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Victim Participation and Lex Talionis: Constitutionality Under Section 18 of the Indiana Bill of Rights

Edward F. Harney Jr.

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Harney: Victim Participation and Lex Talionis: Constitutionality Under S
Victim Participation and *Lex Talionis*¹:
Constitutionality Under Section 18 of
the Indiana Bill of Rights

*You Satan, Jeffrey, I hate you motherf----, I hate you!*²

I. INTRODUCTION

Victim participation³ in the criminal justice system allows the victim⁴ to play a role in decisions concerning both the prosecution and sentencing of the defendant.⁵ The upsurge of victim participation can be seen as a response to the widely held notion that the criminal justice system protects the rights of the accused at the expense of the victim.⁶ As a result of this movement, a

1. "The law of retaliation; which requires the infliction upon a wrongdoer of the same injury which he has caused to another. . . . [A]n eye for an eye; a tooth for a tooth" BLACK'S LAW DICTIONARY 913 (6th ed. 1990). See also *Exodus* 21:24, a biblical passage that is the most general definition of the retributive theory of punishment.

2. Rita Isbell, the sister of one of Jeffrey Dahmer's victims, screamed this statement at a sentencing hearing and simultaneously lunged at the defendant. Karen S. Schneider & Civia Tamarkin, *Day of Reckoning*, PEOPLE, Mar. 2, 1992, at 38. This statement is representative of many statements made under current victim participation statutes. More importantly, however, this statement is an exact illustration of the retributive and vindictive motives behind such statements, motives that run afoul of § 18 of the Indiana Bill of Rights. See *infra* notes 155-68 and accompanying text.

3. The term 'victim participation' will be used to describe both victim impact statements (VIS's) and victim statements of opinion (VSO's). See *infra* notes 14-20 and accompanying text for a complete definition of each of these components.

4. A victim under a victim participation provision may be either the actual crime victim or the victim's family members. However, this note will constrain itself to addressing the constitutionality of victim participation in capital sentencing proceedings. IND. CODE ANN. § 35-50-2-9(a) (Burns 1992) (providing that "[t]he State may seek the death sentence for murder . . ."). As capital punishment may only be imposed for murder under certain aggravating conditions, the participating victim will necessarily be a family member.

5. For a general discussion charting the evolution and successes of the victim's movement, see Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 942 (1985).

6. In 1982, the President's Task Force on Victims of Crime postulated: "[Victims] have learned that . . . the system has lost track of the simple truth that it is supposed to be fair and to protect those that obey the law while punishing those who break it. Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest." OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT vi (1982) [hereinafter TASK FORCE]. For the view that the criminal justice system has disregarded the rights of the victim, as told by a former crime victim, see Betty Jane Spencer, *A Crime Victim's Views on a Constitutional Amendment for Victims*, 34 WAYNE L. REV. 1 (1987). Mrs. Spencer survived a murder attempt and watched as her four sons were slain. She is the Executive Director of the Protect the Innocent Victim's Advocate Foundation and is a strong advocate for a federal constitutional amendment to protect the victim's rights and

proliferation of victim's rights legislation has been enacted in the United States within the past decade.⁷ As of 1988, forty-six states and the District of Columbia had provided for victim input either through constitutional provisions in their respective bills of rights,⁸ legislative enactments,⁹ or both.¹⁰

In addition to the plethora of state provisions, the federal system also provides for victim input at various stages of the process.¹¹ The most significant change occurred when Congress amended Federal Rule of Criminal Procedure 32 through the Victim and Witness Protection Act of 1982 to require the inclusion in the pre-sentence report of a statement of the crime's impact upon the victim.¹² Today, the victim's rights movement continues to lobby at the national level for a federal constitutional amendment to safeguard rights of the victim.¹³

place them on equal footing with those of the accused.

7. As of 1982, only 12 states had provisions specifically guaranteeing the rights of the victim. In a scant six years, this number grew to 46 states and the District of Columbia. NATIONAL ORGANIZATION FOR VICTIM'S ASSISTANCE, VICTIM'S RIGHTS AND SERVICES: A LEGISLATIVE DIRECTORY 10 (1988) [hereinafter NOVA LEGISLATIVE DIRECTORY].

8. As of 1988, 21 states had specific constitutional provisions guaranteeing victim's rights: California, Colorado, Idaho, Kentucky, Louisiana, Maine, Michigan, Minnesota, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin. NOVA LEGISLATIVE DIRECTORY, *supra* note 7, at 10.

9. As of 1988, 14 states and the District of Columbia provided for victim input legislation: Arizona, Arkansas, Delaware, Illinois, Indiana, Kansas, Montana, Nebraska, Nevada, New Jersey, New York, South Dakota, Virginia, and Wyoming. *Id.*

10. As of 1988, 11 states provided for victim's rights through both constitutional provisions and legislative enactments: Alaska, Connecticut, Florida, Iowa, Massachusetts, Maryland, Mississippi, Missouri, New Mexico, Oregon, and Utah. *Id.*

11. The note at 18 U.S.C. § 1512 provides that the attorney general must set up guidelines concerning when the victim must be notified of critical proceedings, the extent of communication and input the victim is to have with the district attorney, and the ability of the victim to make a victim impact statement at trial. For a discussion of the Victim & Witness Protection Act of 1982, see Amy K. Posner, *Victim Impact Statements and Restitution: Making the Punishment Fit the Crime*, 50 BROOK. L. REV. 301 (1984).

12. FED. R. CRIM. P. 32(C) required that the pre-sentence report contain information regarding the "financial, social, psychological, and medical impact upon . . . any individual against whom the offense was committed." FED. R. CRIM. P. 32(C)(2)(C) *as amended by* VICTIM & WITNESS PROTECTION ACT OF 1982, 18 U.S.C. §§ 1512-15, 3146, 3663-64 (1982). Such reports are usually referred to as victim impact statements (VIS's). The rule was amended and later codified at FED. R. CRIM. P. 32(c)(2)(D) to require the same statement as above but that it must be "verified" and presented in a "nonargumentative" fashion. *Id.*

13. The President's Task Force on Victims of Crime suggested that an addition be made to the Sixth Amendment to protect victims rights. The Sixth Amendment would become:

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 previously been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

Victim participation, by either the victims or their representatives, can be divided into two categories: Victim Impact Statements (VIS's) and Victim Statements of Opinion (VSO's). Generally, a VIS includes a list of specific economic losses, identification of physical or psychological injuries and their seriousness, and changes in the victim's work or family status resulting from the offense.¹⁴ A VSO, on the other hand, is the victim's opinion regarding the crime and the sentence.¹⁵ The latter is still constitutionally impermissible,¹⁶ however, the two types of statements can rarely be neatly distinguished from each other, and courts appear to routinely receive a combination of the two. Hence, this Note will examine the implications of both the VIS and the VSO.

Both types of statements can be presented to the court by more than one party and by more than one means.¹⁷ The victim participation provision may provide for the presentation of either a VIS or a VSO by the prosecutor, by the Department of Probation and Parole, by the victims themselves, or, in the case of a homicide, by the victim's representative.¹⁸ Additionally, under some

against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence. *Likewise, the victim, shall have the right to be present and to be heard at all critical stages of judicial proceedings.*

TASK FORCE, *supra* note 6, at 114 (emphasis added). Additionally, several victim's rights groups formed the Victim's Constitutional Amendment Network (Victims CAN) to focus on the enactment of state constitutional amendments. *Id.* For a listing of the founding organizations, see Spencer, *supra* note 6, at 5-6.

14. AMERICAN BAR ASSOCIATION, VICTIM/WITNESS LEGISLATION 46 (1991), *quoted in* 1982 U.S.C.C.A.N. 2518.

15. Presently, VSO's are unconstitutional after *Booth v. Maryland*, 482 U.S. 496 (1987); *see infra* notes 51-71 and accompanying text. However, it appears that the last vestiges of *Booth* will fall given the Supreme Court's treatment of VIS's in *Payne v. Tennessee*, 111 S. Ct. 2597 (1991) (partially overruling *Booth*), as soon as the proper case comes before the Court. The Court specifically noted that because VSO information was not used in *Payne* and was not the subject of the appeal, the constitutionality of such statements could not be decided. *Id.* at 2611 n.2. Hence, part of *Booth's* holding remains for the time being. Indiana permits VSO's in non-capital cases; *see* IND. CODE, § 35-38-1-8(b) (1992). *See infra* note 21 and accompanying text.

16. *Payne*, 111 S. Ct. at 2611 n.2. In the sentencing phase of a capital case, a victim's characterizations and opinions of the crime and the defendant are constitutionally impermissible under the Eighth Amendment as announced in *Booth*.

17. However, in many jurisdictions, cumulative evidence may be excluded in the court's discretion and thus the state might not be able to admit multiple presentations of the victim evidence. *See, e.g.*, FED. R. EVID. 403 ("Although relevant, evidence may be excluded . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

18. Indiana allows all three modes of presentation. The prosecutor may—and, indeed, is expected to—prepare a VIS as it is not legislatively prohibited. Telephone Interview with Richard Good, Executive Director of the Prosecuting Attorney's Council of Indiana (January 3, 1992) [hereinafter Good Interview]. The probation officer must prepare a VIS to be included in the presentence report. IND. CODE ANN. § 35-38-1-8.5 (West Supp. 1991). Also, a victim's statement may be made to the probation officer as part of a pre-sentence investigation under IND. CODE ANN. § 35-38-1-9(c)(3) (West Supp. 1991); to a prosecutor to be included in the pre-sentence report under

provisions, the statements may be presented in either oral or written form by any of the parties discussed above.¹⁹

The person presenting the statement may enhance the impact that the evidence has upon the sentencing body. An emotional address to a jury by the victim or her family would most likely have a greater impact than a written statement by the probation department that a judge reads in camera. Thus, the varying impacts that each permutation may have, either properly or improperly,²⁰ must factor into the equation used when devising or examining a state's victim participation provision.

Indiana has not yet enacted a constitutional provision guaranteeing victims' rights, but it has passed three related pieces of legislation in this area.²¹ These

IND. CODE ANN. § 35-38-1-9(c)(2) (West Supp. 1991); or directly to the court at the sentencing hearing under IND. CODE ANN. § 35-38-1-8 (West Supp. 1991). See *infra* note 21 for the text of these provisions.

19. See MD. ANN. CODE art. 41, § 4-609 (1986).

20. The evidence, if used properly, will help the sentencing body determine whether or not the convicted defendant should be sentenced to death. Improperly used, the evidence may affect the emotions of the trier of fact in such a way that the trier will not render a rational or objective decision and the defendant will be unfairly prejudiced. See *infra* note 53, which summarizes the VIS used in *Booth v. Maryland*; discussed *infra* notes 51-71. The victim's daughter said that the defendant could "[n]ever be rehabilitated" and that she could "never forgive" the defendant. The son made other emotionally charged statements. It should appear that such statements play on the jury's emotions rather than providing information for an informed and objective decision.

21. The Indiana victim participation statutes read as follows:

IND. CODE ANN. § 35-38-1-8 (West Supp. 1991):

(b) A victim present at a sentencing in a felony or misdemeanor case shall be advised by the court of a victim's right to make a statement concerning the crime and the sentence [note that this includes both a VIS and a VSO].

IND. CODE ANN. § 35-38-1-8.5 (West Supp. 1991):

(d) The probation officer shall prepare a victim impact statement for inclusion in the convicted person's pre-sentence report. The victim impact statement consists of information about each victim and the consequences suffered by a victim or a victim's family as a result of the crime.

(e) Unless the probation officer certifies that a victim . . . could not be contacted or elected not to make a statement . . . , the victim impact statement must include the following information about each victim:

- (1) A summary of the financial, emotional, and physical effects of the crime on the victim and the victim's family.
- (2) Personal information concerning the victim, excluding telephone numbers, place of employment, and residential address.
- (3) Any written statements submitted by a victim or a victim representative to the probation officer.
- (4) If the victim desires restitution, the basis and amount of a request for victim restitution.

