the sole issue of punishment. During deliberation, the sentencing authority is referred to the guidance provided by statute.[87] If a sentence of death is subsequently handed down, it is presumably based upon a rationally guided decision.

The second common denominator of the death penalty schemes adopted by Georgia, Texas, and Florida involved the appeals process. All three statutes provide for automatic and expedient appeal

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86. In the penalty phase, all three states relax the rules of evidence. That is, all evidence relevant to the penalty to be imposed is admissible. *Compare* GA. CODE ANN. § 27-2503(a) (1978) *with* 1970 Ga. Laws, at 949, 950, *as amended by* 1971 Ga. Laws, at 902; 1973 Ga. Laws, at 159, 161 (current version deletes: "subject to the laws of evidence"). *See also* Brown v. State, 235 Ga. 644, ____, 220 S.E.2d 922, 925-26 (1975).

87. Sentencing authority refers to the entity that has the authority to ultimately determine the sentence to be imposed.

In Florida, the jury assumes an advisory role. FLA. STAT. ANN. § 921.141(2) (West Supp. 1980). The trial judge is not required to follow the jury's recommendation, provided that if the judge decides to impose death, he or she must submit a written justification for the decision. *Id.* § (3). Thus, the judge is the sentencing authority.

In Georgia, the jury deliberates to essentially determine the sentence. *See* GA. CODE ANN. § 26-3102 (1978). If the jury recommends death, the trial court is required to impose a death sentence. *Id.* If a case is tried before the court, the trial judge is required to utilize the same guidelines as would a jury. *Id.*

A Texas jury assumes a role similar to that in Georgia. In Texas, a jury must answer in the affirmative three specific questions. TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1980). *See also* note 101 *infra* and accompanying text. For death to be imposed, the jury must unanimously answer 'yes' to all three questions. *Id.* § (d). If the jury answers 'no' to any of the three questions, then a sentence of life imprisonment is imposed. *Id.* § (e). Moreover, the jury can answer 'no' only if ten of twelve members agree. *Id.* It is unclear what happens if the jury cannot agree on an answer to the questions.

to the respective supreme courts.[88] At this point, however, the procedures of review provided in each state diverge and take on different shapes. Nevertheless, the end result is construed by the Supreme Court to amount to meaningful appellate review.

The Georgia statute requires the state supreme court to respond to three areas of concern. First, the court is to determine whether the death sentence was "imposed under the influence of passion, prejudice, or any other arbitrary factor. . . ."[89] Secondly, the court must find the aggravating circumstance is supported by the evidence.[90] Finally, the Georgia Supreme Court must decide whether the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. . . ."[91]

The Georgia court is required to consider several sources of information. Relevant information is derived from the trial court record and a detailed questionnaire submitted by the trial judge.[92] Furthermore, statistics are derived from comparative data accumulated specifically by the newly created post of assistant to the supreme court.[93] Moreover, in its decision to affirm a death sentence the Georgia Supreme Court is required to make reference to similar cases it had recently considered.[94]

Utilizing these legislatively established appellate review procedures, the Georgia Supreme Court has on several occasions set aside death sentences. The most prevalent reason to vacate a death sentence was because it was excessive or disproportionate in comparison to sentences imposed in a significant number of factually similar cases.[95] In considering all of these procedures, the United States Supreme Court concluded that Georgia now provides "the further safeguard of meaningful appellate review [to] ensure that

88. GA. CODE ANN. § 27-2537 (1978); TEX. CODE CRIM. PROC. ANN. art. 37.071(f) (Vernon Supp. 1980); FLA. STAT. ANN. § 921.141(4) (West Supp. 1980).

89. Gregg v. Georgia, 428 U.S. at 204. *See also* GA. CODE ANN. § 27-2537(c)(1) (1978).

90. GA. CODE ANN. § 27-2537(c)(2) (1978).

91. *Id.* § (c)(3).

92. *Id.* § (a).

93. *Id.* §§ (f)-(h).

94. *Id.* § (e).

95. *See, e.g.*, Dorsey v. State, 236 Ga. 591, 225 S.E.2d 418 (1976); Jarrell v. State, 234 Ga. 410, 216 S.E.2d 258 (1975); Moore v. State, 233 Ga. 861, 213 S.E.2d 829 (1975); Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974); Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974).

death sentences are not imposed capriciously or in a freakish manner."[96]

In contrast, Florida[97] and Texas[98] did not incorporate as comprehensive an appellate review process as did Georgia.[99] However, the Court emphasized that the statutes of both Florida and Texas require the respective sentencing authorities to submit into the trial record written findings of fact concerning the existence of aggravating and mitigating circumstances.

In Florida, if death is imposed as a sanction, the trial judge must make a written justification for his decision.[100] In Texas, the jury must unanimously answer in the affirmative three questions: 1) whether the defendant intended to kill the victim; 2) whether there is a probability that the defendant would act violently in the future; and 3) whether the defendant's conduct was an unreasonable response to any provocation by the victim.[101] The Court noted that the appellate courts of both Florida[102] and Texas[103] have therefore properly assumed their role as an independent judge of the appropriateness of a particular death sentence, and as the ultimate supervisor over its administration.[104]

In summary, a majority of the Court explicitly held for the first time that capital punishment is not cruel and unusual per se. How-

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96. Gregg v. Georgia, 428 U.S. at 195.

97. *See* note 81 *supra.*

98. *See* note 80 *supra.*

99. *See* notes 87-96 *supra* and accompanying text.

100. *See* note 87 *supra.*

101. *Id. But see* Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. U.L. REV. 1 (1976). The writer argues that the first question answered by the jury inquires about the actual holding that the defendant had committed first degree murder. The third question concerning the element of mental reflection by the defendant has already been answered in the negative by the jury with its finding of first degree murder, instead of murder without malice or manslaughter. Thus, the second question is the only one about which the jury decides matters it had not already considered. The author also suggests that appellate review in Texas, unlike the review in Florida and Georgia, merely consists of an ordinary search for error. *Id.*

102. *See, e.g.*, Messer v. State, 330 So. 2d 137 (Fla. 1976); Thompson v. State, 328 So. 2d 1 (Fla. 1976).

103. *See, e.g.*, Jurek v. State, 522 S.W.2d 934 (Tex. Crim. App. 1975).

104. *See* Rockwell v. Ventura Superior Court, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976). *See also* Palmer, *Two Perspectives on Structuring Discretion: Justices Stewart and White on the Death Penalty*, 70 J. CRIM. L. & C. 194 (1979) (majority finally adopted Stewart's view that in death penalty cases, appellate courts must occupy a policy-making and supervisory role); England, note 44 *supra* ("the judicial obligation of supervision was adopted in Gregg v. Georgia").

ever, the eighth and fourteenth amendments can only tolerate death penalty statutory schemes that direct the sentencing authority's attention to the circumstances of the offense and the particular characteristics of the offender. This goal must be achieved by lending specific guidance and direction to the sentencing authority's discretion by the utilization of statutorily defined guidelines or, by narrowing the categories of murder to which the death penalty may be applied. Moreover, to be valid, a statute must provide as an available alternative a sentence less severe than that of death.

The Court did not require but did endorse a bifurcated proceeding in which the penalty to be applied is considered after the issue of guilt has been settled. Finally and most importantly, the Court placed great emphasis on the procedures adopted by state courts to ensure meaningful appellate review over the infliction of the ultimate penalty. As will be seen in later decisions,[105] the emphasis placed by the Court upon meaningful appellate review subsequently achieves constitutional significance through the due process clause of the fourteenth amendment.

THE INDIANA LEGISLATIVE RESPONSE

The Indiana legislature quickly drew the valid conclusions enunciated in the *Furman* progeny.[106] Enactment of the current Indiana death penalty statute occurred in 1977.[107] Although the statute

105. *See* note 118 *infra*.

106. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 280 (1976).

107. IND. CODE § 35-50-2-9 (Supp. 1980):

> (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b) of this section. In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.
>
> (b) The aggravating circumstances are as follows:
>
> (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.
>
> (2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.
>
> (3) The defendant committed the murder by lying in wait.
>
> (4) The defendant who committed the murder was hired to kill.
>
> (5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c) of this section.

