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CONSTITUTIONALIZING REHABILITATION DID NOT WORK: LESSONS FROM INDIANA AND OREGON AND A WAY FORWARD

Calls for promoting rehabilitation as part of criminal justice reform have echoed across the political spectrum for decades. [1] *Indiana and Oregon embarked on an interesting experiment in this area--recognizing the primacy of rehabilitation in their state constitutions. Both states' constitutions were drafted with sections declaring that the state's criminal law "shall be founded on the principles of reformation, and not of vindictive justice."* [2] *Since courts will play an indispensable role in crafting sentences that promote rehabilitation, the Oregon and Indiana courts' interpretation of these sections invaluably informs how other courts might treat a greater focus on rehabilitation. This Article argues that appellate courts in Indiana and Oregon have incorrectly interpreted these sections and effectively nullified them. The Article then considers various explanations for why appellate courts refused to enforce the sections. Counterintuitively, political sensitivity on the part of elected judges in Indiana and Oregon does not explain the phenomenon. Instead, the* ***270** *Article concludes that Oregon and Indiana appellate judges have lacked a workable framework to apply them. Finally, the Article proposes a framework for Indiana courts to consider challenges under its provision.*

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*271 I. INTRODUCTION

The idea of reforming the justice system is en vogue. It is the rare issue in modern politics that finds support across the political spectrum--from Senator Bernie Sanders on the left, [3] to the Koch brothers on the right. [4] Those seeking to improve the justice system by placing a greater emphasis on rehabilitation should pay particular attention to Indiana and Oregon. Those states embarked on a truly bold experiment in criminal justice reform: constitutionalizing rehabilitation as the most important purpose of punishment. They did so in constitutional sections with no analogue in the federal Constitution or that of any other state. Article I, Section Eighteen of the Indiana Constitution reads: "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice." [5] Until it was amended in 1996, former Article I, Section Fifteen of the Oregon Constitution read: "Laws for the punishment of crime shall be *272 founded on the principles of reformation, and not of vindictive justice." [6]

These sections, however, have largely failed to change the way appellate judges in Indiana and Oregon reviewed sentences. [7] On appellate review, Indiana and Oregon courts have erroneously interpreted these sections and consequently nullified them. This Article considers both political and jurisprudential explanations for this failure. While the idea that elected judges have invalidated these sections for fear of looking weak on crime has intuitive appeal, it is incorrect. Instead, the most likely explanations are appellate judges' failure to develop workable frameworks due to a lack of training, and the increasing reliance of state judges and lawyers on federal law when considering constitutional rights issues. Oregon repealed former Article I, Section Fifteen of the Oregon Constitution, but Article I, Section Eighteen of the Indiana Constitution remains in force. Finally, I propose a practical framework Indiana courts could use at the end of this article that would bring its jurisprudence more in line with the text and purpose of Article I, Section Eighteen.

II. HISTORY

The Indiana Constitution of 1816 required the legislature "as soon as circumstances will permit, to form a penal Code, founded on the principles of reformation, and not of vindictive Justice." [8] Alabama's Constitution of 1819 contained an identical provision. [9] As early as 1827, Indiana Governor James Ray cited the section to decry overcrowded prisons. [10] A contemporary newspaper article questioned whether whipping was consistent with the provision. [11] However, no published Indiana or Alabama cases construed their respective constitutional section. Alabama's next constitution, ratified in 1865, *273 did not contain similar language. [12] Indiana courts only considered what was meant by a penal code "founded on principles of reformation, and not of vindictive justice" after the state adopted Article I, Section Eighteen of the Indiana Constitution in 1851.

Before 1851, Indiana's penal codes underwent gradual, but substantial changes. The first criminal code was the decidedly harsh Marietta Statutes, enacted when the area that would become the state of Indiana was part of the Northwest Territory. [13] Treason, murder, and arson all carried the death penalty. [14] Harsh punishments were also prescribed for other crimes. Robbery and burglary could lead to whipping or imprisonment for up to 30 years. [15] A similar penal code existed after the area became the Indiana Territory in 1800. [16]

Little changed when Indiana officially joined the Union in 1816. In the state's first penal code, the death penalty was the mandatory sentence for treason, murder, rape, and carnal knowledge of a female under ten years old. [17] For 25% of the crimes defined in the penal code, a convict could receive a whipping in addition to a fine and imprisonment. [18] By 1821, however, whipping had fallen into disfavor. [19] That year, the legislature authorized the construction of a state prison in Jeffersonville. [20] It also prescribed prison sentences for crimes that had once been eligible for whipping. [21]

At first, Indiana's prisons seemed well-situated to promote reform. Inmates worked together during the day, but then retreated to separate cells at night. [22] Reformers assumed that isolation would give the convict the time and space to contemplate past misdeeds and how to atone for them. [23] This was similar to other penitentiaries, such as Cherry Hill prison in Philadelphia, which had a policy of absolute isolation. [24] Within several years, however, a perception developed ***274** that the prison administration was failing to reform prisoners, and often actually exacerbating their negative tendencies. [25] The *New Albany Gazette* alleged that the prison superintendent administered ninety-five lashes to a boy for failing to keep fires going in a kiln. [26] There were widespread reports of overcrowding and a lack of supervision for prisoners. [27] Indeed, concerns about poor prison conditions were part of the impetus for Article I, Section Eighteen of the Indiana Constitution. [28]

At the same time that the state's prison system developed, reformers pushed for far more radical changes to the state's penal code. In 1830, Governor James B. Ray called capital punishment a "primitive practice," and said that he found it inherently problematic because of the prospect of executing an innocent person. [29] He called for an end to the death penalty that year, but the legislature took no action. [30] The next year, he called for an end to public executions. [31] Though these attempts failed, the legislature had major debates over ending capital punishment in 1843 and 1846. [32] The legislature also gave courts discretion to impose life imprisonment instead of capital punishment. [33] But capital punishment itself was never outlawed. In fact, an attempt to abolish the death penalty for all crimes except premeditated murder at the 1851 convention failed. [34]

The criminal justice system in the Oregon Territory--recognized by Congress in 1848 [35] --was considered primitive, even by its own citizens. After "the substantial log jail" in Oregon City burned down in 1846, the territory had no formal prison for several years. [36] In their petition for statehood, Oregon residents lamented, "We have no prisons, and no means of punishing many offences, unless we ***275** retrograde to the times of the branding iron, the cropping knife and the whipping post; and this would be revolting to the moral sense of our community." [37] In 1857, Oregon adopted a constitution with a section substantially similar to Article I, Section Eighteen of the Indiana Constitution. There is no record of any debate or discussion about what would become Article I, Section Fifteen of the Oregon Constitution. [38] However, the Oregon Supreme Court has acknowledged that former Article I, Section Fifteen was inspired by Indiana's constitution. [39] Oregon courts have repeatedly acknowledged Indiana's influence on other parts of the Oregon Constitution. [40]

Rehabilitation eventually fell into disfavor during the twentieth century for several reasons.[41] First, critics of the rehabilitative model argued that the very idea of rehabilitation was classist.[42] They felt that a biased justice system would always find that middle and upper class defendants would require less rehabilitation than poor defendants, even if the wealthy defendants' crimes hurt society more.[43] Second, they argued that the rehabilitative model gave excessive power to judges to formulate sentences even though they had no special insight into what kinds of punishments would really promote reform.[44] Finally, they argued that rehabilitation simply had not worked, even when programs were well-conceived and well-financed.[45] Some of the harshest critics of the rehabilitative model were liberals, whom one might expect to favor "considerations of generosity and charity, compassion and love"[46] that the rehabilitative model potentially incorporates into sentencing decisions.