IND. CODE ANN. § 35-38-1-9 (West Supp. 1991):

(c) The presentence investigation may include any matter that the probation officer . . . believes is relevant to the question of sentence and must include:

statutes provide for both VIS's²² and VSO's²³ under certain circumstances. Indiana Code section 35-38-1-8 allows a victim present at a non-capital sentencing to make a VSO.²⁴ Indiana Code section 35-38-1-8.5 mandates that a VIS prepared by the probation officer must accompany every pre-sentence report.²⁵ Additionally, prosecutors can question a victim's relatives at the death penalty phase of a capital trial, or make oral statements in closing arguments concerning the impact on the victim in non-capital trials.²⁶

In formulating these statutes, however, the Indiana Legislature apparently overlooked a provision of the Indiana Bill of Rights. Article I, section 18 of the Indiana Constitution mandates that "[t]he penal code shall be founded on the principles of reformation and not of vindictive justice."²⁷ This provision instructed the early legislature of the principles upon which the Indiana penal code was to be founded. Section 18 should serve as a limit and a guide to the current Indiana Legislature, mandating the justifications upon which new criminal statutes may be based.²⁸ The legislature can only enact criminal statutes that take into consideration the purposes delineated by this section, and the Indiana Supreme Court is bound to strike down any legislation not following

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- (1) any matter the court directs to be included;
 - (2) any written statements submitted to the prosecuting attorney by a victim under IC 35-35-3;
 - (3) any written statements submitted to the probation officer by a victim; and
 - (4) except in cases where the death sentence is sought under IC 35-50-2-9, preparation of the victim impact statement required under section 8.5 of this chapter.

In 1990, the Indiana legislature inserted § 35-38-1-9(c)(4) in response to the Court's holding in *Booth v. Maryland*, 482 U.S. 496 (1987), discussed *infra* notes 51-71, that VIS use during the sentencing phase of a capital case violates the Eighth Amendment. Good Interview, *supra* note 18. It is important to note that while the inclusion of a VIS in a capital case is not required, it is not legislatively prohibited. In fact, after *Payne*, Indiana prosecutors are expected to introduce such evidence. *Id.* Thus, after *Booth*, there is no bar, either constitutionally or legislatively, against the probation officer preparing a VIS in a capital case.

22. See *supra* note 21 for the text of the statute.

23. See *supra* note 21 for the text of the statute.

24. See *supra* note 21 for the text of the statute.

25. See *supra* note 21 for the text of the statute. In a case where the prosecutor seeks the death penalty, the probation officer is not required to prepare a VIS. *Id.* However, the statute does not prevent the officer from doing so, and after *Payne* every likelihood exists that a VIS will accompany all pre-sentence reports, both capital and non-capital. Good Interview, *supra* note 18.

26. This may be subject to local evidentiary rules regarding relevancy, however. The U.S. Supreme Court has found such evidence to be relevant. *Payne v. Tennessee*, 111 S. Ct. 2597 (1991); see *infra* notes 85-99 and accompanying text. Also, before *Booth* was overruled, the Indiana Supreme Court—reading *Booth* narrowly—had held that statements in a prosecutor's closing argument concerning the victim impact were relevant when the defendant knew the victim prior to the homicide. *Woods v. State*, 557 N.E.2d 1325 (Ind. 1990). See *infra* notes 104-07 and accompanying text for a lengthier discussion of *Woods*.

27. IND. CONST. art. I, § 18 [hereinafter section 18 or § 18].

28. See *infra* notes 118-54 and accompanying text.

its strictures.

Recently, the United States Supreme Court found that victim participation statutes did not violate the federal Constitution²⁹ and were permissible under the Eighth Amendment.³⁰ However, the Supreme Court was not constrained by the reformation provision found in section 18. This Note suggests that even if the Indiana Supreme Court chose to apply the Supreme Court's Eighth Amendment jurisprudence to Indiana's analogue,³¹ and in the process uphold the constitutionality of Indiana's victim input statutes,³² it still would be compelled to find that the statutes are precluded by section 18. This is because in a capital case, the participation of the victim at the sentencing phase is inherently vindictive.³³

The effect of such a finding would be to invalidate the use of Indiana's victim participation statutes in a capital case. Under its bill of rights, Indiana provides greater rights to criminal capital defendants than are found in the federal Constitution.³⁴ Upon a showing that Indiana's statutes are vindictive

29. *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), discussed *infra* notes 83-99.

30. U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.*

31. IND. CONST. art. I, § 16. "Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense." *Id.* States are free to adopt the United States Supreme Court interpretation of federal provisions in interpreting their analogous constitutional provisions or may choose to interpret the sections on their own. For example, in *Burress v. State*, 363 N.E.2d 1036 (Ind. Ct. App. 1977), the court of appeals made the following statement: "Although this precise question has never been answered in Indiana, it is well settled by the federal cases. Article I, § 12 of the Indiana Constitution is analogous to the Sixth Amendment of the United States Constitution. Both guarantee a speedy trial." *Id.* at 1308.

In other cases, Indiana has chosen to grant a more expansive interpretation to its own provision. *See infra* note 35. However, Indiana may not choose to offer a more narrow interpretation of an analogous provision as the federal Constitution provides the minimum rights that must be given. *See infra* notes 34, 117.

32. In *Benirschke v. State*, 577 N.E.2d 576 (Ind. 1992), the Indiana Supreme Court followed the U.S. Supreme Court's lead as established by *Payne v. Tennessee*, affirming a murder conviction on appeal over the defendant's objection that VIS's were improperly introduced. However, it does not appear that the defendant argued that the victim impact statement violated either § 18 of the Indiana Bill of Rights or art. I § 16; thus the question remains open. *See infra* notes 85-99.

33. This conclusion follows necessarily two premises central to this note. This note forwards the following syllogism:

Premise 1: The Indiana Constitution prohibits retributive or vindictive statutes (*see infra* part III);

Premise 2: Victim participation statutes are both retributive and vindictive (*see infra* part IV); Therefore, the Indiana Constitution prohibits victim participation statutes (*see infra* part V).

34. As Justice Kauger of the Oklahoma Supreme Court notes, "[S]tates are free to grant their citizens greater civil liberties and civil rights than those guaranteed by the federal government." Yvonne Kauger, *Reflections on Federalism: Protections Afforded by State Constitutions*, 27 GONZ.

rather than reformatory, the statutes must be either abandoned completely or revised to protect the defendant's right to be tried under a penal code free of constitutionally impermissible vindictiveness. Inaction by the Indiana courts or the Indiana legislature would defeat both the purpose and spirit of section 18, Indiana's reformation provision.³⁵

Section II of this Note will examine the current state of the law regarding the use of victim participation statements at the sentencing phase³⁶ of a capital case³⁷ at both the federal and state levels.³⁸ Section III of this Note then offers an interpretation of section 18 that is consonant with the text of the provision³⁹ and the framers' intent.⁴⁰ Discerning section 18's meaning will necessarily entail an examination of both the convention history pertaining to this

L. REV. 1 (1991-92). Indeed, she notes, "[t]his double tier of protections is the true hallmark of federalism." *Id.* Chief Justice Rehnquist, during his confirmation hearings, expressed the view that the protections of the federal Constitution are the floor rather than a ceiling of an individual's rights. *Id.* at 2.

35. This would not be the first time the Indiana Constitution was found to grant greater rights than the federal Constitution. See Patrick Baude, *Is There Independent Life in the Indiana Constitution*, 62 IND. L. J. 263, 268 (1987). Baude provides several examples. For instance, 38 years before *Mapp v. Ohio* required it, the Indiana Supreme Court held that the constitution dictated the exclusion of illegally obtained evidence, in *Flum v. State*, 141 N.E. 353, 354-55 (Ind. 1923). *Id.* at 269. More recently, the Indiana Supreme Court held in *Sims v. State*, 413 N.E.2d 556, 560 (Ind. 1980), that a suspect in custody could not validly consent to a search unless specifically advised of the right to counsel. The Supreme Court had found in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), that under the Fourth Amendment, consent might be effective even absent being advised of the right to counsel if found to be voluntary under the totality of the circumstances. *Id.* at 269.

36. Death penalty cases are tried in bifurcated proceedings. First, the defendant's guilt or innocence is determined. If the defendant is found guilty, the jury is reconvened for the sentencing hearing to determine if the death penalty is appropriate under these circumstances. However, the court is not bound by the jury's recommendation. IND. CODE ANN. 35-50-2-9 (West Supp. 1992).

37. This note will constrain itself to capital cases because in this situation, where only two possible sentences can be imposed, death or life imprisonment, the appearance of vindictiveness is much more pronounced. Unlike a restitutionary measure where the victim is asking to be restored to her former position, the remedy available in a death penalty proceeding cannot place the victim in her former position but can only take the life of the defendant. This decision is also guided by the Supreme Court's determination that because death is a punishment different from all other sanctions, the imposition of the penalty must be carefully scrutinized. *Woodson v. South Carolina*, 428 U.S. 280 (1974). Indeed, in *Booth v. Maryland*, the Court reasoned that while the victim information might be relevant in other criminal and civil contexts, it could not "agree that it is relevant in the unique circumstance of a capital sentencing hearing." 482 U.S. 496, 504 (1987); see *infra* notes 51-71 and accompanying text.

38. See *infra* notes 47-117 and accompanying text.

39. Interpreting § 18 begins with examining the text of the provision, because the text of the constitutional provision itself should provide the starting point for any state constitutional argument. Robert E. Uitter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 654 (1987).

40. See *infra* notes 125-46 and accompanying text.

section⁴¹ and the early judicial interpretation given to it by the Indiana Supreme Court. In Section IV,⁴² this Note explores the possible purposes served by allowing victim participation in reference to the traditional goals of sentencing: deterrence, rehabilitation, incapacitation, and retribution.⁴³ Finally, Section V suggests that victim participation contravenes section 18. This Note concludes that the Indiana courts must find that victim participation in capital sentencing hearings is unconstitutional.⁴⁴ Such a holding would protect the capital defendant's rights⁴⁵ and lead to a more enlightened view of penology under the Indiana Constitution. Unfortunately, such a holding would also limit some of the victim's rights.⁴⁶

II. CURRENT STATE OF THE LAW REGARDING VICTIM PARTICIPATION

A. Federal Jurisprudence

The Supreme Court's jurisprudence concerning the constitutionality of victim participation at the sentencing phase of a capital case commenced with *Booth v. Maryland*.⁴⁷ A divided Court found the admission of a VIS at sentencing to be unconstitutional under the Eighth Amendment.⁴⁸ Two years later, in *South Carolina v. Gathers*, the Court extended prohibition of the VIS

41. The Indiana Supreme Court has noted that it considers the constitutional convention debates as an important tool in interpreting its constitution. See *In re Todd*, 193 N.E. 865 (Ind. 1935).

42. See *infra* notes 155-93 and accompanying text.

43. Congress identified these four classic purposes of sentencing in the Sentencing Reform Act of 1984, codified at 18 U.S.C. § 3553(a)(2) (Supp. 1986). No single justification can ever determine the actual imposition of a criminal sanction, and at different times, different justifications are in ascendancy. Henderson, *supra* note 5, at 987. While retribution is currently enjoying a significant rebirth, see *infra* note 118, this note will attempt to demonstrate that at the time the Indiana Constitution was drafted, reformation was the principle justification for punishment.

44. See *infra* part V.

45. It has been persuasively suggested and unsuccessfully argued that the death penalty itself is violative of § 18. See *Judy v. State*, 416 N.E.2d 95 (Ind. 1981) (DeBruler, J., dissenting), for such an argument. This note does not intend to make such an argument, in light of the long history of Indiana cases that have upheld the death penalty under this provision even though capital punishment appears to be inherently vindictive. See *infra* part IV.

46. As one commentator has noted, "liberals find themselves caught in yet another apparent paradox: To be solicitous of a defendant's rights is to be anti-victim." Henderson, *supra* note 5, at 952-53. However, Professor Henderson also notes that while victim's rights are increasingly advocated, it is not clear that the reforms have anything to do with the victim or even whether they are desirable. *Id.* at 953. It is difficult to advocate the rights of the defendant seemingly at the expense of the victim. However, under the present VIS scheme in Indiana, the defendant's rights under the Indiana Constitution are being abused. Indiana must either repeal the victim participation statutes in capital cases as they are inconsistent with § 18, or it must amend the Indiana Constitution and remove its reformation provision.

47. 482 U.S. 496 (1987). See *infra* notes 51-71 and accompanying text for a full discussion of *Booth*.