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after

is a hybrid of the three statutes reviewed and upheld by the United States Supreme Court,[108] it is essentially modeled after the Florida statute.[109]

A comparison of the Indiana capital punishment statute with those of Florida, Georgia and Texas reveals important similarities, and some rather ominous defects. The three major points held in common by all four statutes are: 1) each lists the generally accepted aggravating and mitigating circumstances by which the judge or jury is directed to utilize in its consideration of the appropriate punishment to be inflicted;[110] 2) each state adopts a bifurcated proceeding in which evidence and arguments relevant to punishment are submitted only after the issue of guilt has been settled;[111] and 3) each statute provides automatic and expedient appellate court review of every death sentence imposed.[112] Thus, on its face, the Indiana statutory scheme appears to have adopted the major provisions of death penalty schemes upheld by the Supreme Court.

However, closer scrutiny reveals two major defects in the Indiana death sentence. These flaws occur at the beginning and at the end of the statutory scheme. Indeed, one occurs at the start of Indiana's criminal justice system, and one occurs at the stage of final adjudication.

The first defect is revealed in the opening sentence of the

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reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review.

108. *See* notes 80-82 *supra* and accompanying text.

109. *See* note 81 *supra*. The Florida statute in turn is substantially patterned after the MODEL PENAL CODE § 210.6 (Proposed Official Draft, 1962).

110. *Compare* note 107 *supra with* FLA. STAT. ANN. § 921.141(5) (West Supp. 1980) *and* GA. CODE ANN. § 27-2534.1(b)(1)-(10) (1978).

111. *Compare* IND. CODE § 35-50-2-9, note 107 *supra with* statutes cited in notes 80-82 *supra*.

112. *Compare* IND. CODE § 35-50-2-9, note 107 *supra with* statutes cited in note 88 *supra*.

statute: "The state *may* seek a death sentence for murder. . . ."[113] The second defect concerns the lack of definitive procedures employed by the Indiana judicial system in fulfillment of its mandated role as supervisor over the administration of the death sentence. It is submitted that both statutory defects are of constitutional significance.

THE LACK OF MEANINGFUL APPELLATE REVIEW

The United States Supreme Court endorsed appellate review procedures adopted by Florida,[114] Georgia,[115] and Texas.[116] Through its endorsement the Court implied that the proper role of the judiciary in its review of death sentences is to supervise and independently ensure the uniform and even-handed application of the penalty.[117] Moreover, this implicit mandate of judicial supervision and independent evaluation was soon made explicit in subsequent cases.[118] An examination of the Indiana statute reveals no such safeguard as meaningful appellate review.

At the Trial Level

In the penalty phase of the Indiana bifurcated proceeding, the jury is required to utilize in its deliberation the statutorily defined list of aggravating circumstances. The jury may recommend a death sentence only if it finds beyond a reasonable doubt the existence of one of the aggravating circumstances alleged, and that any existing

113. IND. CODE § 35-50-2-9(a) note 107 *supra* (emphasis added).

114. *See* Proffitt v. Florida, 428 U.S. 242 (1976).

115. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

116. *See* Jurek v. Texas, 428 U.S. 262 (1976).

117. *See* note 104 *supra* and accompanying text.

118. Presnell v. Georgia, 439 U.S. 14 (1978) (vacated death sentence because it was imposed upon the existence of an aggravating circumstance found in the trial record by the Georgia Supreme Court, but about which the jury neither had been instructed, nor had the jury specifically designated it in writing as required); Lockett v. Ohio, 438 U.S. 586 (1978) (held invalid Ohio death penalty because the listed mitigating circumstances were not broad enough to allow the sentencing authority to consider *all* relevant evidence of mitigating circumstances submitted to the jury); Coker v. Georgia, 433 U.S. 584 (1977) (vacated death sentence for rape conviction on grounds that death was excessive and disproportionate of a penalty considering no life was taken by defendant); Gardner v. Florida, 430 U.S. 349 (1977) (vacated and remanded death sentence because trial court did not fully divulge to defense counsel, *or* place into the record for the benefit of the Florida Supreme Court review, the contents of a confidential presentence report) (Marshall and Brennan strongly dissented suggesting the Florida judiciary had betrayed the trust and confidence relied upon by the plurality in Proffitt v. Florida, 428 U.S. 242 (1976)).

mitigating circumstances do not outweigh the aggravating circumstances.[119] Unlike the sentencing authorities of Florida[120] and Georgia,[121] an Indiana jury is not required to submit a written justification for its decision to recommend death. Unlike a Texas jury,[122] an Indiana jury is not required to answer three specific questions concerning the elements of the offense and the characteristics of the offender.

Thus, upon review the Indiana Supreme Court is deprived of a trial record that clearly and specifically states the reasoning behind the decision to impose the death sentence. The court can never truly be sure that the judge or jury took into consideration only the statutorily defined aggravating circumstances rather than some other capricious or impermissible circumstance, such as the race or social position of the defendant.[123] Furthermore, without the requirement of a written justification, the trial record will not show what weight was given any existing mitigating circumstance and why the aggravating circumstance outweighed the mitigating.

In addition, the statutes of Georgia, Florida, and Texas have an extra safeguard in the form of an automatic commutation clause. In those states, if the judge or jury fails to comply with the statutory requirements of clear justification of its decision to impose death, an

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119. IND. CODE § 35-50-2-9(e)(1)-(2), note 107 *supra*.

120. *See* note 87 *supra* and accompanying text.

121. *Id.*

122. *Id.*

123. *See* Indianapolis Star, March 8, 1980, at 20, col. 1. Steven Judy was convicted on February 2, 1980 of killing a woman and her three children. After a one-half hour deliberation, the jury recommended a sentence of death. At a reunion of juror members, the ex-jury foreman stated that: "Some jurors might have recommended lengthy consecutive prison sentences for the murders . . . had not Judy taunted them with his threats (that they may be his next victims if he did not receive the death penalty). . . . I already had my mind made up, but it helped me to come across with a vote for the death penalty. It swayed a couple of others."

The ex-jury foreman further stated: "Normally, a person who could do a thing like that would have to be insane. . . . But the pictures taken by police as evidence made us all sick. He was so proud of his hundreds of past crimes . . . like he conquered all those women and he knew all the number of the types of crimes he admitted . . . so we knew he was not ignorant of what he had done. I think he was just a damn mean kid."

The above quotes reflect one juror's consideration of at least two mitigating circumstances, *i.e.*, IND. CODE § 35-50-2-9(c)(2), note 107 *supra* (the defendant's mental or emotional disturbance), and IND. CODE § 35-50-2-9(c)(3), note 107 *supra* (defendant's ability to conform his conduct to the law). But more importantly, not one of the aggravating circumstances considered by the person above comes close to an aggravating circumstance defined or permitted by the statute.

automatic life sentence is imposed.[124] Since in Indiana the judge or jury is not required to either submit a written justification, or to answer specific questions, no comparable safeguard exists.

Furthermore, in its decision to impose either imprisonment or a death sentence, the Indiana jury occupies only an advisory role. The trial court is not bound by the jury's sentencing recommendation.[125] Thus, it appears that a jury could, in a given case, recommend a sentence of imprisonment and the trial judge could wholly disregard the recommendation and, on his own authority impose a sentence of death. The statute does not require the trial judge to justify this decision.

As noted by the Supreme Court, this shortcoming of the Indiana statute is of constitutional significance. In *Woodson v. North Carolina*, the plurality stated:

> A separate deficiency of North Carolina's mandatory death sentence statute is its failure to provide a constitutionally tolerable response to *Furman* . . . [T]here is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of [the] power [to impose the ultimate punishment] through a review of the death sentence . . . [The North Carolina procedure, therefore,] does not fulfill *Furman's* basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, *and make rationally reviewable the process for imposing a sentence of death.*[126]

Similarly, the Court condemned the Louisiana statute for its lack of a procedure which "permits review to check the arbitrary exercise of the capital jury's de facto sentencing discretion."[127] Consequently, the Court concluded that in North Carolina and Louisiana "there is no meaningful appellate review of the jury's decision."[128]

Admittedly, Indiana included within its death statute a list of the generally accepted aggravating and mitigating circumstances.[129]

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124. FLA. STAT. ANN. § 921.141(3)(b) (West Supp. 1980); TEX. CODE CRIM. PROC. ANN. arts. 37.071(a), (e) (Vernon Supp. 1980); GA. CODE ANN. § 27-2534.1(c) (1978).