*276 III. ARTICLE I, SECTION EIGHTEEN OF THE INDIANA CONSTITUTION AND FORMER ARTICLE I, SECTION FIFTEEN OF THE OREGON CONSTITUTION JURISPRUDENCE

This Part considers Indiana's and Oregon's jurisprudence as it relates to (1) capital punishment, (2) length of imprisonment, (3) prison conditions, (4) procedural issues, and (5) miscellaneous issues. Over a century-and-a-half of decisions have made clear that Indiana and Oregon appellate courts rendered Article I, Section Eighteen of the Indiana Constitution and former Article I, Section Fifteen of the Oregon Constitution dead letter.

A. Capital Punishment

Indiana reformers seized on Article I, Section Eighteen of the Indiana Constitution to argue for ending capital punishment. In early 1852, only months after Indiana voters ratified the new constitution, state representative Oliver Torbet spoke passionately in favor of a bill to substitute life imprisonment for the death penalty.[47] Torbet argued that the main object of punishment was reform of the offender. "Strange method of accomplishing the reformation of the offender," Torbet observed, "to kill him!"[48] Torbet's argument ultimately failed to move the state legislature. But the challenge to capital punishment under Article I, Section Eighteen of the Indiana Constitution shortly moved to the courts.

In *Driskill v. State*,[49] a man convicted of first-degree murder challenged his death sentence under the Article I, Section Eighteen. In rejecting his appeal, the Indiana Supreme Court made several interesting claims about Article I, Section Eighteen. First, the court claimed that the death penalty itself, at least for crimes such as first-degree murder is not vindictive, but retributive.[50] Second, the court declared that the most important purpose of punishment is to protect society, not reform criminals.[51] Third, the court implied that even if rehabilitation is the primary purpose of punishment, it is still acceptable for an individual sentence not to promote rehabilitation so ***277** long as the entire penal code does.[52] This would seem to preclude individual challenges to sentences since the prosecution could always reply that the penal code in its entirety promotes rehabilitation. Moreover, it is unclear what proportion of the penal code has to promote rehabilitation versus other goals. If 51% of the sentences in the penal code promote rehabilitation, and the other 49% promote deterrence, incapacitation, or retribution, can the state say that it has complied with Article I, Section Eighteen? Since 1855, Indiana courts have consistently rejected the argument that capital punishment violates Article I, Section Eighteen.[53]

Of course, capital punishment is not necessarily incompatible with what is likely the original understanding of Article I, Section Eighteen of the Indiana Constitution. As noted previously, at Indiana's 1851 constitution convention, delegates rejected a proposal to ban capital punishment.[54] Thus, those who drafted and approved Indiana's constitution could not have understood Article I, Section Eighteen to forbid capital punishment. *Driskill* could have affirmed capital punishment by making this narrow claim. Or, after considering the crime's circumstances and the offender's background,

Driskill could have invoked the absurdity canon [55] or similar principles and held that it would be ridiculous to punish the particular offender in that case with an eye toward reformation when he was so dangerous and violent that the main concern in the specific case at hand had to be protecting society. Later the same year in *Rice v. State* [56] for example, the Indiana Supreme Court declared that there are some criminals "whose necks have become so hardened 'that they should suddenly be cut off, and that without remedy.'" [57] Notably, however, *Driskill* went much further and explained that the main concern of all ***278** punishments under the constitution was in fact incapacitation, and that courts need not craft sentences to reform offenders in individual cases. [58]

Interestingly, one Indiana judge in 1857 even argued that the prospect of capital punishment could facilitate reform by persuading a person to accept responsibility for his crimes and recommit to God. In sentencing a defendant to death for murdering his wife, the judge asked "are you prepared to stand before that All-Seeing Judge, seated upon the Throne of Eternal Justice, and declare your innocence? If not ... prostrate yourself before the Mercy Seat, and implore the interposition of the Divine Redeemer." [59] Though this sounds strange to modern ears, it is consistent with the way many Americans during the colonial understood capital punishment--that is, they believed capital punishment could rehabilitate a criminal's soul. [60] To ensure that a prisoner's soul was saved, colonial jurisdictions often permitted the condemned to attend church if there was a scheduled service before the execution and even to pick the Bible passage preached during the sermon. [61] There is some evidence that Indiana residents in the 1850s had similar expectations of capital punishment. A newspaper article covering Driskill's and Rice's executions extensively documented their interactions with clergy members during their final hours and expressed dismay that the impending executions had not caused them to manifest "any signs of penitence," or to confess their guilt. [62]

Today, viewing Article I, Section Eighteen of the Indiana Constitution through such an explicitly Christian theological lens--as many colonial Americans viewed capital punishment--would likely cause First Amendment challenges under the Establishment Clause. Possibly for that reason, decisions involving death penalty challenges ***279** based on Article I, Section Eighteen have not argued that capital punishment could rehabilitate an offender's soul. [63] This is true even of *Driskill*, which explicitly acknowledged that rehabilitation was not capital punishment's purpose. [64]

Like the defendant in *Driskill*, the defendant in *Finch* argued that the death penalty was unconstitutional under former Article I, Section Fifteen of the Oregon Constitution. [65] As in *Driskill*, the *Finch* court rejected the argument. It found capital punishment consistent with former Article I, Section Fifteen for three reasons. First, *Finch* found that the original understanding of Article I, Section Fifteen was that it permitted capital punishment. [66] *Finch* noted that five future Oregon Supreme Court members were delegates to Oregon's 1857 constitution, and that they at various points all either sentenced defendants to death, or affirmed death sentences. [67] Moreover, *Finch* observed that legislatures sitting after the constitution's ratification did not abolish capital punishment, and, in fact, explicitly reauthorized the death penalty. [68] Second, *Finch* concluded that capital punishment was consistent with former Article I, Section Fifteen because another section of the constitution authorized the governor to grant reprieves in death penalty cases. [69] The governor could only have the power to grant reprieves under the Oregon Constitution, the court reasoned, if that constitution contemplated the death penalty's existence. [70] Therefore, capital punishment could not violate former Article I, Section Fifteen of the Oregon Constitution. Finally, *Finch* noted that former Article I, Section Fifteen was taken from Article I, Section Eighteen of the Indiana Constitution. [71] Since by 1857, Indiana courts had already construed Article I, Section Eighteen of the Indiana Constitution not to prohibit capital punishment, delegates ***280** at Oregon's 1857 constitutional convention must have meant to adopt that construction. [72]

In the modern era, some jurists have questioned whether capital punishment is consistent with Article I, Section Eighteen of the Indiana Constitution and former Article I, Section Fifteen of the Oregon Constitution. For example, in his dissent

in *Adams v. State*, [73] Justice DeBruler effectively argued for overturning prior decisions such as *Driskill* and forbidding Indiana from imposing the death sentence for first-degree murder. Taking issue with the *Driskill* court's assertion that the death penalty was "even-handed justice," Justice DeBruler instead described it as based on the philosophy of "an eye for an eye," which he found a vindictive principle of law. [74] Moreover, Justice DeBruler rejected *Rice's* [75] argument that courts could treat some defendants as beyond redemption. In his view, Article I, Section Eighteen of the Indiana Constitution required that a sentence not foreclose "all possibility of reformation of the offender." [76] Interestingly, Justice DeBruler also claimed that a life sentence for first-degree murder would comport with Article I, Section Eighteen. [77] A life sentence would necessarily only promote rehabilitation in that it might give a prisoner the time and space to contemplate the crimes committed and change character; it would not reform the prisoner for the purpose of eventually returning to society. That is, rehabilitation need not give a criminal a second chance to live as a free person as long as it always gives the chance to become a better person.