48. *Booth*, 482 U.S. at 503.

to include comments made by the prosecutor concerning personal characteristics of the victim that were unknown to the defendant.⁴⁹ However, less than five years after the *Booth* decision and less than three years after the *Gathers* decision, a newly constituted Court held in *Payne v. Tennessee* that both *Booth* and *Gathers* were incorrectly decided, and that the Eighth Amendment did not prohibit the introduction of victim information in a capital case.⁵⁰

1. *Booth v. Maryland*

In *Booth v. Maryland*,⁵¹ the U.S. Supreme Court addressed the practice of allowing the sentencing jury to consider a VIS prepared by the state Division of Probation and Parole (DPP).⁵² The Maryland statute mandating the VIS had provided that the DPP prepare the statement solely from information supplied by the victim's family.⁵³ The statute also stated that, at the sentencing hearing,

49. 490 U.S. 805 (1989). See *infra* notes 73-83 and accompanying text for a full discussion of *Gathers*.

50. 111 S. Ct. 2597 (1991). See *infra* notes 84-98 and accompanying text for a full discussion of *Payne*.

51. 482 U.S. 496 (1987). A jury convicted and sentenced Booth to death for the 1983 robbery and murder of an elderly couple in their Baltimore home. The couple's son found the victims two days after the killing, bound and gagged, with multiple wounds to their chests. *Id.* at 498.

52. The VIS was prepared pursuant to MD. ANN. CODE art. 41, § 4-609(c) (1986). The statute mandates that the report shall:

- i. Identify the victim of the offense;
- ii. Itemize any economic loss suffered by the victim as a result of the offense;
- iii. Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;
- iv. Describe any change in the victim's personal welfare or familial relationships as a result of the offense;
- v. Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and
- vi. Contain any other information related to the impact of the offense upon the victim or the victim's family that the trial court requires.

The application to capital cases and its mandatory consideration by the sentencing body is codified at MD. CODE ANN. art. 41, § 4-609(d) (1986), which was amended by the Maryland General Assembly in 1983 to expressly include death penalty cases.

53. MD. CODE ANN. §§ 4-609(c), (d) (1986). In non-homicide cases, the victims themselves provide the information for the report. *Booth* did not specifically address the constitutionality of the use of a VIS or a VSO in a non-capital case.

The complete VIS can be found as an appendix to the *Booth* decision at 482 U.S. 509. The rather long statement details the feelings and problems encountered by the survivors and deserves a complete reading to understand the impact such a statement may have had upon the sentencing jury. The problems experienced by the victims' family included lack of sleep, depression, and fear on the part of the victims' son. The victims' daughter told the DPP that she also suffered from lack of sleep and had become withdrawn and distrustful. She also said that she could not watch violent movies or look at kitchen knives without being reminded of the murders. She expressed the opinion that the defendant could "[n]ever be rehabilitated" and that she could "never forgive anyone for killing [her parents] that way." The granddaughter told the DPP that she had received counseling

the VIS could be either read to the sentencing body by the state or introduced by testimony from the family members who provided information about the impact of the crime upon them.⁵⁴ The Court reasoned that the information was both irrelevant to a capital sentencing decision and that its admission created a constitutionally unacceptable risk that the jury might impose the death penalty in an arbitrary and capricious manner.⁵⁵ Thus, the Court—in a divided opinion delivered by Justice Powell⁵⁶—held that the Eighth Amendment⁵⁷ prohibits a capital sentencing jury from considering victim impact evidence, and subsequently vacated the Maryland Court of Appeals decision upholding Booth's sentence.⁵⁸

Although termed a VIS by the Maryland statute, the statement read in *Booth* included both a VIS and a VSO component.⁵⁹ The Court recognized

but that "no one could help her." The son stated that his parents "were not killed, but were butchered like animals" and that no one "should be able to get away with it." The DPP officer reported, "The family wants the whole thing to be over with and they would like to see swift and just punishment." *Id.* at 512-15.

54. In *Booth*, the prosecutor read the VIS to the jury after making an arrangement with the defense. Prior to the arrangement, the defense presented a motion to suppress the VIS on the grounds that the information was both irrelevant and unduly inflammatory in violation of the defendant's Eighth Amendment protection. The Maryland trial court denied the motion. Subsequently, the prosecutor acquiesced to a defense request to read the statement rather than present the direct testimony of the family members. The defense hoped that the reading might lessen the impact of the statement. 482 U.S. at 500-01.

55. 482 U.S. at 502-03.

56. The Court was divided five to four. Justice Powell authored the opinion of the Court, and was joined by Justices Brennan, Marshall, Blackmun, and Stevens. Two dissenting opinions were filed: Justice White was joined by Chief Justice Rehnquist and Justices O'Connor and Scalia; Justice Scalia was joined by Chief Justice Rehnquist and Justices White and O'Connor. *Booth*, 482 U.S. at 496.

57. The Eighth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666 (1962).

58. 482 U.S. at 502, 509. The Court noted that its decision was guided by the "death is different" doctrine announced in *Woodson v. North Carolina*, 428 U.S. 280 (1974) (plurality opinion of Justices Stewart, Powell, and Stevens) and in other circumstances such evidence might be properly introduced. The Court also noted that in a non-capital criminal trial or in a civil trial where damages are to be awarded, such evidence might be relevant and its admission is best left to the trial judge's discretion. 482 U.S. at 509 nn.7 & 12. California has held similarly, in *People v. Levitt*, that the family's "bereavement is relevant to damages in a civil action, but it has no relationship to the proper purposes of sentencing in a criminal case." 156 Cal. App. 3d 500, 516-17 (1984).

59. While the statute termed the report a VIS, the actual report in *Booth* included both a VIS and a VSO component. The Court recognized this when it stated: "The VIS in this case provided the jury with two types of information. First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant." *Id.* at 502-03. The Court discussed the implications of both, but did not use the exacting terminology used in this note. However, in light of the above reasoning, *Booth* applies to both victim participation components. For definitions as used in this note, see *supra* notes 14-20 and accompanying text.

this, and chose to discuss each component separately.⁶⁰ Regarding the VIS component, the Court rejected the state's argument that the evidence should be considered because it revealed the full extent of the harm caused by the defendant.⁶¹ The Court reasoned that while the full range of foreseeable consequences might be relevant in non-capital, criminal contexts and in civil contexts,⁶² it was not relevant in the unique capital sentencing hearing.⁶³ Such evidence would shift the focus of the hearing from the blameworthiness of the particular defendant to the character and reputation of the victim and the effect of the crime on his family.⁶⁴ This shift in focus might cause the jury not only to disregard the uniqueness of the defendant, but also to impose the death penalty because of factors about which the defendant neither knew about nor were relevant to his decision to kill.⁶⁵ Consideration of this irrelevant information could result in the imposition of the death penalty in a capricious, arbitrary, and, ultimately, unconstitutional manner;⁶⁶ hence, the introduction of the VIS violated the defendant's Eighth Amendment rights.⁶⁷

60. The discussion of the VIS component may be found at 482 U.S. 503-07 and the VSO component at 482 U.S. 508-09.

61. 482 U.S. at 503-04. "The State claims that by knowing the extent of the impact upon and the severity of the loss to the family, the jury was better able to assess the 'gravity or aggravating quality' of the offense." *Id.*

62. *See supra* note 58.

63. 482 U.S. at 504. *See also supra* note 37. The Court reasoned that the factors presented in the VIS "may be wholly unrelated to the blameworthiness of a particular defendant," and thus the inquiry might impermissibly shift from the defendant as required by *Woodson* to the victim and effect on his family. 482 U.S. 496, 504.

64. 482 U.S. at 504. The Court cited *Woodson*, 428 U.S. at 304, for the proposition that the jury in a capital case is required to focus on the defendant as a "uniquely individual human bein[g]." A VIS that would shift the focus from the defendant to the victim would clearly violate the stated proposition. *Booth*, 482 U.S. at 504.

65. 482 U.S. at 504. The Court also noted in a footnote that such evidence might be admissible if it directly related to the circumstances of the crime, but it gave no guidance as to what this actually meant. *Id.* at 507 n.10. The Indiana Supreme Court used this caveat to uphold a death sentence over the defense's argument that impermissible victim information was presented to the sentencing jury. *See Woods v. State*, 557 N.E.2d 1325 (Ind. 1990), discussed *infra* at notes 103-10 and accompanying text.

66. The Court had previously held that the death penalty could not be imposed under sentencing procedures that created a substantial risk that the death penalty would be inflicted in an "arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Justices Stewart, Powell, and Stevens) (quoting *Furman v. Georgia*, 408 U.S. 238 (1972)) (holding that the imposition of the death penalty in the cases considered constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments).

67. Additionally, the Court found that VIS evidence might vary depending on the family of the victim or the victims themselves. Certain families could be expected to be more articulate at conveying their grief and other families could be altogether lacking. Also, victims would be different. Some may have been "sterling member[s] of the community," while others may have been of "questionable character." These variations, the Court held, should not play a part in deciding whether a defendant should live or die. *Booth*, 482 U.S. at 505-06. Justice Scalia, in dissent, did not accept this argument. *Id.* at 515 (Scalia, J., dissenting). He noted that prosecutors'

The Court also held that the VSO component of the prosecutor's statement was inappropriate at the sentencing phase of a capital case.⁶⁸ The Court found that the only purpose of the information would be to inflame the jury and divert its attention from deciding whether or not to impose the death penalty based on the relevant evidence.⁶⁹ Hence, the introduction of the evidence was improper, because the jury's determination might become an emotional one rather than the reasoned determination required by the Court's death penalty jurisprudence.⁷⁰

Thus, after *Booth*, both VIS's and VSO's were considered, in most situations, to violate the Eighth Amendment and thus were inadmissible at the sentencing phase of a capital case.⁷¹ Two years later, a similar majority would extend the *Booth* rule in *South Carolina v. Gathers*,⁷² while the dissenters continued to question the validity of a rule excluding victim impact evidence from the jury's consideration.

2. *South Carolina v. Gathers*

In *South Carolina v. Gathers*,⁷³ the Court held that comments made by the

abilities to present their arguments to the jury are not the same and neither are different witnesses; hence, the fact that some victim's families might be more articulate was a "makeweight consideration." *Id.* at 517-18 (Scalia, J., dissenting).

For an analysis of the *Booth* decision on grounds that the inclusion of a VIS may violate Equal Protection, see Jonathan Wilmott, Note, *Victim Characteristics and Equal Protection for the Lives of All: An Alternative Analysis of Booth v. Maryland and South Carolina v. Gathers and a Proposed Standard for the Admission of Victim Characteristics in Sentencing*, 56 BROOK. L. REV. 1045 (1990).

The Court was also concerned with the difficulties the defendant would have in rebutting VIS evidence. The possibility that the sentencing hearing could become a "mini-trial" concerning the VIS might distract the jury from determining the appropriateness of the death penalty based on the defendant and the circumstances of the crime. *Booth*, 482 U.S. 506-07.

68. *Id.* at 508-09.

69. *Id.* at 508.

70. *Id.* The Court cited to *Gardner v. Florida*, 430 U.S. 349 (1977) (opinion of Justice Stevens), for the proposition that the death penalty determination should be based on reason rather than caprice or emotion.

71. See *supra* note 65 (for the exception to the *Booth* per se rule of inadmissibility).

72. 490 U.S. 805 (1989).