125. IND. CODE § 35-50-2-9(e), note 107 *supra*.

126. 428 U.S. at 302-03 (separate concurring opinions of Stewart, J., joined by Powell and Stevens, JJ.) (emphasis added).

127. Roberts v. Louisiana, 428 U.S. at 335; *see* notes 61-76 *supra* and accompanying text.

128. Roberts v. Louisiana, 428 U.S. at 336.

129. IND. CODE § 35-50-2-9(b)(1)-(9), note 107 *supra*.

The trial judge and jury are required by statute to utilize these objective standards in their consideration of the appropriate punishment to be imposed.[130] But the statute gives no guidance as to how these standards are to be used, or how each is to be weighed against the other. Furthermore, the statute does not provide any procedure as to how the trial court should record this decision-making process. Thus, it is evident the Indiana statutory scheme neither adopts nor requires the procedures necessary to create at the trial level a clear and specific record upon which the state supreme court can base a rational review. The end result is the promulgation of a decision-making system of imposing death that provides "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[131] This deficiency of the Indiana death sentence renders it constitutionally infirm under the eighth and fourteenth amendments.

Review in the Indiana Supreme Court: The Need for a Comparative Analysis between Factually Similar Cases

In its decision to uphold the validity of the death penalty in Georgia, Florida, and Texas, the United States Supreme Court emphasized the appellate review procedures adopted by the courts of those states.[132] In substance, however, each state adopted different procedures.[133] As noted earlier, the appellate procedures of Georgia are far more comprehensive than its counterparts in Florida and Texas.[134]

Nevertheless, the supreme courts of Florida and Texas assumed a similar role as the Georgia court. The Supreme Court favorably noted that all three state courts have not hesitated to vacate a death sentence when each court had independently determined that the sentence should not have been imposed.[135] In each state, the decision to vacate a death sentence is essentially derived from a comparative analysis between cases to ensure that "the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case."[136] With the adoption of these procedures the Court con-

130. *Id.* §§ (e)(1), (2).
131. Furman v. Georgia, 408 U.S. at 313 (White, J., concurring).
132. *See* notes 77-105 *supra* and accompanying text.
133. *Id.*
134. *Id.*
135. *See* notes 95-103 *supra* and accompanying text.
136. Proffitt v. Florida, 428 U.S. at 253.

cluded that all three states provide meaningful appellate review of each death sentence imposed.

Previous case law and the Indiana death penalty statute do not state exactly what procedures the Indiana Supreme Court has adopted to ensure meaningful appellate review. The statute provides for two rather vague guarantees: automatic and expedient review by the Indiana Supreme Court.[137] With regard to case law, the court has yet to decide the appropriateness of a death sentence imposed under the current statute.[138]

This void in the statute and Indiana case law is significant. Unlike Georgia, Indiana does not statutorily provide for an elaborate and extensive information-gathering system upon which the supreme court can base a rational comparison of factually similar

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137. IND. CODE § 35-50-2-9(h), note 107 *supra*.

138. In State v. McCormick, ___ Ind. ___, 397 N.E.2d 276 (1979), the court held the application of subsection (b)(8) of the death penalty violated the due process rights of the defendant. Significantly, this case involved an interlocutory appeal of the trial court's dismissal of the state's request for the death penalty. The defendant had neither been convicted of murder, nor had a death sentence been imposed.

The facts of the case are important. The defendant was indicted for murder and incarcerated awaiting trial. While in jail, the defendant allegedly killed a fellow inmate. Based upon the stronger evidence available in the jail homicide, the state went to trial requesting the death penalty alleging as an aggravating circumstance that: "The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder." IND. CODE § 35-50-2-9(b)(8), note 107 *supra*. A majority of the supreme court affirmed the trial court's reasoning that this situation violated the defendant's right to due process because it:

> [A]llows the State to secure a conviction on a strong murder case, then seek the death penalty by proving a weak case before a jury which is undeniably prejudiced. This opens the door to death penalty recommendations upon a level of proof lower than proof beyond a reasonable doubt.

State v. McCormick, ___ Ind. at ___, 397 N.E.2d at 280.

Judge DeBruler, a staunch opponent of capital punishment in Indiana, dissented because the situation did not amount to a violation of due process.

To rectify the Indiana situation, Senators Duvall and O'Bannon introduced S.B. 278 to the Senate Committee on the Judiciary. The bill proposed an amendment to the Indiana death penalty to change subsection (b)(8) to read:

> (b) The aggravating circumstances are as follows:
>
> . . . .
>
> (8) The defendant has committed more than one (1) murder in a single course of events, and was charged with at least two (2) of these murders in the charging instrument. However, this aggravating circumstance shall be dismissed if the defendant is not convicted of more than one (1) murder in the trial.

This proposed amendment, however, never passed the committee. *See* INDIANA JUDICIAL CENTER, LEGISLATIVE BULLETIN at 84 (1980).

cases. Moreover, unlike Florida or Texas, the Indiana Supreme Court has not on its own volition adopted procedures necessary to develop a comparative analysis. Indeed, the present lack of Indiana cases dealing with the current death statute prohibits the court, at least in the immediate future, from developing any type of comparative analysis.[139] Thus, although the statute provides for automatic and expedient review, the Indiana legislature and the Indiana Supreme Court have failed to develop a system that ensures meaningful appellate review of each death sentence. Until such a system is developed, the Indiana death penalty statute cannot pass constitutional muster under the eighth and fourteenth amendments as construed in *Furman* and its progeny.

AN UNCONSTITUTIONAL AMOUNT OF DISCRETION IN THE INDIANA PROSECUTOR: THE *JACKSON* DEFECT

Discretion is a phenomenon that permeates every level of the criminal justice system.[140] Every actor within the system, from the arresting officer to the parole official, possesses some degree of discretion that can be exercised in such a way as to ameliorate the impact of law exerted upon a particular individual. Many actors exercise their discretionary powers in an informal and invisible manner.[141] Officials at higher stages in the criminal justice system, such as judges, exercise their discretionary powers in a highly formal,

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139. It is possible, of course, that the Indiana Supreme Court is at this very moment allowing death penalty cases to accumulate so that a system of comparative analysis can be developed. At the time of this writing, there are at least five men on death row at the Indiana State Prison in Michigan City, Indiana.

The last man to be sentenced to death was Stephen Judy on February 25, 1980; *see* note 123 *supra*. Judy was put to death by electrocution in the early morning hours of March 9, 1981.

Others on death row are Michael Daniels, sentenced August, 1979; James Brewer, sentenced March 1, 1978; Larry Hicks, sentenced September 1, 1978; Donald Norton, sentenced September 13, 1976; and James Bonds, sentenced February 24, 1977. Norton and Bonds were sentenced to death pursuant to IND. CODE § 35-13-4-1 (1973), which was held unconstitutional in French v. State, 266 Ind. 276, 362 N.E.2d 834 (1977). *See also* note 26 *supra* and accompanying text. Thus, it is unclear how final disposition of their cases will be handled.

140. *See generally* W. GAYLIN, PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING (1974); GOLDSTEIN AND GOLDSTEIN, CRIME, LAW AND SOCIETY (1971); E. SCHUR, RADICAL NON-INTERVENTION: RETHINKING THE DELINQUENCY PROBLEM (1973); J. SKOLNICK, JUSTICE WITHOUT TRIAL (1975).

141. *See, e.g.*, W. GAYLIN AND E. SCHUR note 140 *supra*. For example, the decision by a police officer to arrest a juvenile is often based upon such variables as race, the seriousness of the offense, the social position of the juvenile's parents, the administrative inconvenience of procedures associated with arrest, etc.

structured, and visible setting. Moreover, discretionary decisions made by these higher level officials are often subject to appellate review.[142]

It is important for prosecuting attorneys to possess a certain amount of controlled discretion. Properly exercised discretion can only aid in the administration of justice. But when the possible imposition of a death sentence is involved, all discretion must be structured and checked in order to prevent the arbitrary and capricious application of the ultimate punishment. Moreover, as stressed in *Jackson*,[143] statutory schemes involving the death penalty must be structured to prevent unnecessary burdens upon a defendant's fundamental rights.