B. Prison terms

1. Life imprisonment

Attempts to use Article I, Section Eighteen of the Indiana Constitution and former Article I, Section Fifteen of the Oregon ***281** Constitution to receive lesser prison sentences have almost always failed. In *Tuel v. Gladden*, decided in 1963, the petitioner received a life sentence without parole under the Habitual Criminal Act [78] because of three prior offenses. [79] Oregon's governor had previously commuted the petitioner's original sentence in 1940, but the commutation was revoked later when the petitioner violated the commutation's terms. [80] The petitioner received another commutation in 1954, but then it was revoked after again violating the commutation's terms. [81] The trial court granted the petitioner collateral relief after finding that the Habitual Criminal Act under which the petitioner was sentenced violated former Article I, Section Fifteen of the Oregon Constitution. [82] The Oregon Supreme Court reversed. [83] The Court defined *reformation* and *vindictive*. [84] It even went so far as to declare that life imprisonment without parole was inconsistent with reformation. [85]

So how did the *Tuel* court escape the logical conclusion that the petitioner's life sentence violated former Article I, Section Fifteen? It found, as *Driskill* had, that the most important purpose of punishment was in fact the protection of society--the text of former Article I, Section Fifteen notwithstanding. [86] *Tuel* granted that sentencing laws needed to seek reformation and that they could not be used to retaliate. [87] Importantly, however, the state had no obligation to reform offenders if the attempt to do so put society at risk. [88] A life sentence ***282** under the Habitual Criminal Act was therefore permissible under former Article I, Section Fifteen because focusing exclusively on reforming an offender who has committed four felonies so he can reenter society would be absurd because of how improbable it was that someone with his history would actually reform. [89]

Indiana courts have likewise found that a life sentence without parole does not violate Article I, Section Eighteen of the Indiana Constitution when imposed in cases of aggravated murder. [90] This is even true in the case of juveniles, when one might expect rehabilitation to play the biggest role in punishment. In *Conley v. State*, the defendant was seventeen when he murdered his younger brother. [91] It was a gruesome crime [92] perpetrated by an individual with mental illness. [93] Despite the fact that this case was the first time the Indiana Supreme Court had considered whether life without parole for juvenile offenders violated the Indiana Constitution, it concluded that it did not violate Article I, Section Eighteen without any explicit analysis of the provision. [94]

2. Habitual Offender Laws

Habitual offender laws subject defendants to harsher punishment because of previous offenses. [95] In *Funk v. State*, the defendant was convicted of theft and received a two-year sentence on that charge. [96] As a habitual offender, he received an additional thirty years. [97] The court concluded that its analysis determining that the defendant's ***283** sentence under the habitual offender statute [98] was not cruel and unusual also demonstrated that the act did not violate Article I, Section Eighteen of the Indiana Constitution. [99]

The Oregon Supreme Court initially rejected the argument that Oregon's Habitual Criminal Act [100] contravened former Article I, Section Fifteen of the Oregon Constitution in just one sentence. [101] *Tuel* provided more analysis. Similar to *Driskill*, *Tuel* found that protection of society was the most important purpose of punishment, despite the language of former Article I, Section Fifteen, since the "Oregon Constitution does not attempt to state all of the principles to be followed by the legislature in enacting sentencing laws." [102] Indiana courts have consistently held that habitual offender laws do not violate Article I, Section Eighteen of the Indiana Constitution [103] and Oregon courts have done likewise with former Article I, Section Fifteen of the Oregon Constitution. [104]

3. Mandatory Minimums

Defendants have also unsuccessfully argued that mandatory minimums violate the provisions. In *State v. Reams*, the Oregon Court of Appeals reasoned that if the death penalty--which definitively prevents an offender's reformation and return to society--was constitutional under former Article I, Section Fifteen, a mandatory minimum of twenty-five years for aggravated murder certainly was too. [105] An Indiana appeals court upheld mandatory minimum jail sentences for juveniles caught possessing handguns without explicitly considering Article I, Section Eighteen of the Indiana Constitution. [106]

***284** 4. Parole

Courts have also not accepted the argument that Oregon and Indiana's constitutional goal of reformation requires an opportunity for parole. In *Huggins v. Indiana Parole Board*, Huggins filed a civil complaint against the parole board after it denied his request for parole. [107] He submitted his record of education, work performance, and counseling to show that he had been reformed. [108] Huggins argued that since he was demonstrably reformed, Article I, Section Eighteen of the Indiana Constitution required his parole. [109] The parole board considered the following criteria: "(1) nature and circumstances of the crime for which the offender is committed; (2) offender's prior criminal record; (3) offender's conduct and attitude during the commitment; and (4) offender's parole plan." [110] Huggins argued that the board should consider his reformation above all else. [111] The court found that the other factors were permissible in considering parole and drew upon an Indiana Supreme Court case explaining that the legislature could permissibly abolish parole. [112] Interestingly, the court seems to have accepted that Huggins was in fact reformed, implying that the purpose of promulgating the penal code--reformation--was accomplished in his case.

As with the death penalty, there was some modest pushback. In *Shumway v. State*, concurring Justice Tanzer argued that a mandatory sentence of life without some possibility of parole for murder in individual cases sentence offended former Article I, Section Fifteen of the Oregon Constitution. [113] In many ways however, Justice Tanzer's concurrence is remarkable for how narrow a construction it would have given that section. Justice Tanzer accepted that it applied only to statutes as a whole and not individual sentences, and did not create individual rights, in the same way Oregon's bill

of rights' other sections do. [114] So long as a sentencing statute, "in its classification of crimes, in its penalty provisions, or in the way the penalties are to be administered, [must omitted] provide[s] in some manner for the ***285** possibility of individual reformation," it passes constitutional muster. Nonetheless, an offender did need an opportunity to receive parole. However, Oregon courts have not adopted his view. [115]

C. Prison Conditions

In both Indiana and Oregon, concerned citizens, politicians, and prison administrators have cited former Article I, Section Fifteen of the Oregon Constitution and Article I, Section Eighteen of the Indiana Constitution as a mandate to improve penal conditions. In 1859, the Indiana legislature passed a resolution authorizing a committee to better understand "the almost uniform failure to secure the reformation of convicts; and to investigate the best means of conforming the system to the requirements of the Constitution [Article I, Section Eighteen of the Indiana Constitution]." [116] To prevent juveniles from being "thrown into a cell with an old experienced offender" and coming out a "graduate in crime," the Indiana legislature in 1903 provided that those between sixteen and thirty years old would go to a reformatory instead of the state prison. [117] The new reformatory provided instruction in trades to furnish young offenders with skills. [118]

In 1902, an Oregon prison administrator cited former Article I, Section Fifteen of the Oregon Constitution as the reason he allowed more religious services on Sundays and worked to increase the number of prison library books. [119] He also proposed conditional parole for well-behaved inmates and a night school for prisoners' education. [120] A gubernatorial candidate in Oregon's 1914 election ***286** answered a question about his criminal justice platform, explaining, "I think the spirit of this section [former Article I, Section Fifteen of the Oregon Constitution] should be carried out, prisoners treated humanely and given an opportunity, if they are not unregenerate, to become once again useful and honorable citizens." [121] However, whenever prisoners have invoked their respective sections to argue for different prison conditions on appeal, they have not succeeded. This is unsurprising, especially under Oregon's former Article I, Section Fifteen. A department of corrections policy is certainly not a "law[] for the punishment of crime." [122]