73. *Id.* The facts of *Gathers* are particularly disturbing. *Gathers* and three other youths encountered the victim, Haynes—a self-proclaimed preacher—in the wooded section of a park at night. Neither of the parties had met each other before. When Haynes rebuffed an attempt at conversation by *Gathers*, *Gathers* and his friends responded by beating and kicking the victim severely. Before leaving the scene, *Gathers* beat Haynes with an umbrella, which he then inserted into the victim's anus. The youths, apparently looking for something to steal, had rummaged through the victim's belongings. Haynes' belongings consisted of some Bibles and other religious symbols that were left strewn about at the scene. Later, *Gathers* returned to the scene and stabbed Haynes with a knife. *Id.* at 806-07. *Gathers* was later convicted by a jury of murder and second-degree assault and sentenced to death by the trial court. On appeal, the South Carolina Supreme

prosecutor concerning personal characteristics of the victim, of which the defendant was unaware at the time of the murder, were unconstitutional.⁷⁴ The Court reasoned that the prosecutor's remarks were virtually indistinguishable from the VIS found to be impermissible in *Booth*.⁷⁵ The only difference, the Court noted, was that the information was supplied by the prosecution, based on items found at the crime scene, instead of the victim's family, in which case the information would have been based on personal qualities. Using the rationale it had followed in striking down Maryland's VIS statute, the Court held that allowing the sentencing jury to rely on such information could result in the imposition of the death penalty because of factors of which the defendant was unaware, and which were irrelevant to the defendant's decision to kill.⁷⁶ Such an imposition would violate the Eighth Amendment. Once again, a minority of four justices disagreed with the Court's analysis.⁷⁷

The state also argued that even if *Booth* was correctly decided, the information presented by the prosecutor fit the *Booth* exception, which allowed the introduction of evidence directly related to the circumstances of the crime.⁷⁸ Justice Brennan, writing for the majority, disagreed. In *Booth*, the victim's personal effects and papers were strewn around his body. The Court reasoned that while evidence of the defendant's apparent search for something to steal was a relevant circumstance of the crime, and thus a proper subject for comment, the

Court reversed the conviction relying on *Booth v. Maryland*, 482 U.S. 496 (1987). See *South Carolina v. Gathers*, 369 S.E.2d 140 (S.C. 1988). The Supreme Court affirmed.

Faced with a similar situation prior to *Gathers*, the Indiana Supreme Court did not choose to interpret *Booth* as South Carolina had interpreted the case. In *Daniels v. State*, 528 N.E.2d 775, 782 (Ind. 1988), the Court upheld a death sentence even though the prosecution argued the personal characteristics of the victim at the sentencing phase.

74. 490 U.S. at 811.

75. *Id.* The prosecutor admitted only VIS information at the sentencing phase. VSO evidence was not introduced at the *Gathers* sentencing hearing. *Id.*

76. *Id.*

77. Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, believed *Booth* was wrongly decided and stood ready to overrule it. However, they believed that *Gather's* sentence could be upheld without overturning *Booth* if that holding was confined to the exclusion of statements concerning the harm to the victim's family and not the exclusion of "virtually all consideration of the victim." The comments in *Gathers* related solely to the personal characteristics of the victim and were made not by the victim's family, but by the prosecutor. A narrow reading of *Booth's* Eighth Amendment rule would allow the *Gathers* sentence to be upheld. *Id.* at 814. Several state courts, including Indiana, had already adopted the minority's narrow reading of *Booth*. See, e.g., *Daniels v. State*, 528 N.E.2d 775 (Ind. 1988) (upholding a sentence on the grounds that the rule announced in *Booth* would not be applied retroactively); *Moon v. State*, 375 S.E.2d 442 (Ga. 1988).

Justice Scalia argued that *Booth* should simply be overruled as being beyond any provision found in the Constitution and would have upheld the death sentence. *Gathers*, 490 U.S. at 823.

78. See *supra* note 65.

content of the papers was irrelevant.⁷⁹ Thus, the prosecutor had properly introduced a description of the crime scene at the guilt phase of the trial, but he had impermissibly discussed the contents of the crime scene items at the sentencing phase. The prosecutor noted in his remarks that the victim was a self-proclaimed minister who was carrying various religious items, including beads and a plastic angel. Also, the prosecutor told the jury about the contents of two cards found on the victim: the "Game Guy's Prayer"⁸⁰ and a voter registration card. The contents of these cards, the Court held, could not possibly have been relevant to the circumstances of the crime and thus did not fit into the exception announced in *Booth*.⁸¹

Thus, after *Booth* and *Gathers*, any information about the victim or the victim's family not related to the circumstances of the crime or to the defendant's moral culpability could not be introduced at the sentencing phase of a capital case. The information was per se inadmissible under the Eighth Amendment. As Justice O'Connor noted in her dissent in *Gathers*, the effect of this rule was to eliminate virtually all consideration of the victim at the penalty phase.⁸² However, with the retirement of Justice Brennan and the appointment of Justice Souter, the minority became a majority. Less than two

79. *Gathers*, 490 U.S. at 811. The Court went on to stress that the attack took place at night on a dark path in a wooded area and the assailants were not using flashlights. Thus, the contents of the papers that the victim happened to be carrying were "purely fortuitous" and could not be relevant to the defendant's moral culpability.

80. The prayer is as follows and is included to show how irrelevant such a statement was to the imposition of the severest penalty society can inflict:

Dear God, help me be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be a regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get to the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life.

Id. at 808-09.

81. *Id.* at 811.

82. *Id.* at 814.

years after it was announced, the *Gathers* ruling, along with most of the *Booth* rule, would be overruled by *Payne v. Tennessee*.⁸³

3. *Payne v. Tennessee*

The Supreme Court held in *Payne*⁸⁴ that the Eighth Amendment,⁸⁵ contrary to the interpretation given it by *Booth* and *Gathers*, did not erect a per se bar prohibiting a capital sentencing jury from considering victim impact evidence or prosecutorial argument on that subject.⁸⁶ Chief Justice Rehnquist, delivering the opinion of the Court,⁸⁷ found that neither evidence relating to the victim's personal characteristics (as in *Gathers*) nor the impact of the murder on the victim's family (as in *Booth*) is precluded by the Constitution.⁸⁸ Thus, a state may legitimately conclude that such evidence is relevant to the jury's determination of whether to impose the death penalty. The Court noted that in the event such evidence is so unduly prejudicial that it renders the sentencing determination fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism of relief for the prejudiced defendant.⁸⁹

At the sentencing phase of the trial, the state presented two forms of victim impact evidence that it had not presented earlier at the guilt phase. First, the state presented the testimony of the woman who was the mother and grandmother of the victims. She testified about how the surviving son had been affected

83. 111 S. Ct. 2597 (1991).

84. *Payne*, after driving around town with a friend, returned to the apartment complex where his girlfriend lived. The Christophers lived across the hall. Payne entered the Christopher's apartment and began to make sexual advances towards the mother, Charisse. After Charisse resisted his advances, Payne became violent and proceeded to stab the woman 84 times with a butcher's knife. Payne also stabbed Charisse's two young children. He killed the youngest, Lacie, and left Nicholas wounded, presumably to die. A South Carolina jury found Payne guilty of two counts of first-degree murder in the deaths of Charisse and her two-year old daughter Lacie. Payne was also convicted of assault with intent to commit murder regarding the attack on Nicholas. *Id.* at 2601-02.

85. For the text of the Eighth Amendment, see *supra* note 30.

86. *Payne*, 111 S. Ct. at 2609.

87. In *Payne*, the majority ruled six to three. The dissenters in *Booth* and *Gathers*, Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy, were joined by Justice Souter. Justices Marshall and Stevens filed dissenting opinions in which Justice Blackmun joined.

88. *Id.* The Court noted, however, that the relevancy of such evidence is left to the discretion of the states and that each state may decide that such evidence is not relevant to capital proceedings within their state. *Payne*, 111 S. Ct. at 2612 (O'Connor, J. concurring.) The Court noted that, beyond the limitations set by its death penalty jurisprudence, "the Court has deferred to the State's Choice of substantive factors relevant to the penalty determination." *California v. Ramos*, 463 U.S. 992, 1001 (1983).

89. *Payne*, 111 S. Ct. at 2608 (citing *Darden v. Wainwright*, 477 U.S. 168, 179-83 (1986) (holding that the due process standard of fundamental fairness governs argument of prosecutor at sentencing)).

by the murders of his mother and sister.⁹⁰ Second, in arguing for the death penalty during his closing argument, the prosecutor commented on the effects that the murders had on the son. These comments included a plea that justice be done for the child's sake. Also, in rebuttal to the defense attorney's closing argument, the prosecutor discussed how the murdered daughter would not experience the joys of living and the surviving son would not experience the joys of having a mother and a sister.⁹¹

The Court found that the VIS's made by the prosecutor and the victims' relative were acceptable forms of evidence in a capital case. The Court reasoned that, because no prohibition could be found in the Eighth Amendment, the states had the power to determine the procedures and remedies required to meet the needs of the public.⁹² A state may legitimately conclude that for the jury to meaningfully assess the defendant's moral culpability and blameworthiness, it should have before it the harm caused by the defendant even though the defendant might neither have known of nor intended such consequences.⁹³ The Court concluded that *Booth* and *Gathers* may deprive the state of the full moral force of its evidence, and may prevent the jury from having the evidence necessary to determine the proper punishment for a capital offense.⁹⁴ The

90. She stated that the boy cries for his mother and does not understand why she does not come home. She also said that he cries for his sister and says that he is "worried about [his] Lacie." *Payne*, 111 S. Ct. at 2603.

91. Many of the things discussed by the prosecutor relating to the impact on the surviving son might have been found to be permissible even without overruling *Booth* and *Gathers*, by using the "relevant to the circumstances of the crime" footnote in *Booth*. See *supra* note 65. The defendant could reasonably have been expected to foresee the impact on the surviving son because he was there at the scene of the crime and, thus, this was relevant in evaluating the defendant's decision to kill. Justice Souter impliedly rejected this application in his hypothetical set out in his concurring opinion. He found that resting the admission of impact evidence on the fortuity of the defendant being made aware of the victim's family at the time of the murder was arbitrary and unacceptable. *Payne*, 111 S. Ct. at 2617 (Souter, J., concurring.)

92. *Payne*, 111 S. Ct. at 2608.

93. *Id.* Justice Souter remarked that criminal conduct has traditionally been categorized and personalized according to consequences not intended by the defendant. Victim impact is not an unforeseeable consequence, however. "Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person . . . and that the person to be killed probably has . . . 'survivors,' who will suffer harms and deprivations from the victim's death." *Id.* at 2615 (Souter, J., concurring).

94. *Id.* at 2608. The Court noted that *Payne* was an excellent example of the state's having been prevented from presenting to the jury the full force of its evidence if *Booth* was upheld. *Payne's* girlfriend testified that they met at church, that he was affectionate and caring to her children, and that it would have been inconsistent with his nature to commit the murders. *Payne's* parents testified that he was a good son, and a clinical psychologist testified that *Payne* was a polite prisoner and had a low IQ. Following *Booth*, the defendant is allowed to have the jury consider this mitigating evidence, but the state cannot show the other side. The Court agreed with the Supreme Court of Tennessee's finding that the rule was unfair. The Tennessee court said:

It is an affront to . . . the human race to say that at sentencing in a capital case, a

Fourteenth Amendment's Due Process clause is available to safeguard the defendant's right to a fair trial if the evidence is so unduly prejudicial that it renders the trial fundamentally unfair.⁹⁵

Thus, after *Payne*, victim impact evidence may be introduced at the sentencing phase of a capital case subject only to the limitations imposed by the Due Process Clause. The effect of this holding is that *Gathers* was totally overruled, but part of *Booth* remains good law. *Booth* held that both VIS's and VSO's were constitutionally impermissible under the Eighth Amendment.⁹⁶ *Payne* did not address the constitutionality of the VSO holding, and the Court made it perfectly clear that the holding was limited to overturning the VIS holdings of *Booth* and *Gathers*.⁹⁷ Hence, for the time being, the VSO remains unconstitutional under *Booth*.⁹⁸ After *Payne*, a VIS—evidence relating to the victim or the impact on the victim's family—is appropriate in a capital sentencing hearing. However, the introduction of a VSO—evidence relating to the victim's characterizations and opinions of the crime, defendant, and the appropriate sentence—violates the Eighth Amendment.

B. Indiana Jurisprudence

While some jurisdictions chose to interpret *Booth* liberally,⁹⁹ others, including Indiana,¹⁰⁰ chose to narrow its application and hold that it did not

parade of witnesses may praise the background, character, and good deeds of [the defendant], without limitation to relevancy, but nothing may be said that bears upon the character of, or the harm imposed by the victims.

791 S.W.2d 10, 19 (Tenn. 1987).

95. See *supra* note 89.

96. See *supra* notes 51-71 and accompanying text.

97. *Payne v. Tennessee*, 111 S. Ct. 2597, 2611 n.2 (1991) (holding that since no such evidence was presented by the prosecutor, the holding concerning VSO's in *Booth* was left undisturbed).