In *Furman v. Georgia*, the United States Supreme Court invalidated death penalty statutes that permitted a judge or jury to exercise unbridled sentencing discretion.[144] Except for the sentencing stage, *Furman* did not deal with the exertion of discretion at any other level of the criminal justice system. As post-*Furman* litigation implies however, it cannot be assumed that the Court will tolerate the exercise of discretion of such magnitude as to have the same effect as the sentencing discretion condemned in *Furman*.[145]

Indiana is rather unique in the procedures necessary for a prosecutor to seek the death penalty. The Indiana penal code provides that a person convicted of murder "shall be imprisoned for a fixed term of forty years, with no more than twenty years added for aggravating circumstances or not more than ten years subtracted for mitigating circumstances. . . ."[146] However, a separate statute provides that the "state *may* seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument,

142. *See, e.g.*, IND. CODE § 34-1-47-1 (1976).

143. 390 U.S. 570 (1968); *see* notes 6 *supra* and 149-77 *infra* and accompanying text.

144. 408 U.S. 238; *see* notes 32-71 *supra* and accompanying text.

145. *See* Note, *Legislative Response to* Furman v. Georgia—*Ohio Restores the Death Penalty*, 8 AKRON L. REV. 149 (1974); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974); *see also* Wollan, *The Death Penalty after Furman*, 4 LOY. CHI. L.J. 339 (1973).

146. IND. CODE § 35-50-2-3 (Supp. 1980). The statute further provides for a fine of not more than $10,000. Murder is defined as: "A person who: (1) knowingly or intentionally kills another human being; or (2) kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery; commits murder, a felony." IND. CODE § 35-42-1-1 (Supp. 1980).

the existence of at least one of the aggravating circumstances listed. . . ."[147]

In other words, for the death penalty to be an available sentencing alternative the prosecutor must specifically request it.[148] Unless this procedure is strictly followed, death is not an available sentencing option. It is at this statutory juncture that an Indiana prosecutor possesses an unconstitutional amount of discretion. It is also at this juncture that the *Jackson* defect exists without restraint.

As stressed in *Jackson*, a defendant's right not to incriminate himself and his right to a jury trial are fundamental guarantees.[149] Neither Congress nor the states may needlessly burden or chill these fundamental rights. Based upon this premise, the Supreme Court in *United States v. Jackson*,[150] held unconstitutional the death penalty provision of the Federal Kidnapping Act.[151]

Under the Federal Kidnapping Act, a defendant could be sentenced to death only if a *jury* recommended the death penalty. Thus, a peculiar effect of the Act was that the death penalty was not an available sentencing option if a defendant pleaded guilty or waived his right to a jury trial. The Court concluded that:

> [T]he inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who chose to exercise them, then it would be patently unconstitutional. . . .
> Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . [For] the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them.[152]

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147. IND. CODE § 35-50-2-9 (a), note 107 *supra* (emphasis added).

148. For procedures incident to grand jury indictments or filing an information, see IND. CODE §§ 35-1-15-1 to -23; 35-1-17-1 to -7; and 35-3.1-1-1 to -19 (Supp. 1980).

149. The fifth and sixth amendments are set out at notes 5 and 6 *supra*.

150. 390 U.S. 570 (1968). *See* note 6 *supra* and accompanying text.

151. Act of June 25, 1948, ch. 645, § 1201, 62 Stat. 760.

152. United States v. Jackson, 390 U.S. at 581-83 (emphasis in the original).

Thus, the central issue in *Jackson* was not whether death would be imposed, but rather the statutory scheme by which death is made an available sentencing alternative.

The statutory scheme of the Indiana death penalty delegates to the prosecutor complete control over the decision to seek or not to seek a death sentence. He or she is motivated to exercise this power for several reasons. But a peculiar effect of the statutory scheme is that it allows an Indiana prosecutor to exert impermissible burdens upon a defendant's fundamental rights similar to those condemned in *Jackson*.

A frequent argument made in post-*Furman* death penalty litigation was the allegation that discretion was impermissibly exercised at every stage of the criminal justice system.[153] It has been asserted that a prosecutor has unfettered discretion to select those whom he wished to prosecute for a capital crime instead of, for example, manslaughter, and those with whom he wished to plea bargain to a lesser offense than capital murder.[154] The Court, however, rejected this argument as it "seem[ed] to be in the final analysis an indictment of our entire system of justice."[155]

In essence, then, the Court held that it would allow the exercise of prosecutorial discretion if it is based upon rational reasons, rather than capriciousness or arbitrariness. Rational reasons to not seek a death sentence are such factors as the offense alleged is not sufficiently serious to warrant the imposition of death, or because there exists an insufficiency of evidence available to convict for a capital crime.[156] Thus, the implication is that the decision to seek the death penalty cannot be based upon capriciousness or other impermissible reasons or, as in *Jackson*, in such a way as to place unnecessary burdens upon a defendant's fundamental rights.

It seems only proper that an Indiana prosecutor has the discretionary power to not seek a death sentence when the evidence is insufficient to convict for a capital crime, or the offense is not sufficiently serious to warrant the punishment of death. But it also

153. *See, e.g.*, Gregg v. Georgia, 428 U.S. at 226.

154. *Id.* The impermissible discretion argument goes even further to condemn the standardless and therefore arbitrary exercise of the executive power of the governor to pardon or commute death sentences. For the obvious reason that it is not relevant to the present discussion, this part of the argument is not included in the text.

155. Gregg v. Georgia, 408 U.S. at 226.

156. *Id.* at 225. *See* note 165 *infra* and accompanying text.

seems essential under due process principles that this prosecutorial discretion be structured, checked, and visible for judicial review.

As stated above, the statutory scheme of the Indiana death penalty gives the prosecutor complete control over the decision to seek a death sentence.[157] The scheme permits the exercise of prosecutorial discretion in an unstructured, unchecked, and invisible manner. The statute allows the prosecutor to utilize the threat of a possible death sentence as an impermissible lever against a defendant to encourage from him a waiver of his fifth amendment right not to plead guilty and to deter him from exercising his sixth amendment right to a jury trial. The statutory scheme therefore allows an Indiana prosecutor to use the threat of death in precisely the same manner condemned by the Court in *Jackson*.

It could be argued that *Jackson* condemned the provisions of a statute whereas the present discussion deals with the prosecutorial decision to utilize a statute. Although this is true, the distinction is immaterial.

In the recent case of *Lockett v. Ohio*,[158] the Supreme Court held that the Ohio death penalty statute was not in accord with the eighth and fourteenth amendments. The majority reasoned that the Ohio statute too severely limited the category of relevant mitigating circumstances to be considered and weighed against the statutorily defined aggravating circumstances.[159] Because this successful constitutional challenge required reversal of the imposed death sentence, the plurality found it unnecessary to consider further any other arguments raised by the petitioner.[160]

Justice Blackmun, however, found it necessary to discuss other defects of the Ohio death penalty.[161] In his opinion, the Ohio statutory scheme contained a *Jackson* deficiency. Under Ohio procedure the trial court has unfettered discretion to prevent the imposition of a capital sentence if a defendant pleads guilty.[162] If the defendant

157. *See* notes 107, and 146-53 *supra* and accompanying text.

158. 438 U.S. 586 (1978).

159. *Id.* at 609.

160. *See* Lockett v. Ohio, 438 U.S. at 609 n.16.

161. *Id.* at 613 (Blackmun, J., concurring). Significantly, Justice Blackmun was amongst the dissenters in Furman v. Georgia, 408 U.S. at 405; Woodson v. North Carolina, 428 U.S. at 307; and Roberts v. Louisiana, 428 U.S. at 363. Thus, it is uncharacteristic of him to candidly admit that "heretofore [he has] been unwilling to interfere with the legislative judgment of the States in regard to capital-sentencing procedures. . . ." Lockett v. Ohio, 438 U.S. at 615.