1. Rehabilitation programing

Prisoners have also been largely unsuccessful in arguing that these constitutional sections required treatment programs for prisoners' reformation. In *Kent v. Cupp*, habeas petitioner Kent had received an indeterminate life sentence for sex offenses. [123] After participating in sex offender treatment programs and other treatment programs for years, his participation in group therapy was terminated. [124] He attempted to get into a treatment program at the Oregon State Hospital, but was denied because he was not mentally ill. [125] Kent asked the court to either order the prison to provide him with rehabilitation programs (which would aid his parole case) or release him. [126] The majority refused, holding that it had no authority to order that rehabilitation programs be made available. [127] Judge Fort vigorously dissented, arguing that former Article I, Section Fifteen required the Oregon Department of Corrections to make reasonable efforts to provide suitable rehabilitation programs. [128]

Similarly, in *Manley v. State*, an inmate had received a total fifty-five year prison sentence for child molestation. [129] He argued that ***287** the Indiana Department of Correction violated Article I, Section Eighteen by not offering all of the rehabilitative services recommended for him. [130] At the time of the case, the state did not offer even one of the recommended sex-offender rehabilitation programs. [131] The Department's policy was to offer a specific sex-offender program at one particular facility and for sex offenders to complete it within three years before their projected release

date. [132] The court found the policy reasonable because an inmate's participation in the program close to his release date would maximize the program's impact. [133] The court rejected the inmate's argument that refusing his participation at present was vindictive. [134]

2. Juveniles incarcerated with adults

In *Hunter v. State*, [135] the Indiana Supreme Court [136] assessed whether incarcerating a juvenile offender convicted of burglary and murder with adults violated Article I, Section Eighteen of the Indiana Constitution. The court explained in some depth why confining a juvenile offender in an adult prison in this particular case was consistent with the intent of the drafters of Article I, Section Eighteen. [137] Although the court did not explicitly invoke a standard of review in applying the section, the opinion's tone suggests that it is quite deferential. [138] As in *Driskill*, the court held that a legislative sentencing scheme could comply with Article I, Section Eighteen if it generally promoted reform even if it did not do so in a specific case. [139]

*288 *D. Procedural Challenges*

Inmates have challenged various judicial procedures as being inconsistent with Article I, Section Eighteen of the Indiana Constitution.

1. Jury Instructions

In *Emory v. State*, the Indiana Supreme Court affirmed the trial court's decision to exclude a jury instruction that verdicts cannot be based on a desire to punish. [140] Such an instruction, the court explained, "is simply not a correct statement of law." [141] In *Baird v. State*, another defendant convicted of first-degree murder request a reference to Article I, Section Eighteen of the Indiana Constitution in the jury instructions during the trial's penalty phase. [142] This time, the court claimed that this was a correct statement of law--unlike in *Emory*--but nonetheless affirmed the refusal to give the instruction because Article I, Section Eighteen "seems to be addressed to lawmaking bodies" [143] and would likely only confuse a jury. [144]

2. Time Limits on Requesting Suspended Sentence

A petitioner convicted of deviate conduct and who had received a fifty year prison sentence challenged time limits on filing a petition as contrary to Article I, Section Eighteen. [145] Initially, the trial court granted Schweitzer's petition to reduce her sentence to twenty years. [146] However, it vacated the reduction because Schweitzer filed the petition more than 180 days after she began serving her sentence, and did not obtain the prosecutor's consent, as required for petitions filed after the deadline. [147] An Indiana appeals court rejected her argument that a time limit on petitions for sentence reduction violated ***289** Article I, Section Eighteen, explaining that rehabilitation did not require unfettered access to sentence reduction. [148]

E. Miscellaneous Challenges

Defendants and prisoners have invoked former Article I, Section Fifteen of the Oregon Constitution and Article I, Section Eighteen of the Indiana Constitution to challenge various other aspects of Oregon's and Indiana's justice systems.

1. Vague Statute

In *State v. Wojahn*, Oregon indicted the defendant for negligent homicide. [149] The relevant part of the statute read:

> When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any motor vehicle in a negligent manner, * * * the person so driving such vehicle * * * is guilty of negligent homicide, and, upon conviction, shall be punished by imprisonment in the county jail for not more than one year, or in the state penitentiary for not more than three years, or by a fine of not to exceed $2,500, or by both fine and imprisonment. [150]

The trial court dismissed the indictment, but the Oregon Supreme Court reversed. [151] The defendant argued that convicting him under the statute violated former Article I, Section Fifteen, because the statute failed to give him sufficient notice of what constituted negligent driving. [152] Since the statute did not clearly explain what negligent driving was, he reasoned, he could not know what improvements he had to make and thus the statute would fail to reform him. [153] The court rejected the argument because any reasonable person who killed someone while driving would know how to improve driving in the future. [154] Moreover, the court reasoned ***290** that since capital punishment did not violate former Article I, Section Fifteen, neither could the punishment a defendant received for negligent homicide. [155]

2. Driving Privileges

In *Hazelwood v. State*, a man asked an Indiana trial court to rescind his lifetime driving ban. [156] The court cited a provision requiring a person seeking reinstatement of driving privileges to show that he had not been convicted of driving while privileges were revoked for life and denied his request. [157] On appeal, he argued that the provision contravened Article I, Section Eighteen of the Indiana Constitution because its purpose was necessarily not rehabilitative. [158] An Indiana appeals court did not engage with the argument and held only that Article I, Section Eighteen did not allow as-applied challenges. [159]

3. Adoption

An incarcerated father drew upon former Article I, Section Fifteen of the Oregon Constitution to challenge a family court's order allowing his minor son to be adopted. [160] A statute allowed an adoption decree to issue if the parent was incarcerated for three years or more and adoption was in the child's best interest. [161] The father argued that the statute violated former Article I, Section Fifteen of the Oregon Constitution because the adoption of his child could in no way plausibly help rehabilitate him. [162] The appeals court rejected the argument, finding that the statute allowing adoption was not a "law for the punishment of crime." [163] Instead, the statute was a device to improve the minor child's living situation. [164] The court intimated that the statute could be used vindictively (though without expressly stating whether this would offend former Article I, Section Fifteen), ***291** but concluded that there was no such use in the present case. [165] Notably, this was in some tension with the Oregon Supreme Court's decision in *State v. Grady*. In *Grady*, a county welfare commission terminated the petitioner's parental rights after she was imprisoned for violating her probation's terms. [166] The supreme court reversed. [167] It cited as justification for its conclusion the "salutary provision" of former Article I, Section Fifteen:

> What better inducement can she have for redemption than the assurance that she may have again her little girls in one united family? What a devastating blow to self-improvement if this young person, who, according to her own mother, yearned for affection and felt left out in her own family, to learn that she is to be forever separated from her little ones after satisfying the penalty of imprisonment. To destroy the great human tie between her and those she bore would, under the circumstances present here, approximate a species of unintended vindictive justice which might well undo all of the reformation expected from her present incarceration. [168]

While *Grady* possibly reflects a desire to give effect to the provision, *Stursa* reflects how little weight Oregon courts have actually given it.

Signs of Life?

The overall thrust of the cases discussed above would indicate that these constitutional sections are dead at the appellate level. In Indiana however, the doctrine of amelioration suggests that Article I, Section Eighteen of the Indiana Constitution is alive on appellate review--albeit on life support.

In *Dowdell v. State*, the trial court originally sentenced Dowdell to not less than ten years, nor more than twenty-five for robbery. [169] In seeking post-conviction relief, he argued that the minimum sentence ***292** should have been five years, pursuant to a statute enacted three days before his sentencing. [170] The general rule in Indiana is that the statute in place at the time a crime was committed determines the sentence. [171] The court of appeals found that an exception to this general rule applied if the legislature intended a new statute to have an ameliorative effect. [172] In cases where there was

> an express statement by the legislature that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the proscribed act, then to hold that the more severe penalty should apply would serve no purpose other than to satisfy a constitutionally impermissible desire for vindictive justice. We could not ascribe to the legislature an intent to punish for vindictive purposes. [173]

Though the court found the amendment not to be ameliorative in this case and therefore affirmed the trial court, [174] the opinion saw the nascence of the doctrine of amelioration.