98. The Court did not address the constitutionality of VSO's because this issue was not presented; however, it appears likely that the last vestiges of *Booth* will fall, given the proper case. In *Booth*, the dissent made no distinction between the two types of information discussed by the majority. The dissent found nothing in the Constitution to impose limitations upon the states as to what type of evidence could be admitted. *Booth v. Maryland*, 482 U.S. 496 at 515-16 (1987) (White, J., dissenting) and at 520 (Scalia, J., dissenting). Thus, it would appear that the present Court would leave the determination of the relevancy of VSO's to the discretion of the state legislatures.

99. See, e.g., *State v. Gathers*, 369 S.E.2d 140 (S.C. 1988), *aff'd*, 490 U.S. 805 (1989), discussed at *supra* notes 73-83 and accompanying text. The South Carolina Supreme Court, in reversing the trial court's death penalty determination, had read *Booth* for the broad proposition that the injection of the victim's personal characteristics by any party into the sentencing determination violates the Eighth Amendment. *Id.* at 144.

100. *Daniels v. State*, 528 N.E.2d 775 (Ind. 1988), *rev'd*, 491 U.S. 902 (1989) (holding that the cause be remanded for consideration in light of *Gathers*), and *rev'd*, 561 N.E.2d 487 (Ind. 1990) (reversing on the grounds that while *Booth* and *Gathers* may have been violated, retroactive

prohibit prosecutorial argument concerning the personal characteristics of the victim at the sentencing phase of the trial.¹⁰¹ After *Gathers*, state courts had no choice but to reverse their earlier holdings and, applying the extension made in *Booth*, find that prosecutorial comments were inadmissible under the Eighth Amendment.¹⁰² However, before *Payne* was announced, the Indiana Supreme Court did not reverse any death penalty determinations under the *Booth/Gathers* rule. In fact, the Indiana Supreme Court demonstrated that it was willing to use the exception to uphold other death penalty determinations.

In *Woods v. State*,¹⁰³ the Indiana court upheld the conviction and sentence of the defendant¹⁰⁴ even though the prosecutor's summation contained victim impact evidence.¹⁰⁵ The prosecutor had discussed the personal characteristics of the victim, and the effect that the victim's murder would have on the family. This appears to be exactly the type of information that the *Gathers* Court found to be unconstitutional. However, the Indiana court reasoned that *Booth* and *Gathers* prohibited victim impact evidence only if it was irrelevant to the moral culpability of the defendant or the circumstances of the crime.¹⁰⁶ The prosecutor's comments in *Woods*, the Court held, were relevant to both because the defendant was previously acquainted with the victim and thus knew about his personal characteristics and closeness with his family.¹⁰⁷

Following *Payne*, the Indiana Supreme Court has had only one opportunity to rule on the admissibility of victim information of the type found to be constitutionally permissible under the Eighth Amendment.¹⁰⁸ Two options were available to the Indiana court after *Payne*; first, the Indiana Supreme Court

application of them to a case on collateral review at the time of the decision was inappropriate).

101. See, e.g., *State v. Daniels*, 528 N.E.2d 775 (Ind. 1988); *Moon v. State*, 375 S.E.2d 442 (Ga. 1988). See also *People v. Rich*, 755 P.2d 960 (Cal. 1988); *People v. Ghent*, 739 P.2d 1250 (Cal. 1987).

102. Justice DeBruler, dissenting in *Daniels v. State*, 561 N.E.2d 487, 492 (Ind. 1990), would have reconsidered the prosecutor's remarks in light of *Gathers* as the Supreme Court had instructed the Indiana Supreme Court to do. He found that the remarks were irrelevant to the jury's consideration and applying *Gathers* would have reversed the death penalty determination. *Id.*

103. 557 N.E.2d 1325 (Ind. 1990).

104. *Id.* at 1326.

105. *Id.* The prosecutor stated that the victim was physically frail, that the victim's family grieved the loss, and that the defendant had deprived the family of the victim's company. He also stated that the defendant was an executioner that deserved no more than he gave his victim and that the victim, before being killed, had not been given the due process rights which the defendant had received. *Id.*

106. *Id.*

107. *Id.* The defendant knew the victim because his mother had worked for him. Thus, he was aware of the victim's frailty and the closeness of the victim with his family. Also, the court found that the defendant knew that had he not killed the victim, the victim would have been able to identify him. *Id.*

108. *Benirschke v. State*, 577 N.E.2d 576 (Ind. 1991).

could follow the U.S. Supreme Court's lead on the admissibility of victim evidence. Alternatively, the court could find that while the evidence did not violate the federal Constitution, it violated the Indiana Constitution and thus was impermissible in an Indiana capital sentencing hearing. In *Benirschke v. State*,¹⁰⁹ the Indiana court chose the former. The court ruled summarily that in light of *Payne*, the prosecutor's comments to the jury regarding the impact of the murder upon the victim's family did not violate the state's constitution.¹¹⁰ Additionally, the Indiana court found that the VIS admitted was essentially the same as was found to be admissible under *Woods*, and would have been admissible even before *Payne* was decided.

Thus, Indiana seems resigned, at least at this time, to follow the Supreme Court's lead on the question of evidence permitted by the Eighth Amendment. However, the court could have found that under Indiana's Eighth Amendment analogue, *Booth* and *Gathers* were the proper interpretation of Indiana's protection.¹¹¹ Perhaps the Indiana court wished to find the information admitted to be unconstitutional but, because *Benirschke's* counsel did not base her argument on Indiana's Constitution, the court felt bound to decide the case on the federal grounds.¹¹² However, Indiana need not disagree with the rationality of *Payne* to find that, while VIS's and VSO's are permitted under the Eighth Amendment, their admission is unconstitutional in Indiana. Section 18 of Indiana's bill of rights can provide protection in this area.¹¹³

109. *Id.*

110. *Id.* at 578.

111. Indiana Chief Justice Randall T. Shepard recognized this when he cited Justice Brennan in a recent article. See Randall T. Shepard, *Indiana Law, the Supreme Court and a New Decade*, 24 IND. L. REV. 499, 504 (1991). Justice Brennan, in a dissent from a Burger Court decision on the constitutional rights of a defendant, urged state courts to use their own constitutions to afford protection not available under the federal charter. See *Michigan v. Mosley*, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting).

The federal Constitution provides the minimum protection that a defendant must be given and no one questions a state's power to construe state provisions as providing broader protection for individual rights. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). See also IND. CONST. art. I § 16, which provides that criminal sentence must be proportional to the crime; the Supreme Court has recently decided that the federal Constitution provides no such guarantee. See *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991).

112. Shepard has noted that a party must argue the Indiana law primarily—and not merely as an addendum to the federal argument—to prevail on an Indiana constitutional claim. Randall T. Shepard, *A Second Wind for the Bill of Rights*, 22 IND. L. REV. 575 (1989). The Chief Justice is not alone in requiring that a state constitutional issue be argued as a separate and individual claim. See, e.g., *State v. Jewett*, 500 A.2d 233, 234-36 (Vt. 1985) (admonishing parties for their inadequate briefs and ordering a supplemental briefing on the state issues).

113. Indiana is not adverse to giving the defendant rights not granted by the federal Constitution. See, e.g., *Campbell v. State*, 96 N.E.2d 876 (Ind. 1951) (granting the indigent defendant a right to counsel years before the U.S. Supreme Court held, in *Gideon v. Wainwright*, that the right was guaranteed by the federal Constitution. 372 U.S. 335 (1963)). But see *Thomas*

III. THE INDIANA CONSTITUTION PROHIBITS RETRIBUTIVE OR VINDICTIVE STATUTES IN THE PENAL CODE

This Section will demonstrate that the criminal statutes of Indiana's penal code must be based primarily on the principles of reformation, not retribution, as mandated by section 18 of the Indiana Bill of Rights. Any statute failing to meet these criteria must be found unconstitutional. However, this Section will also show that while reformation must be the tantamount goal of all criminal statutes, the alternative justifications of deterrence and incapacitation are constitutionally permissible. First, to determine the constitutionally permissible justifications, the actual language of section 18 will be examined. Second, an attempt to discern the legislative intent from the convention debates and the time period in which the section was enacted will be made. Third, this Section will examine the Indiana Supreme Court's early section 18 jurisprudence to show that existing state law would not uphold a statute based solely on retribution. Thus, if the Indiana Supreme Court is presented with a retribution-based statute, it is constitutionally bound to strike it down.

A. *The Constitutional Language*

In what was arguably a more enlightened era, the Indiana framers made a conscious decision regarding the type of penal code they wished to have in their newly formed state.¹¹⁴ At the same time, the framers proscribed the

v. Indianapolis, 145 N.E. 550 (Ind. 1924) (upholding an ordinance prohibiting all picketing); *Waters v. Indianapolis*, 134 N.E. 482 (Ind. 1922) (upholding a city ordinance making it unlawful to carry any banner, placard, advertisement, or handbill in any public place). The U.S. Supreme Court eventually incorporated the First Amendment to apply to the states, thus giving citizens more freedom of expression than the Indiana Court was willing to give. *Gitlow v. New York*, 268 U.S. 652 (1925).

114. Many influential thinkers, philosophers, and statesmen began to reject the retributive justification of punishment during the eighteenth and nineteenth centuries in favor of a utilitarian model. This model saw reformation as the primary goal of penology, but realized that the ideal was not always attainable. Thus, incapacitation and deterrence were seen as permissible alternative goals of punishment. Stephen Kantner, *Dealing with Death: The Constitutionality of Capital Punishment in Oregon*, 16 WILLAMETTE L. REV. 1, 38 (1979). The Indiana Constitution was drafted during this time period. See generally CESARE BECCARIA, ON CRIMES AND PUNISHMENT (Henry Paolucci trans., 1963); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1970). For the view that the historical cycle has shifted from reformation back to vengeance as the primary justification for punishment, see Leonard Orland, *From Vengeance to Vengeance: Sentencing Reform and the Demise of Rehabilitation*, 7 HOFSTRA L. REV. 29 (1978) (illustrating this shift by examining the abandonment of indeterminate sentencing and parole in favor of determinate sentencing codes).

The Supreme Court is not immune from the movement towards retributive justification of punishment and has specifically stated that retribution is a socially acceptable goal under the Eighth Amendment in capital cases. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (noting, "Retribution is . . . neither . . . a forbidden objective nor one inconsistent with the dignity of

legislature from basing the penal code on principles that were uniformly rejected. These principles, both accepted and rejected, are embodied in article I, section 18 of the Indiana Constitution. Section 18 mandates that “[t]he penal code shall be founded on the principles of reformation and not of vindictive justice.”¹¹⁵ Several principles may be discerned about the provision from this simple and concise language.

First, the framers saw “the principles of reformation” as being mutually exclusive from the principles of “vindictive justice.”¹¹⁶ This is inferred from the form of the provision itself. The language “shall be founded on . . . and not of” suggests that the framers found the two principles to be diametrically opposed and inconsistent with each other. Hence, the penal code must be founded on the principle of reformation and not on vindictiveness or retribution.¹¹⁷

However, it is not as obvious that the framers desired reformation to be the only permissible goal of the penal code. Assuming that they were aware of alternative punishment justifications¹¹⁸—namely, deterrence and incapacitation

man.”); *Furman v. Georgia*, 404 U.S. 238, 308 (1972) (Stewart, J., concurring) (noting that “[t]he instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose . . .”). While *Gregg* accepted retribution as an acceptable goal, it implicitly rejected the interpretation of the Eighth Amendment offered by Justice Marshall in *Furman v. Georgia*, 404 U.S. 238, 247 (Marshall, J., concurring) (noting that “retribution for its own sake is improper” and the Court had “consistently denigrated retribution as a permissible goal of punishment. The Eighth Amendment is our insulation from our baser selves.”).

115. See *supra* note 27 and accompanying text.

116. Kantner, *supra* note 114, at 1. Kantner interprets an Oregon constitutional provision directly borrowed from § 18. OR. CONST., art. 1 § 15 provides that “[l]aws for the punishment of crime shall be founded on principles of reformation, and not of vindictive justice” (emphasis added to distinguish the difference between the provisions). Kantner concludes that the provision precludes capital punishment in Oregon because it is inherently vindictive. Because of the similarity between the provisions, several inferences made from the language are directly applicable when interpreting Indiana’s provision.

117. At least one Indiana Supreme Court justice has expressly recognized this proposition. See *Judy v. State*, 416 N.E.2d 95, 113 (Ind. 1981) (DeBruer, J., dissenting) (holding that “[§ 18’s] plain meaning is that principles of reformation must underpin the establishment of criminal penalties to the exclusion of principles of vindictive justice.”).