162. OHIO R. CRIM. PROC. 11(c)(3). To paraphrase Justice Blackmun:

The rule states that if the indictment contains one or more specifications

pleads not guilty, the trial court does not have the same power to preclude a death sentence. Significantly, the trial court had only the *power* to prevent a death sentence, and not that it was *required* to prevent the imposition of a death sentence. Thus, the statute operated as a lever to encourage guilty pleas. In Justice Blackmun's view the availability of a lesser sentence if a defendant plead guilty was an impermissible burden upon his right not to incriminate himself and his right to a jury trial. These burdens on fundamental rights cannot stand by virtue of *Jackson*.[163]

The Indiana statutory scheme in comparison to the Ohio scheme reveals the same *Jackson* defect. An Indiana trial court, with the consent of the prosecutor, has the power to dismiss the request for the death penalty. Indeed, an Indiana prosecutor has even the greater power to not request the death penalty in the first place. As in Ohio, such a dismissal, or the decision to not seek the death penalty, absolutely precludes imposition of a death sentence. Similarly, just as in Ohio, "[t]his disparity between a defendant's prospects under the two sentencing alternatives is . . . too great to survive under *Jackson*. . . ."[164]

Proponents of the death penalty could argue the above contentions are based upon pure conjecture and speculation. In other words, as three members of the Court stated in upholding the Georgia death penalty against a similar attack:

> [of aggravating circumstances], and a plea of guilty or no contest to the charge [of aggravated murder with specifications] is accepted, the court may dismiss the specifications and impose sentence [of life imprisonment] accordingly, in the interests of justice. Such a dismissal of aggravating specifications absolutely precludes imposition of the death penalty.

Lockett v. Ohio, 438 U.S. at 618.

163. *See, e.g.*, Lockett v. Ohio, 438 U.S. at 619. As stated, under Ohio procedure the trial court has only the power to preclude a death sentence. Thus, the court could still impose death if it chose to not exercise its power. Nevertheless, it is this power to which Blackmun objected.

164. 438 U.S. at 619. Ohio procedure is similar to Indiana in another important respect. OHIO REV. CODE ANN. § 2929.04(A) (Baldwin 1980), provides: "Imposition of the death penalty for aggravated murder is precluded, unless one or more of the [aggravating circumstances] is specified in the indictment or count in the indictment. . . ." Thus, an Ohio prosecutor has the same power as an Indiana prosecutor to preclude the imposition of a death sentence by simply not specifying an aggravating circumstance in the indictment.

However, an Ohio prosecutor's power in this respect is still somewhat more limited than the power of an Indiana prosecutor. For example, if an Ohio defendant is charged with felony murder, then the indictment necessarily includes the specification of an aggravating circumstance. In Indiana, on the other hand, the prosecutor has the power to charge felony murder and still decide not to request a death sentence. *See* notes 166-77 *infra* and accompanying text.

> Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. . . . [D]efendants will escape the death penalty through prosecutorial charging decisions only because the offense is insufficiently serious; or because the proof is insufficiently strong. . . . Thus the prosecutor's charging decisions are unlikely to have removed from the sample of cases by the Georgia Supreme Court any which are truly 'similar.' If the cases really were 'similar' in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital cases; and [we are] unwilling to assume the contrary.[165]

Thus it is necessary to show that there are "facts to the contrary" and that Indiana prosecutors are indeed motivated by factors other than the seriousness of an offense or the insufficiency of the evidence.

As indicated earlier, the statutory scheme of the Indiana death penalty is unique. The only way that death can be an available sentencing alternative is for the prosecutor to specifically request it in the indictment or information.[166] It is possible for two different defendants in two different counties to commit almost identical offenses; for example, murder during the perpetration of a robbery. Under Indiana procedure, it is possible for both defendants to be charged under identical criminal statutes;[167] and yet, based upon no other reason than the charging decisions of the respective prosecutors, one defendant could face a forty to sixty year prison

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165. Gregg v. Georgia, 428 U.S. at 225 (White, J., Burger, C.J., and Rehnquist, J., concurring). Justice White stated further:

> Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. . . . This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt.

Id.

166. *See* notes 107 and 146-47 *supra* and accompanying text.

167. For murder, IND. CODE § 35-42-1-1 (1) (Supp. 1980); for felony murder, *id.* at (2). *See* note 146 *supra*. The statute making robbery an offense is IND. CODE § 35-42-5-1 (Supp. 1980).

sentence[168] while the other faces death.[169] Thus, the statutory scheme in Indiana allows for the obviously arbitrary and capricious selection of criminals against whom the death penalty is sought. Moreover, the charging decision by the prosecutor is neither visible nor subject to appellate review.

These capricious and arbitrary characteristics of the Indiana death penalty are even more evident when it occurs within the same county; even more so when it occurs between co-defendants. There are at least three cases on point currently before Indiana trial courts.[170] Although each case involves some of the same defendants, all three cases are unrelated. Each case consists of indictments for robbery, murder, felony murder, conspiracy to commit robbery, and a separate request for the death penalty. In addition, the third case involves the charge of criminal confinement.[171]

In each case the prosecutor has offered to dismiss the request for the death penalty in exchange for a plea of guilty.[172] By dismissal of the request, the prosecutor effectively precludes any possibility that a death sentence would be inflicted upon any of the defendants who complied with the prosecutor's conditions. Clearly, this prosecutor is utilizing the threat of death to encourage from the defendant a plea of guilty, and a waiver of his right to a trial. Neither the lack of evidence, nor the non-serious nature of the offense is the motivating factor behind the prosecutor's offer to plea bargain. The Indiana statutory scheme condones this practice although it was un-

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168. IND. CODE § 35-50-2-3 (Supp. 1980). *See* note 146 *supra* and accompanying text.

169. IND. CODE § 35-50-2-9, note 107 *supra.*

170. State v. Larry Williams, DeWayne Schuh, Larry Perkins, and George Redman, SCR 79-32 (Marshall County Super. Ct., Ind., filed May 15, 1979) (change of venue granted), now S-79-53 (Fulton County Cir. Ct., Ind.); State v. Larry Williams and Larry Perkins, SCR 80-9 (Marshall County Super. Ct., Ind., filed Feb. 4, 1980) (change of venue granted), pending for docket number in LaPorte County Circuit Court; State v. Larry Perkins, George Redman, and Pat Williams, SCR 80-11 (Marshall County Super. Ct., Ind., filed Feb. 6, 1980) (change of venue granted), now Cause No. 6461 (Starke County Cir. Ct., Ind.).

171. For murder, see IND. CODE § 35-42-1-1(1) (Supp. 1980). In addition, felony murder is a separate charge in the several indictments. *See id.* at (2). *See also* note 146 *supra.*

For the crime of robbery, see IND. CODE § 35-42-5-1 (Supp. 1980); for criminal confinement, see IND. CODE § 35-42-3-3 (Supp. 1980).

172. Interview with Jere L. Humphrey, counsel for defendants Larry Williams and Pat Williams, in Plymouth, Indiana (December 1, 1979 and March 10, 1980). *See also* File, *Deposition of Larry Perkins*, at 23 (Jan. 26, 1980), State v. Williams, Cause No. S-79-53 (Fulton County Cir. Ct., Ind.).

equivocally condemned in *United States v. Jackson*, and emphatically reasserted by Justice Blackmun in *Lockett v. Ohio*.[173]

The exercise of prosecutorial discretion has another important effect. By exercising his discretion in this manner, the prosecutor removes factually similar cases from the sample of cases that may eventually reach the Indiana Supreme Court for a comparative analysis. For example, the only defendant charged with all three felony murders has entered a plea agreement with the prosecutor.[174] The agreement is that in exchange for a guilty plea in each of the three felony murders, the prosecutor will dismiss the request for the death penalty and recommend concurrent sentences of fifty-four years.[175] In addition, this particular defendant is to testify against his co-defendants.[176] Thus, this defendant, who will have plead guilty to *three* separate felony murders, will serve a term of years while one of his co-defendants, who is charged with only *one* felony murder, faces a possible death sentence.[177] Obviously, the Indiana Supreme Court is effectively precluded from comparing these factually similar cases. Moreover, the court could possibly affirm a sentence of death imposed upon an individual who is even less dangerous to society than his principle accuser: a man who remains alive and who will eventually be eligible for parole. Such disparity in the application of the death sentence violates every concept of due process that has yet been advanced by the Supreme Court since *Jackson* and *Furman*.