The Indiana Supreme Court acknowledged the doctrine of amelioration in *Watford v. State* [175] and *Holsclaw v. State* [176] --though it denied the offenders the benefit of the doctrine in both cases. It explicitly embraced the doctrine in *Richards v. State*, where it held that a convicted rapist originally sentenced to 115 years in prison was entitled to a maximum sentence of seventy years under a new statute put in effect before sentencing, but after his crime. [177] A substantial caveat is in order--unlike the court of appeals in *Dowdell*, the *Richards* supreme court made no mention of Article I, Section Eighteen. The Indiana Supreme Court thus endorses the doctrine of amelioration, but we do not know if it accepts the court of appeals' ***293** rationale for the doctrine--the rejection of vindictive justice in Article I, Section Eighteen.

Furthermore, the criteria for an offender to qualify for the doctrine of amelioration are stringent. [178] First, there is a narrow time window for when the doctrine applies--a new statute must go into effect after a crime was committed, but

before sentencing. [179] This means that a statute with clear ameliorative effect does not apply if goes into effect after sentencing. [180] Second, the new statute must either alter the definition of a crime [181] or shorten the maximum sentence available for the crime. [182] Third, the statute must have an ameliorative effect in all foreseeable cases, and not simply the one currently before the court. [183]

If the basis for the doctrine of amelioration is indeed Article I, Section Eighteen of the Indiana Constitution, then the doctrine's premise is in significant tension with its requirements. Several examples illustrate this point. Assume the legislature concludes that a previous statute for marijuana possession was so harsh for all offenders that it most likely precluded the possibility of rehabilitation. If a revised statute went into effect after sentencing, an offender would be ineligible for the doctrine of amelioration and would continue to serve time under an old statute *Dowdell* would label vindictive based on the legislature's decision to moderate the sentences in a new statute. [184] Or assume that same statute reduced the minimum sentence for those who possessed a small amount of marijuana for personal consumption to better facilitate rehabilitation in such cases, but left the maximum intact for large scale distributors. The recreational offender would likewise be ineligible for the doctrine ***294** of amelioration even though the doctrine would seem applicable in her circumstances. Because the revised statute does not affect all cases, an Indiana court would not apply the doctrine of amelioration to those convicted of possession, even though the legislature itself had concluded that more leniency was warranted for a small-time offender. Nevertheless, Indiana offenders have successfully availed themselves of the doctrine on occasion, [185] though, many of these cases do not mention Article I, Section Eighteen as support for their holdings. [186] It is therefore unclear to what extent Article I, Section Eighteen of the Indiana Constitution animates the doctrine of amelioration, even in Indiana's lower courts.

IV. WHY HAVE COURTS BEEN SO HESITANT TO ENFORCE THESE SECTIONS?

Neither state's high court has given an offender relief definitively on the basis of Article I, Section Eighteen of the Indiana Constitution or former Article I, Section Fifteen of the Oregon Constitution. What accounts for this hesitancy? I first argue that though fear of political repercussions for looking soft on crime is a tempting explanation, it is wrong. I then consider various jurisprudential explanations and conclude that appellate judges in Indiana and Oregon have lacked a workable framework to evaluate challenges under these sections.

A. Assessing Possible Political Motivations for Declining to Invoke Article I, Section Eighteen of the Indiana Constitution and Former Article I, Section Fifteen of the Oregon Constitution.

Perhaps the most tempting explanation for judicial refusal to use these sections is sensitivity to negative political consequences. Both Indiana and Oregon use some form of election to select jurists. [187] ***295** Moreover, the public has demonstrated considerable concern about rising crime rates in the latter half of the twentieth century. [188] In the 1960s and 1970s, murder rates doubled and robbery rates tripled. [189] At the same time, high-profile riots took place in many cities. In the 1980s, many believed a crack epidemic was sweeping the inner cities. [190]

As a result, politicians began to enact longer, harsher sentences for many crimes. By 1991, every state had adopted some form of mandatory minimum sentencing for certain crimes and Congress enacted at least twenty new mandatory minimum provisions. [191] Elected judges perceived as being too soft on crime faced consequences. In 1986, Chief Justice Rose Bird of the California Supreme Court lost her seat. [192] After the death penalty was reinstated, Bird never voted to affirm a death sentence. [193] All told, she reversed sixty-one death sentences. [194] Given that 83% of California voters supported capital punishment in 1985, [195] the year before her defeat, it was perhaps inevitable that she would face a serious challenge. Groups opposing her raised more than $5.6 million, [196] and she eventually lost by more than

two-to-one. [197] Two other California ***296** justices lost their seats, also largely due to their opposition to capital punishment. [198] Likewise, Justice Penny White became the first supreme court justice in Tennessee to lose her retention election. [199] In 1996, she voted with the majority to overturn a convicted rapist and murderer's death sentence and remand for resentencing. [200] A campaign against White focused on that single decision, leading to her defeat. [201]

Bird's and White's cases illustrate that a state's methods of judicial selection can influence how judges behave when reviewing sentences. A 2015 Reuters' study found that in states where supreme court justices were appointed, they reverse 26% of death sentences. [202] Directly elected justices by contrast reversed just 11% of death sentence cases. [203] Justices in hybrid systems where jurists are appointed and then subject to a retention election reversed 15% of death sentences. [204]

Judges have gone to great lengths in campaigns to show they are tough on crime. When three Tennessee Supreme Court justices faced stiff reelection competition, the opponents' campaigns prominently featured a death sentence the court had reversed. [205] Justice Gary Wade admitted to conducting polling showing that 70% of Tennesseans supported capital punishment. [206] An advertisement advocating the justices' reelection informed viewers that the justices had in fact affirmed almost 90% of death sentences. [207]

This all suggests an obvious explanation for why appellate judges in Indiana and Oregon have refused to enforce Article I, Section Eighteen of the Indiana Constitution and former Article I, ***297** Section Fifteen of the Oregon Constitution: doing so would make them appear "soft on crime" and put their seats at risk. Yet this does not explain why neither state's appellate courts has invalidated a sentence based on these sections for two reasons. First, appellate decisions effectively nullifying these sections significantly predate any "tough on crime" movement. *Driskill*, discussed above, neutered Article I, Section Eighteen of the Indiana Constitution only four years after the section was ratified, in 1855. Furthermore, the delegates to Indiana's 1851 constitutional convention were popularly elected, and voters ratified the final document 113,230 to 27,638. [208] Presumably then, most Indiana voters approved of Article I, Section Eighteen and would not have unduly punished justices who invoked it at least occasionally.

For their part, Oregon voters ratified the Oregon Constitution by a margin of more than two-to-one. [209] And even though *Finch*, [210] affirming the death penalty in light of former Article I, Section Fifteen, came more than fifty years after ratification, it still predated the "tough on crime" movement by more than fifty years. Further undermining the theory that the Oregon Supreme Court would have faced negative political consequences for invoking former Article I, Section Fifteen, Oregon voters abolished capital punishment shortly after *Finch*, with a constitutional amendment in 1914. [211]

Second, justices in both states have proven willing to invalidate sentences on other grounds, even when doing so could potentially produce great public outcry. In *State v. Quinn*, the defendant argued that Oregon's death penalty statute was unconstitutional. [212] A statute required the trial court judge to impose a death sentence if the judge found one of several aggravating circumstances in a murder case. [213] ***298** The Oregon Supreme Court found this sentencing statute unconstitutional because it violated Article I, Section Eleven of the Oregon Constitution, [214] reading:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and

> not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment.