Also, for the purpose of this note, vindictive justice and retribution are seen to be synonymous. Justice DeBruer also has stated that § 18 bars vengeance and retribution. *Id.* The theory of retribution will be discussed in greater detail. See *infra* notes 155-64.

118. The debates of the 1850 Indiana convention suggest that the framers were aware of these goals, although they did not specifically discuss them. Bryant remarked soon after § 18 was proposed that the object of punishment was twofold: “the prevention of crime and the reformation of the offender.” 2 H. FOWLER, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1903 (Indiana Historical Collections Reprint 1935) (1850) [hereinafter DEBATES]. The prevention of crime could be

—the framers could have included or excluded either justification specifically. The framers chose to do neither. Hence, two possible constructions of section 18 are possible: that deterrence and incapacitation are acceptable goals as long as reformation remains the paramount goal of the penal code; or that reformation is the only goal upon which a penal code could be constructed, and a code based on any alternative rationale would be invalid.¹¹⁹ The latter construction would seem to be an unwise choice as it would limit the legislature to reformatory provisions possibly at the expense of protecting society. The more likely construction, then, is the former. While reformation would be the ultimate goal of the penal code, the protection of society would not be compromised by prohibiting statutes enacted for the purposes of deterrence and incapacitation.¹²⁰

Second, the provision recognizes that the legislature may periodically enact statutes, either intentionally or unintentionally, that are vindictive in nature.¹²¹ Since the provision specifically prohibits this, the duty to screen out such

construed to include both deterrence and incapacitation. Indeed, this is consistent with utilitarian theory, which was popular during the time of the constitution's creation.

119. The question can be put another way. If *Y* told *X* that she "shall do *A*," but "shall not do *B*," and *A* and *B* are mutually exclusive acts, does this necessarily preclude *X* from doing *C* or *D*? The answer lies in whether or not the statement includes the entire universe of options available to the actor. If *A* and *B* constitute the entire universe, *C* and *D* are precluded. The above language does not limit the universe, however. Had *Y* wished to preclude the *C* and *D* options, he could have told *X* that she may "only do *A*." Also, with this formulation, the prohibition against *B* would not be needed. Hence, the selected language absent the "only" suggests that other options might not be precluded and that both the *C* and *D* options are available to the actor. By applying this analysis to § 18, it appears that deterrence and incapacitation are not prohibited by the language, so long as reformation is the paramount goal.

Also, the contextual background of the statement must be considered. The context may suggest that the universe of options was curtailed or implicitly expanded. That utilitarian theory was the dominant justification at the time the Indiana Constitution suggests that while reformatory principles must be included and perhaps be overarching, the section does not prohibit deterrence or incapacitation.

Another rule that could be applied to the provision is the Latin maxim, *expressio unius est exclusio alterius*. BLACK'S LAW DICTIONARY 581 (6th ed. 1990) ("[T]he expression of one thing is the exclusion of another."). Indiana recognized this principle in *State ex rel. Thomas v. Williams*, 151 N.E.2d 499 (Ind. 1958), and *Robinson v. Moser*, 179 N.E. 270 (Ind. 1931). A strict application of this rule would preclude any rationale except reformation. However, the apparent intent of the framers would be frustrated if the rule were applied in such a manner. Oregon also rejected this argument. See *State v. Cochran*, 105 P. 884, 891 (Or. 1909).

120. This is in accord with the utilitarian theory of punishment. The Indiana Supreme Court has also recognized that while reformation must ultimately be the goal of the penal code under this section, the legislature is not obliged to pursue such goals at the expense of the protection of society. *Dillon v. State*, 454 N.E.2d 845, 852 (Ind. 1983). Such an interpretation seems consistent with the framers' intentions.

121. Kantner, *supra* note 114, at 31.

statutes falls to the courts, acting as guardians of the constitution.¹²² Third, the constitution requires only that the penal code *as a whole* be inculcated with the principles of reform. This means that some individual statutes may have one of the alternative justifications discussed above.¹²³ This lends credence to the construction that allows the rationales of deterrence and incapacitation to be included in the formulation of criminal statutes.

Thus, it can be seen from the language of the provision that the justifications of reformation, deterrence, and incapacitation are acceptable. As long as the penal code is essentially reformatory, a statute need not be struck down because it advances only the policies of deterrence or incapacitation.¹²⁴ However, because retribution is categorically prohibited when all three accepted rationales are absent, the statute must be found unconstitutional as retribution is undeniably prohibited by the language of the constitution.

B. Constitutional History of Section 18

The 1816 constitutional convention led to the creation of the first Indiana Constitution¹²⁵ in less than three weeks¹²⁶ because the delegates borrowed from existing state constitutions.¹²⁷ The predecessor to the current section 18 was article IX, section 4.¹²⁸ That section was also borrowed from what was

122. See *Public Service Comm. v. Indianapolis*, 131 N.E.2d 308 (Ind. 1956) (DeBruler, J.) (stating that the court has a duty to determine if a specific act is prohibited by the constitution).

123. Had the framers wished that each and every statute be based on reformation, they could have specifically mandated such a result by providing that "[a]ll criminal statutes shall be based upon" Additionally, the framers could have restricted the provision to apply only to sentencing as Oregon did in its constitutional provision—"[l]aws for the punishment of crime" OR. CONST., art. 1, § 15.

124. Such a statute may be acceptable under § 18, but it should probably be subjected to closer scrutiny to ensure that the effect of the statute, in combination with other similar statutes, does not shift the focus of the penal code from its overall reformatory purpose. The invalidation of a statute on this basis would most likely be a rare occasion. However, if the court determined that a statute shifted the code away from reformation, it would be bound to strike it down as a penal code based primarily on either deterrence or incapacitation in violation of § 18.

125. Robert Twomley, *The Indiana Bill of Rights*, 20 IND. L. REV. 211 (1945).

126. *Id.* at 212. Twomley's article provides a general history of the 1816 and 1850 bills of rights and also discusses each section of the 1850 bill of rights individually.

127. The convention borrowed the constitution almost entirely from the Ohio Constitution of 1802 and the Kentucky Constitution of 1799. CHARLES KETTLEBOROUGH, 1 CONSTITUTION MAKING IN INDIANA xx (1916). The major difference between the Ohio and Kentucky Constitutions and the new Indiana Constitution concerned the provision relating to amendments to the constitution. *Id.* This later proved to be the cause of the call for the 1850 convention.

128. IND. CONST. OF 1816, art IX, § 4. "It shall be the duty of the General assembly, as soon as circumstances permit, to form a penal code founded on the principles of reformation, and not of vindictive justice" The committee reported the provision to the convention with no subsequent amendments being recorded. KETTLEBOROUGH, *supra* note 127, at 115.

perceived to be best from a sister state's constitution.¹²⁹ The framers pulled language from the Ohio Constitution, article VIII, section 14,¹³⁰ to create the predecessor to section 18.

At the convention, little debate or discussion surrounded either the creation of the constitution or the bill of rights.¹³¹ The committee on the preamble and the bill of rights created the bill of rights, which included twenty-four distinct sections, just two days after the committee had been formed.¹³² The delegates did not debate the vast majority of the provisions because they saw themselves as assembling well-settled principles of government to fit the needs of the newly-formed state.¹³³ It may be inferred that section 18's predecessor received no attention because the assembly felt that it was a well-settled principle that reformation was the proper goal of any penal code and a vindictive code should be avoided.

A growing dissatisfaction with the 1816 constitution prompted the call for the 1850 constitutional convention.¹³⁴ The original bill of rights had seldom been criticized,¹³⁵ but the convention appointed the Committee on Rights and Privileges to draft a new bill.¹³⁶ The 1850 convention pursued a more

129. The practice of borrowing language from constitutions perceived to be acceptable appears to have been rather common. Oregon borrowed heavily from Indiana's Constitution. As one framer declared at the Oregon Convention of 1857 in support of modeling Oregon's Constitution after Indiana's Constitution, "Its Bill of Rights . . . is gold-refined; it is up with the progress of the age. I desire that such a bill may precede or become part of our constitution." Kantner, *supra* note 114, at 37 (quoting THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, 101-102 (Charles H. Carey ed., 1857)). Other states also borrowed from Indiana's Constitution, including Washington and Montana.

130. KETTLEBOROUGH, *supra* note 127, at xx. The analogous section of the Ohio Constitution, art. VIII, § 14 read, "For the same reasons, a multitude of sanguinary laws are both impolitic and unjust; *the true design of all punishments being to reform rather than exterminate mankind*" (emphasis added). Ohio had, in fact, borrowed this section. The original author was Blackstone. See BLACKSTONE'S COMMENTARIES 727-40 (J.W. Ehrlich ed., Nourse Publishing Co. 1959). No similar provision existed in the Kentucky Constitution of 1799.

131. Twomley, *supra* note 125, at 211. The convention amended only § 5 of the bill of rights. This section grants the right of trial by jury. *Id.* at n.1.

132. *Id.* at 211.

133. *Id.* Section 5 of the 1816 bill of rights was the only provision changed after being presented by the committee on the preamble and bill of rights. The convention adopted the reformation provision without debate. *Id.*

134. The major dissatisfaction concerned the method of amending the constitution.

135. Twomley, *supra* note 125, at 213.

136. The committee was formed on October 8, 1850, one day after the convention had begun. JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 17 (Indiana Historical Collections Reprint 1936 (1851) [hereinafter JOURNAL]).

deliberative approach than its predecessor in the creation of the new constitution.¹³⁷ Eventually, three hundred and thirty-three resolutions embodying provisions desired either by the delegates or their constituents were presented for consideration.¹³⁸ Section 18 of the new bill of rights, however, was neither the reason for the lengthened deliberations nor a highly debated issue.

On January 29, 1850, Walter March¹³⁹ proposed an amendment to the section then being considered by the convention. This amendment stated that “[t]he penal code of this state shall be founded on the principles of reformation, and not of vindictive justice.”¹⁴⁰ James Bryant¹⁴¹ concurred with March’s assessment that the purpose of all punishment should be to prevent crime while at the same time attempting to reform the offender.¹⁴² However, Bryant suggested that the amendment be offered as a distinct section, as he had “no doubt but that it [would] pass.”¹⁴³ March, following Bryant’s advice, withdrew the amendment and presented the section directly following the resolution of debated topic.¹⁴⁴ The proposal was eventually adopted without debate and became section 18 of the Indiana Bill of Rights.¹⁴⁵

The lack of debate concerning the provision does not imply that it was thought to be of little import. Ohio revised its constitution the same year and

137. This can be seen by several factors. First, the 1816 constitution contained little new or original thought and was the standard type then in vogue in many of the older commonwealths. KETTLEBOROUGH, *supra* note 127, at xx. Second, while the 1816 convention lasted a mere 20 days, the 1850 convention lasted over six times as long: *Id.* at lxxxix. Third, the 1850 convention had almost twice as many committees drafting sections that the 1816 convention. Thus, it appears that the latter convention delegates tried to be more thorough in their creation of the new constitution.

138. KETTLEBOROUGH, *supra* note 127, at 234. The first resolution was submitted on October 9, 1849, three days into the convention; the final being introduced on January 29, only two weeks before final adjournment. *Id.*

139. March was a delegate from the district of Grant and Delaware. DEBATES, *supra* note 118, at 3.

140. This section was proposed as an addendum to the provision authorizing the legislature to provide homes of refuge for the correction and reformation of juveniles. *Id.* at 1903.

141. Bryant was a delegate from Warren County. *Id.* at 4.

142. Bryant was especially distressed with the number of juveniles ending up in the state prison, where reformation was extremely unlikely. DEBATES, *supra* note 118, at 1903.

143. *Id.* at 1903.

144. *Id.* at 1904. The text presented was exactly the same as had been proposed by March only moments earlier.