Clearly, the Indiana death penalty contains serious constitutional deficiencies. Until the legislature eliminates these defects in the statutory scheme, the death penalty in Indiana will continue to be applied arbitrarily, capriciously, and in such a way as to needlessly burden a defendant's fundamental rights guaranteed by the fifth and sixth amendments. The Indiana death penalty therefore

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173. *See* notes 149-64 *supra* and accompanying text.

174. *See* note 168 *supra*; File, *Deposition of Larry Perkins*, *supra* note 172, at 6-23. Larry Perkins pleaded guilty in S-79-53 in January of 1980. The Marshall County prosecutor is presently making arrangements for Perkins to plead guilty in SCR 80-9 (now pending before LaPorte Circuit Court) and Cause No. 6461 in Starke Circuit Court.

175. *Id.*

176. *Id.*; Interview with Jere L. Humphrey, counsel for defendants Larry Williams and Pat Williams, in Plymouth, Indiana (March 10, 1980).

177. *Id.* Further, Larry and Pat Williams are brothers. The charges they face are wholly unrelated to each other. In no case are Larry and Pat Williams co-defendants. *See* note 170 *supra*. Moreover, Pat Williams is allegedly involved with only one murder whereas Larry Perkins is a defendant in all three. *Id.*

violates the eighth and fourteenth amendments. The statutory scheme, however, is not beyond repair.

RECOMMENDATIONS

There are three basic recommendations for the elimination of the constitutional deficiencies in the Indiana death penalty. Each recommendation is related to the other two, but each still contains its own distinct course of action and political ramifications.

Popular Referendum

The first and most obvious procedure by which to cure the constitutional deficiencies of the death penalty is for the Indiana Supreme Court to hold the penalty unconstitutional per se. Abolishment by judicial fiat would obviously eliminate the present arbitrary and capricious application of the ultimate punishment.

Guided by the federal constitution, the United States Supreme Court held that death is not per se an unconstitutional punishment.[178] For Indiana's highest court to hold to the contrary, it would have to rely upon other controlling authority. That authority is found in a clause of the Indiana Constitution which provides that "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice."[179]

In recent years only one Indiana case has dealt directly with this issue. In *Adams v. State*,[180] a bare majority of the Indiana Supreme Court found shelter in the doctrine of stare decisis and held that the death penalty is not vindictive, but is simply even-handed justice. In excellent concurring and dissenting opinions, Judges DeBruler and Prentice point out the illogical aspects of the arguments relied upon by the majority.[181] Nevertheless, in light of

178. *See, e.g.*, Gregg v. Georgia, 428 U.S. at 187.

179. IND. CONST. art. I, § 18. *See also* IND. CONST. art. I § 16 (prohibition against cruel and unusual punishment).

180. 259 Ind. 64, 271 N.E.2d 425 (1971), *rev'd upon rehearing*, 259 Ind. 164, 284 N.E.2d 757 (1972).

181. *Id.* at 74, 271 N.E.2d at 431 (DeBruler, J., concurring in part and dissenting in part); *id.* at 97, 271 N.E.2d at 443 (Prentice, J., dissenting). It is beyond the scope of the text to further analyze *Adams*. However, a synopsis and short excerpts from *Adams* are insightful.

The three judge majority in *Adams* derived the notion of "even-handed justice" from the cases of Rice v. State, 7 Ind. 332 (1855), and Driskill v. State, 7 Ind. 338 (1855). In an attempt to find contemporary authority supporting the notion of "even-handed justice," the majority also cited McCutcheon v. State, 199 Ind. 247, 155 N.E.

Furman and upon a petition to rehear, the court unanimously reversed itself and held the Indiana death sentence incompatible with the federal constitution.[182] Furthermore, it would seem that since the court reversed itself, *Adams* was never controlling authority on the issue of whether the death penalty is compatible with the Indiana Constitution.

It is recommended that the Indiana Supreme Court should rule that the death penalty is simply antithetical with the state constitution. The court should not again try to rationalize the death penalty

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544 (1927). But as the dissent points out, *McCutcheon* did not involve capital punishment and therefore anything stated was merely dicta and not controlling.

The dissent further emphasizes that the majority misplaced its reliance upon *Driskill* and *Rice*. Those cases even admit that capital punishment does not serve the "principles of reformation" as required by the constitution. The reasoning in *Driskill* is simply that capital punishment is not vindictive since its goal is the protection of society. *Driskill* therefore supports Judge DeBruler's point that imprisonment serves the same purpose and thus nothing is lost if the death penalty is abolished by judicial fiat.

But to return to the majority's emphasis, Judge DeBruler analyzes the notion of even-handed justice most cogently:

> It might mean that the death penalty is not vindictive because it is the taking of the life of the offender who has himself taken a life. This would be the same as claiming that the 'eye for an eye' philosophy is not vindictive, when in fact it is the epitome of vindictiveness and revengefulness. The exclusive use of the 'eye for an eye' philosophy is precisely what is precluded by § 18. Whatever it might have meant to the judge who wrote it, this statement that the death penalty is even-handed justice is not an argument at all. . . .

Id. at 76, 271 N.E.2d at 432.

Judge Prentice joined in the rejection of the majority's reliance upon illogical precedent by stating:

> Whatever may have been the circumstances in 1855 motivating us to the decisions reached in *Rice* and *Driskill*, it is clear that we should not be governed by such mish-mash. . . . There are many things in law that are so because we say they are so, but there are limits. Death, as punishment for a crime, any crime, cannot be other than vindictive, whatever may be the meaning of 'even-handed justice.' There can be no basis for denying that the death penalty offends against Article 1, § 18, except by reliance upon these cases as precedent, and they are . . . built on a foundation that did not exist. The doctrine of stare decisis itself compels us to abandon it when it does not serve the objectives of sense and justice.

Id. at 99, 271 N.E.2d at 444.

In sum, both dissenters agree that *"section 18* [of the Indiana Constitution] *merely precludes a penalty which forecloses all possibility of reformation of the offender."* *Id.* at 77, 271 N.E.2d at 432 (DeBruler, J., dissenting) (emphasis in the original). The majority opinion does not, in its own words, refute or answer this argument. Indeed, as long as Section 18 is part of the Indiana Bill of Rights, one simply cannot distort logic to such a degree as to rationalize otherwise.

182. Adams v. State, 259 Ind. 164, 284 N.E.2d 757 (1972).

in the face of the unambiguous constitutional mandate that "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice."[183] By trying to be logical in light of such a clear constitutional provision, the court places itself in the untenable position of wreaking havoc to the notion of sound legal analysis as guided by constitutional principles. Surely, the present court should at all costs avoid such a legacy.

"The highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits."[184] By holding the death penalty invalid under the Indiana Constitution, the supreme court would breathe new life into the democratic processes of Indiana. If the people of Indiana truly want capital punishment, then they should say so through the ratification process of a constitutional amendment.[185] Other states have followed this road;[186] Indiana should do

183. IND. CONST. art. I, § 18.

184. Furman v. Georgia, 408 U.S. at 405 (Burger, C.J., dissenting).

185. See IND. CONST. art. XVI, § 1 (as amended in 1966), for the procedures to be followed to amend the constitution. A possible amendment to Article 1, § 18 could be simply: "This section does not apply to capital punishment."

In 1965, the Indiana General Assembly voted to abolish capital punishment, and in its place make the punishment life imprisonment without eligibility for parole. The vote in the state senate was 35 to 4; the vote in the Indiana House of Representatives was 75 to 18. Governor Branigen, however, vetoed the act and stated:

> I return herewith, without approval, House Enrolled Act No. 1054. In my heart, I am opposed to the taking of the life of another. But, as Governor, I cannot, in good conscience, take the easy course of signing away this awful penalty *unless it is the clear mandate of the people. They must have the opportunity, in an election where this is an issue, to determine whether the penalty, which we have had in our law since statehood, shall no longer be. Until the issue is decided no man's life should be taken.*

Veto Message of Governor Branigen, *quoted in* Adams v. State, 259 Ind. at 89, 271 N.E.2d at 438 (DeBruler, J., concurring in part and dissenting in part) (emphasis added).