It therefore set the defendant's sentence aside and remanded for resentencing.[215] In *Cannon v. Gladden*, the defendant was convicted of assault with attempt to commit rape of a child under sixteen years of age.[216] He received a life sentence.[217] The Oregon Supreme Court granted the defendant collateral relief, holding that a life sentence in these circumstances violated the Oregon Constitution's requirement that "[c]ruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."[218] Thus, the Oregon ***299** Supreme Court has reversed sentences relying on bases other than former Article I, Section Fifteen, despite the potential unpopularity of their decisions.

The Indiana Supreme Court has also struck down a death penalty statute. In *French v. State*, the court confronted an Indiana statute it found to be similar to a North Carolina statute that the Supreme Court of the United States had invalidated.[219] The statute required imposition of the death penalty if certain aggravating circumstances were present.[220] The Indiana high court read the Supreme Court's decision in *Woodson v. North Carolina*[221] to prohibit statutes that made capital punishment mandatory and statutes that left the jury excessive discretion.[222] Accordingly, since it found the statute similar to the one struck down in *Woodson*, the Indiana Supreme Court invalidated the statute as contrary to the U.S. Constitution's Eighth Amendment.[223] Tellingly, the supreme court rejected the defendant's argument that capital punishment violated Article I, Section Eighteen of the Indiana Constitution in one sentence.[224]

These were not isolated cases. For example, between 1993 and 2012, the Indiana Supreme Court reversed seventeen death sentences on direct appeal or collateral review.[225] The Oregon Supreme Court reversed at least nine death sentences.[226] So, Indiana and Oregon courts have issued rulings favorable to politically unpopular criminals (rapists and murderers) that would leave them vulnerable to a political ***300** backlash. A vote to vacate a sentence under the provisions would not be more politically sensitive than a vote to vacate a sentence under, say, Article I, Section Eleven of the Oregon Constitution or the U.S. Constitution's Eighth Amendment. Therefore, a desire to avoid looking soft on crime cannot explain the Indiana and Oregon courts' unwillingness to invalidate a sentence under Article I, Section Eighteen of the Indiana Constitution and former Article I, Section Fifteen of the Oregon Constitution. Something else about the constitutional sections themselves explains the courts' hesitancy.

B. Jurisprudential Explanations

Here, I consider five potential jurisprudential explanations for why litigants have not successfully availed themselves of Article I, Section Eighteen of the Indiana Constitution or former Article I, Section Fifteen of the Oregon Constitution on appeal. I conclude that the best explanation is that appellate judges perceive that they lack a workable framework to evaluate challenges under these sections.

1. The Language is Directory and Not Mandatory

In *Fleenor*[227] and *Baird*,[228] the Indiana Supreme Court found that questioning the legislature's implementation of Article I, Section Eighteen through the penal code would exceed the court's authority. In fact, it was ambiguous to what extent the court considered the section binding on the legislature at all in these decisions. In *Fleenor*, the court termed the Article I, Section Eighteen an "admonition."[229] The *Merriam-Webster Dictionary* defines "admonition" as "a gentle

or friendly reproof" or "counsel or warning against fault or oversight." [230] If in fact the court intended *admonition* to have such meanings, then it seems that it views Article I, Section Eighteen as directory instead of mandatory. Directory provisions of a state constitution would be optional for the legislature to follow while mandatory provisions would not. [231] However, this cannot ultimately ***301** explain Indiana and Oregon courts' reluctance to enforce the respective constitutional sections. Courts have not consistently adopted this position. [232] Most notably in *Hunter*, the Indiana Supreme Court provided extended analysis of whether incarcerating a juvenile offender along with adults violated Article I, Section Eighteen of the Indiana Constitution. [233] In so doing, the court termed the provision as one of the Indiana constitution's "mandates," which suggests it viewed the provision as mandatory. [234]

The best reading of Article I, Section Eighteen of the Indiana Constitution is that it is mandatory. There was a general presumption around the time Indiana's constitution was drafted in 1851 that state constitutional provisions are mandatory. [235] This was largely because they fix the basic principles that would govern a particular state's society. [236] When Cooley wrote his treatise on state constitutions in 1868, he could find only a few instances where courts had interpreted constitutional provisions as merely directory, and the logic underlying those decisions is not applicable here. [237] The New York Court of Appeals was one of the few courts to find a state constitutional provision directory in 1853. The provision read:

> No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the legislature, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal. [238]

***302** In *People ex rel. Scott v. Supervisors of Chenango*, [239] a litigant challenged a statute's constitutionality because a final tally of the ayes and nays on the bill was not taken [240] after it had passed--after conference committee negotiations between the senate and the assembly amended the bill--and entered into the senate's journal. [241] Even though the legislature had failed to literally follow the provision in passing the law, the New York Court of Appeals nonetheless held it constitutional. [242] The court noted that the senate had entered such a tally when it originally voted on the bill, and the house had done so with the bill's final version. [243]

In dismissing the argument that the senate's failure to fully follow the provision made the bill unconstitutional, the New York Court of Appeals implicitly found that the provision was directory because not following it did not make the process for passing the bill illegitimate. [244] The court contrasted this provision with another provision requiring a quorum to be present when a bill is passed. [245] When a quorum is lacking, one could say that a final bill truly lacks the consent of the governed. [246] Not following Article III, Section Fifteen of the New York Constitution of 1846 however had no such consequence. The principle that seems to have driven the court's decision in *People ex rel. Scott v. Supervisors of Chenango* is that a constitutional provision is directory when not following it would not undermine the constitution's basic premises. [247]

When a society codifies how it will punish criminals and arrange its justice system in a constitutional provision, declining to follow it is to cast aside that constitution's fundamental principles. Like most states and the federal government, Indiana has a section forbidding cruel and unusual punishments. [248] Few would argue that it is simply an "admonition" that a legislature could ignore at will if it wanted to impose purposefully cruel punishments. Why are Article I, Section ***303** Eighteen of the Indiana Constitution and former Article I, Section Fifteen of the Oregon Constitution any less binding?

Moreover, the use of the word *shall* in Article I, Section Eighteen of the Indiana Constitution counsels in favor of viewing it as mandatory. *Shall* is a form of the future tense that indicates that something will certainly happen. Tellingly, Indiana and Oregon courts themselves adopt the presumption that portions of statutes using the word *shall* are mandatory [249] unless it is clear from the context or purpose of a statute that the legislature promulgating it intended a different meaning for "shall." [250]

To hold that Article I, Section Eighteen of the Indiana Constitution is only directory, one would need to believe that the framers of the Indiana Constitution intended *shall* to mean something like *may*. The best argument one can make in support of that proposition is that the delegates at the 1851 convention rejected a proposal to end the death penalty for all crimes except premeditated murder. [251] Many modern legal scholars would view the death penalty for a crime other than premeditated murder as necessarily vindictive. [252] If the convention accepted the imposition of vindictive sentences in at least some cases, then the best inference seems to be that the framers considered Article I, Section Eighteen of the Indiana Constitution as a general desire--or "admonition"--that legislatures would follow in most cases, but could freely disregard if they desired. However, in addition to arguing that capital punishment is actually retributive instead of vindictive--a distinction the Article explores later--one can also argue that capital punishment is necessary to protect society. Some criminals are arguably so dangerous that they will likely kill again once they leave prison or kill inmates or guards while there. The only way to prevent this would be to impose a death sentence. To the extent that capital punishment effectively deters murder, it might also protect society from future murderers. These rationales provide reasons beyond mere revenge against the offender to support capital punishment.