145. The convention adopted the provision and ordered it to be engrossed for its third and final reading. They adopted the section after its final reading the following day without vote and referred it to the committee on revision, arrangement, and phraseology. For an unknown reason, the committee excised the words “of this state” from the final version. KETTLEBOROUGH, *supra* note 127, at 299 n.49. The exact location in the Convention Journal can be found at JOURNAL, *supra* note 136, at 835.

deleted the reformatory rationale from its new constitution.¹⁴⁶ However, the Indiana delegates chose to keep the reformatory provision. One may conclude that there must have been a strong consensus in favor of this provision. Absent a strong consensus, there would have been some debate, or else an alternative proposal would have been forwarded, much like March had done. The delegates must have believed uniformly that the purpose of the penal code should be to reform the offender rather than to exact retribution on him. Section 18 must embody what the framers desired to be the paramount purpose of the penal code, and must indicate what is to be avoided, as well. A penal code that was primarily based on any justification other than reformation, or that included retributive statutes, would be contrary to the intent and purpose of the accepted provision.

C. Indiana Supreme Court Jurisprudence Concerning Section 18

Most of the Indiana Supreme Court's jurisprudence concerning section 18 has dealt with the issue of capital punishment. Defendants have made numerous attempts to seek the reversal of death sentences on the grounds that the death penalty is vindictive and thus violates the provision. The Indiana Supreme Court has uniformly rejected this argument,¹⁴⁷ however, and has continued to uphold the validity of capital punishment in Indiana.¹⁴⁸

The Indiana Supreme Court was first faced with this argument in *Driskill v. State*.¹⁴⁹ The court, apparently as a matter of first impression, held that the death penalty was not inconsistent with section 18 of the Indiana Constitution. Writing for the court, Justice Davison said,

The punishment of death for murder in the first-degree, is not, in our opinion, vindictive, but is even-handed justice The eighteenth section of the bill of rights, when properly construed, requires the penal laws to be so framed as to protect society, and at the same time . . . inculcate the principle of reform.

146. OHIO REV. CODE ANN. § 49 (Baldwin 1982).

147. Justice DeBruler and former Justice Prentice, however, are of the opinion that the death penalty violates § 18. See *Williams v. State*, 430 N.E.2d 759 (Ind. 1982) (DeBruler, J., dissenting); *Adams v. State*, 271 N.E.2d 425 (Ind. 1971) (Prentice, J. and DeBruler, J., dissenting).

148. See, e.g., *Hawkins v. State*, 37 N.E.2d 79 (Ind. 1941); *McCutcheon v. State*, 155 N.E. 544 (Ind. 1927); *Rice v. State*, 7 Ind. 332 (1855).

149. 7 Ind. 338 (1855) (*per curiam*).

This holding is necessarily based on the assumption that, in 1855, capital punishment in Indiana effectively served utilitarian goals¹⁵⁰ and was not based on retribution.¹⁵¹ According to the court's own analysis, if there had been evidence that the state's capital punishment scheme was retributive, the court would have been bound to declare that the scheme was unconstitutional. Later cases have echoed *Driskill's* interpretation of section 18 with regard to the imposition of the death penalty.

Thus, an examination of the plain meaning of the language and the intent of the framers, coupled with the early court's interpretation of the provision, leads to the conclusion that the Indiana Constitution forbids retributive statutes in its penal code. While the penal code must be founded primarily on the principles of reformation, alternatives are not proscribed if they help to protect society. Therefore, if victim participation statutes are found to advance reformation, deterrence, or incapacitation, and are not motivated by the goal of retribution, they will be constitutionally permissible. However, if they advance none of the permissible justifications or are based on the forbidden goal of retribution, they must be struck down.

IV. VICTIM PARTICIPATION STATUTES ARE BOTH RETRIBUTIVE AND VINDICTIVE

This Section argues that victim participation in the sentencing phase of a capital case is both retributive and vindictive. Additionally, this Section argues that victim participation does not serve the constitutionally permissible goals of reformation, deterrence, or incapacitation. When faced with conclusive evidence that victim participation statutes are retributive and do not advance the permissible justifications of section 18, the Indiana Supreme Court must find them to be unconstitutional.

A. Constitutionally Impermissible Goals: Retribution and Vindication

Very little agreement exists regarding the exact parameters of the retributivist theory of punishment.¹⁵² Generally, retribution¹⁵³ is defined as

150. The death penalty has been said to further the goal of deterrence. However, this is certainly the subject of a great deal of debate. Also, the death penalty could be seen to be the ultimate incapacitation of the offender. Thus, in 1855, the court must have found that the death penalty effectively served one of these goals, or it would have been bound by § 18 to strike it down.

151. Kantner, *supra* note 114, at 40.

152. *Id.* at 5. Kantner also notes several previous definitional attempts and recognizes their imprecision and inconsistency. *Id.* at 5 n.27. See also Paul Boudreaux, *Booth v. Maryland and the Individual Vengeance Rationale for Criminal Punishment*, 80 J. CRIM. L. & CRIMINOLOGY 177, 185 (1989) "The most unfocused of the [penal] justifications is social retribution. The stock of commonly used expressions is testament to its nature: 'eye for an eye', 'just desserts', 'moral

“the deliberate and official infliction of pain on an offender based on an assessment of the offender’s moral responsibility for committing an offense.”¹⁵⁴ In other words, the offender is given his just desserts. H.L.A. Hart contends that this theory asserts the following: First, that a person may be punished if and only if he has voluntarily done something morally wrong; second, that his punishment must match or be equivalent to the wickedness of the offense; and third, that the justification for punishing under such conditions, the return of suffering for moral evil voluntarily done, is itself just and morally good.¹⁵⁵ Immanuel Kant would add that retribution is not merely permissible against the offender, but obligatory.¹⁵⁶ Essentially, social retribution can be reduced to the contention that criminals deserve punishment because they deserve punishment.¹⁵⁷

The other definition of retribution, and perhaps the one most likely to come to mind, is that of revenge.¹⁵⁸ Society has a right to retaliate against those who have hurt its citizens or failed to follow its rules.¹⁵⁹ The prosecutor stands in the shoes of the victim but uses the criminal justice system to retaliate against the defendant in the name of the state, instead of taking individual vengeance.¹⁶⁰ Supporters agree that this theory is justified not only because individual victims are able to vindicate themselves and release the hate and anger inside them, but also because it channels society’s outrage and prevents mob

punishment’, ‘debt to society’, or ‘pay for the crime’.” *Id.*

153. Retribution is also called revenge or retaliation. WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 25 (1986).

154. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 *CORNELL L. REV.* 655, 659 (1989).

155. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 231 (1982). The third assertion, that punishment is morally good in itself, is in direct contradiction with the utilitarian justification for punishment, which sees all punishment as an evil in itself which can only be used to meet some greater evil. See BENTHAM, *supra* note 114.

156. *Id.* at 232. Thus, if two persons are left in the world and one murders the other, the sole remaining citizen must be put to death under this theory.

157. Boudreaux, *supra* note 152, at 186. See also Jack P. Gibbs, *The Death Penalty, Retribution and Penal Policy*, 69 *J. CRIM. L. & CRIMINOLOGY* 291, 295-96 (1978). Gibbs suggests that while this proposition does not distort the retributive doctrine, it points out its fundamental shortcoming. Once a retributivist has made this statement, he really has nothing more to say. Gibbs goes on to discuss the problems of the retributive doctrine and the fact that it offers no solutions to the specific problems haunting the criminal justice system. He concludes that the doctrine is attractive precisely because it is an empty formula. *Id.*

158. Henderson, *supra* note 5, at 991.

159. *Id.*

160. Leslie Sebba, *The Victim’s Role in the Penal Process: A Theoretical Orientation*, 30 *AM. J. COMP. L.* 217, 232 (1982).

violence that might occur absent the retribution.¹⁶¹

Recent victim's rights legislation appears to be driven by the retaliatory view of retribution rather than the Kant-Hart moral retributivist view.¹⁶² One commentator has noted that victim participation in sentencing specifically emphasizes the retributive and retaliatory aspects of punishment and stresses personal vengeance.¹⁶³ In fact, this is the most persistent criticism of victim participation. Critics argue that victim participation will reduce the criminal justice system to a forum for personal vendettas and revenge—a throwback to the ancient practice of blood feuds—and thereby frustrate rational and dispassionate decision making.¹⁶⁴ The Indiana framers obviously wished to avoid such a system, as is evidenced by their having included section 18's prohibition against vindictive justice.

In capital sentencing, the possibility that the hearing may become a forum for vengeance is even more apparent. Because the sentencing body is presented with a binary decision—namely, life or death—any request by the victim that the defendant be put to death appears per se vindictive. An examination of an actual VIS helps to show the retributive and vindictive aspects that victim participation introduces.

At the sentencing hearing of the much publicized murder trial of Robert Chambers, popularly known as the "Preppy Murderer," the father of the victim submitted a letter to the court in support of the imposition of the death penalty. The letter queried the court: "How can you talk of punishment? What number of years can equate to her senseless death?" The father stated his own conclusion: "A lifetime of incarceration would be inadequate."¹⁶⁵ From the VIS, it appears that the father wanted to avenge the death of his daughter by seeing that the defendant received his just desserts. While one can try to understand the feelings of the victim's father and can certainly understand his anger towards his daughter's murderer, the father's comments only furthered

161. Henderson, *supra* note 5, at 994-95. She argues that this is actually a utilitarian argument, however, and cannot adequately support the retaliation model. See also Steven J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1508-14 (1974).

162. Henderson, *supra* note 5, at 994.

163. Dina R. Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 AMER. CRIM. L. REV. 391, 398 (1989). She notes, "Proponents argue that 'the consideration of [the victim's] needs and opinions can help [him] regain a sense of control over his life and fulfill a desire for retributive justice.'" *Id.* at n.28.

164. Howard C. Rubel, *Victim Participation in Sentencing Proceedings*, 28 CRIM. L.Q. 226, 237-38 (1986). The prospect of allowing victims to use the system in retaliation against defendants enjoys little support among social scientists and practitioners. Henderson, *supra* note 5, at 994-95.

165. N.Y. TIMES, Apr. 16, 1988, at 36, col 4.

retributive goals. Such goals are not permitted under the Indiana Constitution and no other constitutionally permissible goals can be supported by the statement.

Thus, victim participation at sentencing introduces a retributive element into the determination of the criminal sentence. If, however, the retributive element can be omitted from the victim participation statutes and another permissible goal can be achieved by the inclusion of the victim at sentencing, such participation would be constitutional. Hence, the next subsection of this Note will examine the constitutionally permissible goals of rehabilitation, deterrence, and incapacitation to determine whether victim participation advances these penal justifications.

B. Constitutionally Permissible Goals: Rehabilitation, Deterrence, and Incapacitation

Rehabilitation, or reformation, is the paramount goal of the penal system under the Indiana Constitution as expressed by section 18.¹⁶⁶ Under this theory, defendants are punished by being given appropriate treatment. This is done in the hope that they can be rehabilitated and returned to society sufficiently reformed such that they will not commit further crimes.¹⁶⁷ Appropriate treatment, H.L.A. Hart proposed, “embraces any strengthening of the offender’s disposition and capacity to keep him within the law . . . which is intentionally brought about by human effort [rather] than through fear of punishment.”¹⁶⁸ Generally, this “human effort” falls into two categories: inducing repentance by helping the defendant recognize his moral guilt or providing psychological treatment and education.¹⁶⁹

In some situations, VIS’s and VSO’s may further the goal of reformation by helping with the treatment of defendants. If the sentencing authority believes that a defendant might repent when faced with direct evidence of his moral guilt, a VIS might be the best evidence of the harm caused.¹⁷⁰ An example of this might be in a case where the defendant has killed someone through his drunken

166. See *supra* notes 118-54 and accompanying text.

167. LAFAYE & SCOTT, *supra* note 153, at 24. However, as one commentator has noted, “[W]e do not know how to rehabilitate offenders, at least within the limits of the resources that are now or might reasonably be expected to be devoted to the task.” HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 55 (1978). Henderson claims that while this might be true in a general sense, knowledge exists about substance abuse and criminal activity, and this provides at least some direction for rehabilitative efforts. Henderson, *supra* note 5, at 990 n.247.

168. Hart, *supra* note 155, at 25-26.

169. Phillip A. Talbert, Comment, *The Relevance of Victim Impact Statements to the Criminal Sentencing Decision*, 36 UCLA L. REV. 199, 217 (1988).