186. *See, e.g.*, Note, *The New Illinois Death Penalty: Double Constitutional Trouble*, 5 LOY. CHI. L.J. 351 (1974). The Illinois Constitution has a provision that is substantively similar to Indiana's. ILL. CONST. art. I, § 11, provides: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. . . ." In light of this mandate, many legislators and the governor had trouble with the enactment of new death penalty legislation after *Furman*. However, a popular referendum was held and capital punishment was endorsed at a margin of 2 to 1. *Id.*

The California Supreme Court construed the death penalty under the state constitution as cruel and unusual punishment in People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 405 U.S. 983 (1972). Subsequently, the public amended the state constitution to simply read that capital punishment is not cruel or unusual. *See* CAL. CONST. art. I, § 27.

the same. Only then can it be a safe premise of the criminal justice system that there does exist a clear mandate from the people that death, in rare instances, is a permissible punishment.

Meaningful Appellate Review

Procedures Developed by the Supreme Court. The Indiana Supreme Court can correct in one of two ways the constitutional deficiencies of the current appellate review procedures governing death sentences. First, the court could simply devise its own comprehensive procedures aimed at ensuring meaningful appellate review.

This would necessarily involve two areas of concern. The court must develop procedures requiring the trial court to make an accurate record and transcript of the decision-making process involved in imposing a sentence of death. As in Florida,[187] this could involve the adoption of rules requiring the sentencing authority to submit into the record a written justification for the decision to impose death. Or, as in Texas,[188] the court could require the judge or jury to answer several specific questions concerning the elements of the offense and the characteristics of the offender. In addition, the court should require the trial judge to answer a questionnaire in *every* capital case, regardless of whether or not a death sentence was imposed.

Obviously, there is a wide array of procedures that the court could require to ensure an accurate record at the trial level. However, since this is a two-step process the court must also adopt for itself rules and procedures to facilitate its own review of capital cases.

As in Florida, Georgia, and Texas, the Indiana Supreme Court should develop some sort of an analysis which compares factually similar cases. The goal of this comparative analysis is to ensure that the aggravating and mitigating circumstances present in one case will result in the imposition of a sentence comparable to that imposed in a factually similar case. How this is achieved can only be resolved by the court. But, again, it seems essential that the court have available for its review the sentencing decisions of *all* capital cases, regardless of whether or not death is actually imposed. Only

187. *See* note 100 *supra* and accompanying text.
188. *See* note 101 *supra* and accompanying text.

then can the supreme court analyze different sentences imposed in factually similar cases.

Legislative Action. The above recommendation that the Indiana Supreme Court develop the procedures necessary to ensure meaningful appellate review contains the inherent danger that the court would in essence assume a legislative function. Therefore, to effectively avoid this problem the court should simply rule under the eighth and fourteenth amendments that the Indiana death penalty statute is unconstitutional because it fails to provide for meaningful appellate review. This course of action would result in returning to the legislature the proper responsibility of devising the procedures and allocating the resources necessary to develop a system of meaningful appellate review of capital cases.

The legislature should develop a comprehensive information-gathering system comparable to that employed in Georgia.[189] Moreover, the legislature should provide for additional supreme court staff members whose sole function is to compile capital cases and derive from the records the relevant information.[190] In addition, it is recommended that the legislature enact special provisions that require all capital cases to be sent to the Indiana Supreme Court, regardless of whether or not a death sentence was imposed. This would necessarily include cases in which guilt is ascertained by a plea agreement between the defendant and the prosecutor.

This extra safeguard ensures that the supreme court will have available for comparison all cases in which a death sentence had been considered, and not simply the cases in which a death sentence was imposed. As stated earlier, without such a provision the court would be unable to compare and analyze different sentences imposed in factually similar cases.[191] This legislative safeguard seems essential to ensure meaningful appellate review, yet is a requirement not even provided in Florida, Texas, and Georgia.

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189. *See* notes 89-96 *supra* and accompanying text.

190. This recommendation would, of course, necessitate additional funding. To acquire the funds it is suggested that the Indiana legislature should eliminate the official reporter of the Indiana Supreme Court and the Indiana Court of Appeals. As every lawyer and law student knows, the official reporter is so inferior to the up-to-date National Reporter System published by West, that the former is never used. It should therefore be eliminated.

191. *See* notes 134-35 *supra* and accompanying text.

Prosecutorial Discretion and a Cure of the Jackson *Defect*

As can be discerned from the previous discussion of the *Jackson* defect,[192] there is no such thing in Indiana as a pure capital case. What makes murder in Indiana a capital offense is not the crime itself, but rather the decision of the prosecutor to seek the death penalty. It is at this stage of prosecutorial decision-making that occur the serious ramifications associated with the *Jackson* defect. Since prosecutorial discretion and the consequential effects of the *Jackson* deficiency are the very foundation of the statutory scheme, no judicial construction of the statute can save the death penalty.[193] Thus, the *Jackson* defect can only be eliminated by the supreme court's total invalidation of the Indiana death penalty.

Therefore, it is recommended that the Indiana legislature redefine the penalties for murder. In this regard, significant lessons can be learned from the experiences of other states and the federal government.

Guidance can be derived from the United States Supreme Court in the *Jackson* case itself. In that case, the Court by way of dicta suggested that Congress could eliminate the *Jackson* defect by following the example of some of the states in which "the choice between life imprisonment and capital punishment is left to a jury in *every* case—regardless of how the defendant's guilt has been determined."[194]

Guidance can also be found in post-*Furman* death penalty litigation. Except for Justice Blackmun's treatment of the problem in *Lockett v. Ohio*,[195] none of the other death penalty cases considered the existence of a *Jackson* defect because it did not exist.

Except for Ohio, in all of the states involved with death penalty litigation, murder was defined as a capital crime.[196] That is, if a person committed murder, the available sentencing options included a term of imprisonment or a death sentence. The decision to seek the

192. *See* notes 139-76 *supra* and accompanying text.

193. In United States v. Jackson, 390 U.S. 570, the Court held that the death penalty provision of the Federal Kidnapping Act could be judicially severed from the remainder of the statute. Therefore, the defendant in *Jackson* could still stand trial under the Act. However, the Indiana death penalty is a separate act and is not part of any criminal statute. Thus, it cannot be severed.

194. 390 U.S. at 582 (emphasis in the original).

195. 438 U.S. at 613.

196. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

death penalty in those states was therefore not delegated to the prosecutor; the legislature had already made the decision. Thus, the prosecutors of those states could not utilize the death penalty in the manner condemned by *Jackson* and currently practiced in Indiana.

Examples can also be derived from neighboring states. In Illinois, the death penalty statutory scheme provides that "[i]n any case in which the defendant is convicted of murder, the state *shall* seek imposition of the death penalty in all cases where any of the [aggravating] circumstances obtain. . . ."[197] One can clearly see the potential in Indiana for prosecutorial abuse by comparing the Illinois statutory scheme with the Indiana provision that "[t]he state *may* seek a death sentence. . . ."[198]

More to the point, the Kentucky experience is an excellent example of how the Indiana legislature could correct the deficiencies in the current death penalty statute. From 1975 until 1978, Kentucky had a statutory scheme almost identical to that of Indiana. The relevant Kentucky statute provided that "[m]urder is a Class A felony, except that in the following situtions it is a capital offense. . . ."[199] Those situations that made murder a capital offense were simply a list of the generally accepted aggravating circumstances.[200]

To analogize, both Indiana and Kentucky defined murder as a felony punishable by imprisonment. The only way for murder to be designated a capital offense in either state was for the respective prosecutors to take further procedural steps to seek a death pen-

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197. 1973 Ill. Laws, Pub. Act 78-921 (emphasis added). The statute was subsequently held unconstitutional in People *ex rel.* Rice v. Cunningham, 61 Ill. 2d 353, 336 N.E.2d 1 (1975). The statute was invalidated because it provided for appellate review of a death sentence by a three judge panel. This appellate review provision contradicted an Illinois constitutional mandate that required all death sentences to be reviewed by the state supreme court.