***304 2. The Sections Are Not Judicially Enforceable**

On a related note, perhaps *Fleenor* meant to suggest that it was beyond the power of courts to review how the legislature implemented Article I, Section Eighteen of the Indiana Constitution when it called it an "admonition to the legislature." Interestingly, the Indiana Supreme Court's decision in *Smith v. State* suggests that the section is mandatory, even though it also called it an "admonition." [253] To consider whether a court can review the actions of another branch of government, I find it helpful to analogize to federal administrative law. In cases involving agency actions for example, courts sometimes conclude that something is "committed to agency discretion by law." [254] In *Heckler v. Chaney*, the Supreme Court of the United States weighed in on several prison inmates' challenge to the Federal Drug Administration's decision not to commence enforcement actions against states using drugs for lethal injection that allegedly violated the Food, Drug, and Cosmetic Act. [255] In deciding the case, the Supreme Court decided that there was effectively "no law to apply" to assess the agency's action. [256]

Similarly, one could try to argue that the provisions provide insufficient guidance for Indiana and Oregon courts to use to evaluate whether a legislature's sentencing schemes are compliant with said provisions. [257] This would mean it is committed to the legislature's discretion. [258]

Indeed, the sections do leave some important questions unanswered. If the penal code must be "founded on principles of reformation," does that mean that a sentence could also be given for deterrence, retribution, and incapacitation if the primary purpose of the sentence was indeed rehabilitation? Does it mean that every ***305** sentence in the code individually has to promote rehabilitation, or does it mean that taken as a whole, the penal code's main object is to promote rehabilitation? What does *reformation* really mean? Does it mean rehabilitating someone to rejoin society once a sentence is completed, or does it simply mean giving the prisoner a chance to confront the character flaws that led to the commission of the crime?

I submit that there is law to apply even with the above ambiguities. A sentence must meet two requirements. First, it must be designed primarily to rehabilitate an offender. The best interpretation of *reformation* in this context is that a sentence must rehabilitate an offender for the purpose of facilitating return to free society. One of the definitions of *reform* according to Noah Webster's original 1828 *American Dictionary of the English Language* [259] is to "restore to a former good state." [260] This is very similar to the first definition for *rehabilitate* in the same dictionary: "To restore to a former capacity." [261] The "good state" that existed prior to a crime was both a lack of the character flaw that led to the crime, and therefore a life of freedom where the person could be a contributing member of society. Of course, this allows for more severe punishments for more serious crimes. Article I, Section Sixteen of the Indiana Constitution and Article I, Section Eighteen of the Oregon Constitution provides that "[a]ll penalties shall be proportioned to the nature of the offense." A legislature or sentencing judge could rationally believe that someone who commits a serious crime such as homicide or rape must spend a lengthy amount of time in prison because it will take many years to resolve the issues--a basic lack of empathy and compassion, flagrant disrespect for law--that led to the crime's commission.

It is also essential to determine what it means exactly for the penal code to be "founded on the principles of reformation." [262] What does *founded* mean? Exactly what quantum of a punishment must be rehabilitative turns on this definition. The 1828 dictionary suggests several possible meanings. The first three are "set," "fixed," and ***306** "established on a basis." [263] These definitions of *founded* indicate that punishments must be designed solely to reform. The fourth definition provided is however "begun and built [upon]." [264] The modern *Merriam-Webster's Dictionary* provides a similar definition as the 1828 dictionary. The verb *found* can mean "to take the first steps in building," "to set or ground on something solid," or "to establish (something) often with provision for future maintenance." [265] This suggests that rehabilitation is the primary focus of punishment--the foundation as it were of any sentence. [266] However, one can always build on a foundation. If this is true, then a court could add to a sentence beyond what is necessary to rehabilitate in order to achieve extra deterrence or incapacitation. Indeed, rehabilitation and incapacitation are not mutually exclusive goals. A court could find that an offender who is currently a danger to others needs to be separated from society while rehabilitating. Moreover, the prospect of arrest and punishment may deter some from committing crimes even if the punishment's goal is rehabilitation.

A court could also add on to such a sentence for the sake of retribution as long as a retributive sentence is clearly distinct from a vindictive one. Legal scholars have argued that the two are meaningfully different. [267] While a vindictive sentence would be based on a desire for vengeance, one geared toward retribution would be based on a desire for the criminal to give repayment to society and the victim for what she had done. [268] In some sense, the criminal upset the moral balance with a crime. A retributive punishment allows for restoration of that balance. Unlike vengeance, retribution is not personal, and society derives no pleasure or satisfaction from inflicting the sentence. [269]

Second, a sentence must not be vindictive. Webster's 1828 dictionary defined *vindictive* as "given to revenge." [270] In turn, it ***307** makes a distinction between *avenge*, which meant "to inflict a just punishment" [271] and *revenge*, "to inflict pain deliberately and maliciously, contrary to the laws of justice and humanity, in return for injury, pain, or evil suffered." [272] The modern dictionary defines *vindictive* as "disposed to seek revenge," "intended for, or involving revenge," and "intended to cause anguish or hurt." [273] Interestingly, it does not make the distinction between *revenge* and *avenge* that the 1828 version does. It defines *revenge* as "to avenge (oneself or another) usually by retaliating in kind or degree" or "to inflict injury in return for ...." [274] It defines *avenge* as "to take vengeance for or on behalf of." [275]

The definition of *vindictive* provided in the modern dictionary--"intended to cause anguish or hurt"--comes closest to how we use the word in ordinary speech. To be sure, it is not easy to determine whether a trial court gave a sentence

merely "to cause anguish or hurt," or whether a legislature prescribed certain sentences for the same reasons. However, it is no more difficult than deciding whether a sentence is "cruel and unusual," which courts often must do.

3. The Sections Only Apply to Challenges to the Whole Penal Code

Another explanation is that Article I, Section Eighteen of the Indiana Constitution and former Article I, Section Fifteen of the Oregon Constitution do not allow for challenges to specific individual provisions. Certainly, there are many cases from Indiana and Oregon dating back to *Driskill* in 1855[276] suggesting that courts adopted this view.[277] The text of Indiana's and Oregon's sections may demand divergent answers to the question of whether a person can make an ***308** individual challenge. Indiana's reads: "The penal code shall be founded on the principles of reformation, and not of vindictive justice."[278] Indiana's reference to the "penal code" as a whole might be taken as evidence that the drafters only wanted to allow offenders to challenge the penal code as a whole, and not individual sentencing statutes. Oregon's former section, however read "Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice."[279] Perhaps Oregon's reference to "laws" plural, illustrates that the text allows an offender to challenge individual sentencing statutes. Of course, it is possible that "laws for the punishment of crime" meant to serve the same function as "penal code," counseling that the two sections be read the same way.

The theory that these sections do not allow for individual challenges has not been universally accepted. For example, in entertaining a juvenile's challenge to his confinement with adults, the *Hunter v. State* Indiana high court allowed him to challenge state correctional policy as applied to him personally.[280] Many other cases do not state that a defendant can only challenge the whole penal code in rejecting Article I, Section Eighteen of the Indiana Constitution or former Article I, Section Fifteen of the Oregon Constitution arguments.[281]

Such an interpretation is erroneous for two reasons. First, as a practical matter, it would be nearly impossible for a defendant to show that the entire penal code violated Article I, Section Eighteen of the Indiana Constitution and former Article I, Section Fifteen of the Oregon Constitution. Defense counsel would need to research every sentencing provision in Oregon or Indiana, consider how they would affect a range of possible offenders, and then try to make an overall point about the penal code. The effect, then, of saying that these constitutional sections do not permit individual challenges is to say that they are not judicially enforceable. The only realistic way for them to be judicially enforceable is to allow individual challenges.