170. *Id.* at 218.

driving. Faced with the full moral force of the evidence, including the victim's personal characteristics and the devastating effect the accident had on the victim's family, the defendant might be induced to repent and be convinced never to drive again while intoxicated. Victim participation in this case would certainly help to reform the defendant; thus, this type of participation would be permissible under the Indiana Constitution so long as it did not introduce a retributive element. However, in a capital case where the prosecution is seeking the death penalty, victim participation appears unlikely to have such an effect. Remember the "Preppy Murder" case and the VIS discussed above.¹⁷¹ Even if the defendant repents, the most likely effect of the VIS is to convince the sentencing body that the defendant deserves to be put to death.

Also, the victim may have a role in the implementation of an education or treatment sentence.¹⁷² An obvious example would be a situation in which counseling was required; in a case of domestic violence or child abuse, successful rehabilitation apparently necessitates the participation of both the victim and the offender.¹⁷³ This would not be the case in a capital proceeding where cooperation between the victim and defendant is highly unlikely.

Thus, in a capital case, victim participation does not serve the goal of reformation explicitly mandated by the Indiana Constitution. However, the absence of a reformation objective is not necessarily fatal to a victim participation scheme. If it can be shown that victim participation serves one of the other permissible sentencing goals—either deterrence or incapacitation—while not being retributive or vindictive, its use may be valid under the Indiana Constitution.

Deterrence is based on the premise that punishment has the socially useful function of preventing crime.¹⁷⁴ Generally, deterrence theory has two

171. See *supra* text accompanying note 165.

172. *Id.*

173. Henderson, *supra* note 5, at 990. She notes that in such situations it may be preferable to have the offender remain with the family rather than sending the offender to jail. The organization Parents United has had success in counseling both parties to child abuse. *Id.* at 990 n.248.

174. Henderson, *supra* note 5, at 987. Cesare Beccaria stated that for the betterment of society, "[t]he degree of punishment, and the consequences of a crime, ought to be so contrived as to have the greatest possible effect on others, with the least possible pain to the delinquent." *Id.* at n.234 (quoting CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 75 (1953)). Deterrence is best associated with the utilitarians—including Beccaria and most notably Jeremy Bentham—who also include incapacitation and reformation as permissible justifications for punishment so long as they conform to the principle of utility. The principle of utility approves or disapproves of all actions according to the tendency that the actions tend to augment or diminish the happiness of the individual or society. BENTHAM, *supra* note 114, at 11-12. Thus, if incapacitation or reformation of offenders augments the "happiness" of society, they are permissible. However, the utilitarians displayed no

interrelated components; general deterrence,¹⁷⁵ where the punishment given for a criminal act discourages others from engaging in the specific wrongdoing;¹⁷⁶ and specific deterrence, where the punishment dissuades the wrongdoer from engaging in any future wrongdoing.¹⁷⁷ Punishment is valid if it is intended to have a deterrent effect. However, punishment still remains an evil which may only be inflicted if it “promises to exclude some greater evil.”¹⁷⁸ Thus, in some instances, punishment should not be inflicted at all.¹⁷⁹ When punishment is necessary, only that punishment needed to prevent the bad act ought to be inflicted.¹⁸⁰

At first glance, victim participation at sentencing may appear to further the goal of deterrence. The victim’s participation may help to increase the severity of the sanction, thus ostensibly providing both a greater general and specific deterrent to the commission of future acts. However, if the sanction is increased because of the victim participation beyond what is proportional to the offense,

reservation in denouncing the retributive justification considering such to be inherently evil, base, uncivilized and anti-utilitarian. Kantner, *supra* note 114, at 38.

175. Many critics point to rising crime rates as proof that deterrence is not working. Henderson suggests that the rising crime rates may be more attributable to an increase in the population of people at a crime-prone age than to anything else. Regardless of the reason, the rising rates have certainly contributed to the rising popularity of the incapacitation and retribution theories. Henderson, *supra* note 5, at 988 n.237.

176. PACKER, *supra* note 167. As another commentator has stated, “[I]ndividuals who are tempted by a particular form of threatened behavior will . . . refrain from committing the offense because the pleasure they might obtain is more than offset by the risk of great unpleasantness communicated by a legal threat.” FRANKLINE E. ZIMRING, PERSPECTIVES ON DETERRENCE 3 (1971). This is a classic utilitarian analysis that sees humankind as being governed solely by pain and pleasure. Thus, all rational persons will seek to maximize pleasure while minimizing their pain.

177. This theory is questioned by many who point out the high rates of recidivism among those who have been punished for certain crimes. LAFAVE & SCOTT, *supra* note 153, at 23. Bentham might argue that in these cases, the punishment inflicted is not correctly proportioned to the offense. The individual must be deriving more pleasure than pain from the commission of the bad act; however, until the pain is greater than the pleasure, he will not stop committing the act.

178. BENTHAM, *supra* note 114, at 158. This is in direct contradiction with the retributive justification, which sees punishment as an end in itself rather than as a means to an end. The end desired by the deterrence theory is the controlling of action through punishment, such that the total happiness of the community is augmented.

179. Bentham enumerates four circumstances in which punishment ought not be inflicted: where it is groundless, there being no bad act to prevent; where it is inefficacious, and cannot prevent the bad act; where it is unprofitable or expensive such that the evil done would be greater than that prevented; and where it is needless and the bad act may be prevented or cease on its own without it. BENTHAM, *supra* note 114, at 159.

180. *Id.* at 175. Bentham goes on to give 13 rules that should be followed to ensure that the punishment is proportioned to the nature of the offense. See also BECCARIA, *supra* note 114, at 165-72.

the punishment becomes something other than a deterrent.¹⁸¹ This punishment, above what is required to deter the bad act, appears to be both retributive and vindictive—the punishment is applied merely because the person deserves it and the victim requests it. Additionally, victim participation may result in different punishments for the same offenses. In two different murder cases, where victim evidence is presented in one but not the other, the two defendants may receive different punishments for the same crime. This would violate the utilitarian principle of equality in punishment.¹⁸² Because victim participation may increase a punishment disproportionately or vary the sentences received for similar sentences, it violates the principles of deterrence.

However, victim participation may serve the goal of deterrence, albeit slightly, if victim participation increases cooperation between prosecutors and victims in such a way that the certainty of punishment for an offense is increased.¹⁸³ Victims may have more incentive to cooperate with the prosecution if they realize that they will have a role in determining the disposition of the defendant, but the actual increase in certainty of punishment is minimal. The victims must be allowed to cooperate in such a way that the prosecutor, and the system as a whole, become more efficient; and the certainty of punishment must be increased.¹⁸⁴ If victim participation increases the certainty of the punishment, it is valid under the deterrent theory, so long as the problems contrary to the deterrence theory discussed above are avoided.

181. This would violate Bentham's rule number five: "The punishment *ought in no case to be more* than what is necessary to bring it into conformity with the rules here given." BENTHAM, *supra* note 114, at 169. This may be true in a capital case in which it is impossible to show that the death penalty is more of a deterrent than life imprisonment. See *Gregg v. Georgia*, 428 U.S. 183, 184-85 (1976): "[T]he results have been inconclusive . . . there is no convincing empirical evidence either supporting or refuting the view [that] the death penalty may not function as a significantly greater deterrent than lesser" punishments. The Court went on to say that where the murder is carefully contemplated, such as murder for hire, the possible penalty of death may enter into the calculus preceding the decision to act, but in other cases, such as acts of passion, death can be assumed to have no deterrent effect. *Id.* See also JEREMY BENTHAM, *JEREMY BENTHAM TO HIS FELLOW CITIZENS OF FRANCE, ON DEATH PUNISHMENT* (London 1813) (*quoted in* Kantner, *supra* note 114 at 26-27). It is not enough to show that capital punishment serves the utilitarian function *slightly* better than life imprisonment, rather it must serve this function *significantly* better. It must be enough to make up for the added detriment to the defendant who receives death rather than life imprisonment. *Id.*

182. Talbert, *supra* note 169, at 215. Bentham states that punishments may vary according to the individual's sensibilities, that being the response an individual has to the form of punishment, but that generally the punishment inflicted should correspond to the quantity intended for similar offenders. BENTHAM, *supra* note 114, at 51, 169. He offers no argument that punishment should be varied according to the wishes of the victim.

183. Bentham realized that wrongdoers would not be punished for all offenses and thus to make up for any lack of certainty in punishment, the magnitude of the punishment should be increased. BENTHAM, *supra* note 114, at 170. Thus, any increase in certainty would be an added deterrent.

184. Talbert, *supra* note 169, at 216.

Under the theory of incapacitation—the idea that society may protect itself from persons who are found to be dangerous by isolating them from society¹⁸⁵—the person deciding the sentence must determine the future dangerousness¹⁸⁶ of the criminal¹⁸⁷ before deciding on whether he should be incapacitated. Proponents of victim participation assert that the victim's testimony would assist the sentencing court in making the assessment of future dangerousness.¹⁸⁸ This argument is invalid, however, because the relationship between the future dangerousness of the offender and the offense is tenuous at best.¹⁸⁹ The factors that must be examined in determining whether or not an offender should be incapacitated are related to the personal characteristics of the offender, and not those of the victim.¹⁹⁰ Thus, as the inclusion of the victim at the sentencing hearing would not help to predict the future dangerousness of the victim, it does nothing to assist the trier of fact in determining who should be incapacitated.¹⁹¹ Hence, incapacitation may not be advanced as the justification for victim participation.

With the exception that victim participation may further deterrence by increasing the certainty of punishment, the inclusion of the victim does not further any of the permissible goals under the Indiana Constitution. Neither reformation, deterrence, nor incapacitation is furthered by allowing the victim to testify at the sentencing hearing. Coupled with the fact that victim participation includes an element of retribution, present Indiana practices cannot be justified under section 18. Alternatives must be sought if Indiana wishes to provide for the rights of the victims while at the same time protecting the defendants' rights guaranteed by the Indiana Constitution.

185. LAFAYE & SCOTT, *supra* note 153, at 23. LaFave and Scott note that it has also been suggested that society has the right to isolate not only those persons identified by their past criminal conduct, but anyone who can be conclusively shown to be a danger to society.

186. The ability of anyone to accurately predict the future dangerousness of any offender is suspect, according to some critics. See Henderson, *supra* note 5, at 973 n.183.

187. Such factors may include a prior criminal record, a history of alcohol and drug abuse, and a documented inability to secure a job. James B. Wilson, *Dealing With the High-Rate Offender*, 72 PUB. INTEREST 52, 62-63, 65 (1983).

188. See, e.g., TASK FORCE, *supra* note 6, at 77 (noting that "[a] judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimized").

189. Henderson, *supra* note 5, at 989. See also Wilson, *supra* note 187, at 61-63 (stating that the nature of the present offense is not an accurate predictor of who is a high-rate offender).

190. Henderson, *supra* note 5, at 989-90.

191. In some situations, the victim might be able to help the sentencer predict the future dangerousness of the offender. If the victim knew the offender well, information regarding the offender's lifestyle and past activities might be helpful to the court. However, in most cases, the victim will be in no better position to testify as to the defendant's personal characteristics than any others. Talbert, *supra* note 169, at 217. This is irrelevant at the sentencing phase of a capital case, however; because guilt has already been determined, the defendant is faced with only two sentences by which he will be incapacitated totally.

V. CONCLUSION: THE INDIANA CONSTITUTION PROHIBITS THE
PRESENT VIS AND VSO STATUTES

The Indiana Constitution prohibits statutes based on retribution. The plain language of section 18 mandates that the penal code be founded on the principles of reformation and that individual statutes may be valid if based on either deterrence or incapacitation. An examination of the intent of the framers and the early judicial interpretation of section 18 bolsters this conclusion. Thus, a statute founded on the impermissible goal of retribution, and not on the permissible goals of reformation, deterrence, or incapacitation, is unconstitutional.

Victim participation is based primarily on the forbidden foundation of retribution. Even absent retribution, victim participation statutes do not advance any of the constitutionally acceptable goals under section 18. Thus, victim participation statutes are unconstitutional.

The Indiana Supreme Court has not been faced with the argument that victim participation in the sentencing phase of a capital case is violative of section 18. However, if presented with evidence that victim participation is based primarily on retribution—and does nothing to further the goals embodied in section 18—the court has the unequivocal duty of finding the inclusion of the victim in the sentencing determination to be unconstitutional. Any other decision would allow for the continued violation of the defendants' rights as guaranteed by the Indiana Constitution.

Edward F. Harney, Jr.