The death penalty was subsequently repealed by 1977 Ill. Laws, Pub. Act 80-26 § 3 (effective June 21, 1977). Except for the three judge review provision, the death penalty was re-enacted in all relevant respects and can now be found at ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1979).

198. IND. CODE § 35-50-2-9(a), note 107 *supra* (emphasis added). But see a most blatant *Jackson* defect in the Connecticut death penalty statute which provides: "Such hearing [to determine whether death is to be imposed] shall not be held if the state stipulates that none of the aggravating factors set forth . . . exists or that one or more of the mitigating factors set forth . . . exists." CONN. GEN. STAT. ANN. § 53a-46 (West Supp. 1980).

199. KY. REV. STAT. ANN. § 507.020(2) (Baldwin 1975).

200. *Id.* See, *e.g.*, IND. CODE § 35-50-2-9, note 107 *supra*, for a general idea of the Kentucky aggravating circumstances.

alty. The statutory scheme of both states thus provides the same juncture at which impermissible prosecutorial discretion can be exercised.

The Indiana scheme allows prosecutorial discretion to be exercised in this manner. But the Kentucky scheme went so far as to specifically endorse it by providing: "However, any crime classified as a capital offense may at the discretion of the state be prosecuted as a Class A felony. . . ."[201] It is clear, then, that both the Indiana and Kentucky death penalty schemes contained the same *Jackson* defect.

Kentucky, however, has eliminated the constitutional deficiencies in its death penalty. In 1978, amendments were made to the above quoted portions of the Kentucky statute. The first part of the scheme which designated murder as a felony, except that upon the occurrence of an aggravating circumstance it was a capital offense, was amended to read: "Murder is a capital offense."[202] This simple amendment thus made death an available sentencing option for all convictions of murder.

Accordingly, the second part of the Kentucky statute that endorsed prosecutorial discretion was eliminated. That portion of the statute now reads: "When a person is convicted of a capital offense he shall have his punishment fixed at death or imprisonment. . . ."[203] Thus, a Kentucky prosecutor neither needs to make a separate charging decision, nor must he take any procedural steps to make death a sentencing option; the Kentucky legislature already made that decision. Kentucky therefore corrected the *Jackson* defect and eliminated its potential for prosecutorial abuse.

The Indiana legislature must make the same amendments to the statutory scheme of the death penalty. By legislatively providing

201. KY. REV. STAT. ANN. § 532.030(1) (Baldwin 1975). The pertinent part of the Kentucky statute just quoted in the text ends with the phrase: "provided such election to so prosecute [as a Class A felony instead of a capital felony] is made at the time of the indictment." *Id.*

Thus, the discretion of a Kentucky prosecutor is even more controlled than an Indiana prosecutor because for the former, death is already an available sentencing alternative. The Kentucky prosecutor must take affirmative procedural steps to *preclude* death as punishment. The Indiana prosecutor must initially take procedural action to ensure that death is available as a punishment. Moreover, in Kentucky, the prosecutor must make his charging decision "at the time of the indictment." *Id.* Thus, he or she cannot use the death penalty as an impermissible lever like his or her counterpart does in Indiana.

202. KY. REV. STAT. ANN. § 507.020(2) (Baldwin 1978).

203. KY. REV. STAT. ANN. § 532.030(1) (Baldwin 1978).

death as a possible punishment for all convictions of murder, the decision is taken away from the prosecutor. Although the prosecutor is stripped of some power, he is also stripped of the opportunity to abuse that power. The end result, then, will be a constitutionally tolerable death penalty statute in Indiana. Until this reform is made, along with procedures to ensure meaningful appellate review, Indiana will continue to arbitrarily and capriciously select those against whom is inflicted the ultimate penal sanction.

CONCLUSION

All of the major death penalty cases have been decided by the United States Supreme Court in only the last thirteen years. These cases reveal a significant evolution of constitutional thought. But the decisions themselves are based upon differing constitutional theories.

By compiling the theories and comparing the Court's various decisions, one is able to discern a specific and cohesive constitutional analysis of capital punishment. This analysis reveals that the states may inflict death as a penal sanction only if the relevant statutory schemes fulfill basic constitutional requirements. These requirements are in turn derived from the various constitutional theories relied upon by the Court. A state that fulfills the requirements and invokes the proper theories will achieve a constitutionally tolerable death penalty statute.

There are three basic theories and requirements to be met in order to develop a valid death penalty. Under a penumbra of fundamental rights theory, a state must first structure its statutory scheme to prevent the exertion of impermissible burdens upon a defendant's fifth amendment right to not plead guilty, and his sixth amendment right to a jury trial. Secondly, to avoid the cruel and unusual punishment prohibition of the eighth amendment, the sentencing authority must be directed by statutory guidelines that focus on the particular nature of the offense and the specific characteristics of the defendant. Finally, the statute *and* the state judiciary must provide meaningful appellate review to ensure strict compliance with the first two requirements. Meaningful appellate review is essential to avoid violation of due process under the fourteenth amendment.

Utilizing this three-prong approach, an examination of the Indiana death penalty discloses significant defects. First, the statutory scheme and the Indiana judiciary have failed to provide a system

that ensures meaningful appellate review. This legislative and judicial shortcoming occurs at two levels: the trial court and the Indiana Supreme Court. The end result, then, is the promulgation of a decision-making system of inflicting death that provides "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[204]

This lack of meaningful appellate review can be remedied in one of two ways, but the impetus must come from the Indiana Supreme Court. First, the court could on its own volition develop procedures requiring Indiana trial courts to make an accurate record and transcript of the decision-making process involved in imposing a sentence of death. Furthermore, the court must develop a comparative analysis which ensures that similar sentences are imposed in factually similar cases. This necessarily requires the court to compare murder convictions in which a prison sentence was imposed with murder convictions in which death was imposed. And this obviously includes convictions based upon plea agreements.

The second way the Indiana Supreme Court could rectify the situation is to hold the Indiana death penalty unconstitutional for its failure to provide meaningful appellate review. This would result in returning to the legislature the proper responsibility of devising the procedures and allocating the resources necessary to develop a system of meaningful appellate review of capital cases.

The second and most significant deficiency of the death penalty is the power it grants to an Indiana prosecutor: the *Jackson* defect. Death is not an available sentencing option *unless* the prosecutor specifically requests it. It is at this statutory juncture that the prosecutor possesses an unconstitutional amount of power. The statute permits the prosecutor to use the threat of a possible death sentence to encourage from a defendant a plea of guilty, and a waiver of his right to a jury trial. Thus, the Indiana statutory scheme condones the exertion of needless burdens upon a defendant's fifth and sixth amendment rights. This practice is constitutionally intolerable, "[f]or the evil in the . . . statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them."[205]

The *Jackson* defect can only be eliminated by re-defining the penalties for murder. The legislature must provide death as an

204. Furman v. Georgia, 408 U.S. at 313 (White, J., concurring).
205. United States v. Jackson, 390 U.S. at 583 (emphasis in the original).

available sentencing option for all convictions of murder. Stripping from the prosecutor the power to decide whether or not to seek a death sentence also precludes him or her from exerting impermissible burdens upon a defendant's fundamental rights. By holding the statutory scheme in violation of this penumbra of fundamental rights theory, the Indiana Supreme Court will fulfill its role as guardian of the constitution.

The premise of this note has been that the Indiana death penalty is far from a constitutionally valid statute. The moral and ethical issues of capital punishment have been painfully avoided; for the resolution of those questions can only be found within each of us and under our own guiding principles. The political entity known as the State of Indiana, however, has its own guiding principles in the form of the state and federal constitutions. And as Patrick Henry said in support of the adoption of one of those guiding principles: "But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. . . . You let them loose; you do more—you depart from the genius of your country. . . ."[206]

E. Nelson Chipman, Jr.

206. 3 J. ELLIOT'S DEBATES 447 (2d ed. 1876) (arguing for ratification of the eighth amendment in particular, and the Bill of Rights in general, at the Virginia Constitutional Convention).