Second, the fact that these sections are located in the bill of rights' sections of the Indiana and Oregon constitutions supports ***309** allowing for individual challenges. The bill of rights is typically understood as protecting individual rights against the government.[282] Few would suppose that a citizen could only challenge a punishment as cruel or unusual if attempting to argue that the entire penal code was cruel or unusual. Nor would one say that that the right to free expression only allowed a person to challenge all of a government's restrictions on free speech at once as opposed to a particular restriction affecting the challenger.

Third, treating Article I, Section Eighteen of the Indiana Constitution and former Article I, Section Fifteen of the Oregon Constitution as only allowing challenges to the whole penal code yields absurd possibilities. Imagine a situation where any reasonable observer would find that a statute yields a vindictive sentence that cannot possibly lead an offender capable of reform to actually reform. Imagine too that the rest of the penal code was reasonably likely to reform potential offenders and that it was not vindictive. If we take seriously the notion that Article I, Section Eighteen of the Indiana Constitution and former Article I, Section Fifteen of the Oregon Constitution do not permit individual challenges, then courts would have to tolerate a sentence that vitiated the spirit of Article I, Section Eighteen of the Indiana Constitution and former Article I, Section Fifteen of the Oregon Constitution. Or, imagine another scenario where a reasonable observer could conclude that the penal code as a whole was largely vindictive and unlikely to lead most potential offenders to reform.

But in the case at hand, the relevant statute produced a sentence that was not vindictive, and was likely to reform the offender in question. Again, accepting the logic that these constitutional sections allow challenges to the entire penal code even as they preclude individual challenges would mean that an offender in such a case would prevail. [283]

4. Article I, Section Eighteen of the Indiana Constitution and Former Article I, Section Fifteen of the Oregon Constitution Are Not Standalone Inquiries

Conley [284] suggests that the Indiana Supreme Court viewed Article I, Section Eighteen as part of a larger inquiry into whether a punishment was cruel or unusual instead of a separate standalone ***310** inquiry. *Conley* devoted substantial analysis to the question of whether sentencing a juvenile to life in prison without the possibility of parole violated the U.S. Constitution's Eighth Amendment's prohibition on cruel and unusual punishments, and concluded that it was not. [285] Then, in short succession, *Conley* mentioned Article I, Section Sixteen [286] and Article I, Section Eighteen of the Indiana Constitution before considering whether life without parole was cruel and unusual under the Indiana Constitution. [287] Tellingly, it stated that Article I, Sections Sixteen and Eighteen provided the same protections as the U.S. Constitution's Eighth Amendment. [288] Perhaps *Conley* means to imply that a punishment is cruel and unusual if there is no rehabilitative component. Quoting an earlier opinion, [289] *Conley* stated that a punishment would be cruel and unusual if it made "no measurable contribution to acceptable goals of punishment." [290] Since *Conley* seemed to envision Article I, Section Eighteen as part of the cruel and unusual punishment inquiry, it follows that a punishment would be cruel and unusual if it did not measurably contribute to an offender's rehabilitation.

However, *Conley* is unique in suggesting that Article I, Section Eighteen is part of a larger cruel and unusual punishment inquiry, so this rationale for not invoking it (standing alone) to invalidate a sentence necessarily cannot explain the vast majority of the jurisprudence on the section. Moreover, to the extent *Conley* really meant to stand for the proposition that Article I, Section Eighteen was only a factor to be taken into account when applying the Indiana Constitution's prohibition on cruel and unusual punishments, this reading of the text of Article I, Section Eighteen is untenable. If potential for rehabilitation were really just part of the cruel and unusual punishment inquiry, we would expect something to that effect to be included in the text of Article I, Section Sixteen itself. Treating Article I, Section Eighteen this way, then, would make it meaningless that the drafters of Indiana's constitution chose to make it a separate section.

***311** 5. Appellate Judges Felt They Lacked a Workable Framework to Apply Article I, Section Eighteen of the Indiana Constitution and Former Article I, Section Fifteen of the Oregon Constitution.

One remaining explanation for Indiana and Oregon courts' failure to invoke their respective constitutional sections is that they had no framework in which to apply them given their professional training. Before going further, we must recognize that it is a relatively narrow time period providing most of the cases interpreting or applying these provisions: the mid-to-late twentieth century. Aside from *Driskill* and *Rice*, only a handful of such cases arose during the nineteenth century. [291]

A focus on rehabilitation places great discretion in judges' hands. [292] But they received little training during law school or afterwards on sentencing. [293] The result was that they "were functioning as diagnosticians without authoritative texts, surgeons without Gray's Anatomy." [294] While retribution, deterrence, and incapacitation are relatively intuitive concepts, effective rehabilitation is not. Methods that seemed like they would rehabilitate offenders, such as putting them in solitary confinement, may even have made things worse. [295] Appellate judges have no more of a framework than trial court judges or legislators to assess how to rehabilitate an offender. So why question a trial court or a legislature's choice when they lacked the expertise to do so? In the absence of robust judicial review of sentencing decisions, trial

court judges rarely wrote the reasoned opinions justifying their sentences that might have developed standards to apply the provisions. [296]

***312** Although courts have given various explanations for their refusal to vindicate a challenge under these sections, most of them share a common theme of reserving as much flexibility as possible for trial court judges and legislatures to decide whether rehabilitation was possible in a given case and how to achieve it. [297] Holding that Article I, Section Eighteen of the Indiana Constitution and former Article I, Section Fifteen of the Oregon Constitution are not judicially enforceable leaves the legislature with complete discretion over whether, or how, to rehabilitate an offender. Holding that the sections are directory and not mandatory yields the same result. As a practical matter, holding that the provisions only allow challenges to the whole penal code meant that individual challenges never succeed, leaving the legislature and trial court with unfettered discretion.

Another reason that judges never developed such a framework is their reliance on federal law as informing the source of rights. Former Oregon Supreme Court Justice Hans Linde observed that the U.S. Constitution's Fourteenth Amendment "has led many state courts and the lawyers who practice before them to ignore the state's law, enforcing only those personal rights guaranteed by federal law, or to assume that the state's own guarantees must reflect whatever the United States Supreme Court finds in their federal analogues." [298] Moreover, when an "issue arises in an area in which the Supreme Court has been active, lawyers generally stop citing the state's own law and decisions to the state court, and the court abandons reference ***313** to the state constitution." [299] This helps explain why Indiana's supreme court relied solely on the U.S. Supreme Court's cruel and unusual jurisprudence to strike down Indiana's capital punishment statute while giving only cursory mention to relevant Indiana constitutional provisions. [300]

V. A FRAMEWORK FOR ARTICLE I, SECTION EIGHTEEN OF THE INDIANA CONSTITUTION

The Article argues above that appellate judges have hesitated to enforce Article I, Section Eighteen of the Indiana Constitution because they lack a workable framework to use when applying it. In resolving constitutional questions, Indiana courts "examin[e] the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions." [301] This Part presents a framework Indiana courts could use to evaluate Article I, Section Eighteen challenges, deriving from the section's text and attempts to give it meaning. The gist, as argued in section IV, is that any sentence must be designed primarily to promote rehabilitation save for exceptional circumstances, and even then, cannot be vindictive. To reword Article I, Section Eighteen to clarify the meaning this Article advocates: "Unless there is good reason to believe that an offender will not likely reform in the foreseeable future, the justice system must prescribe punishments primarily to achieve rehabilitation. In no case may a sentence be vindictive." Defendants would be able to argue that a sentencing statute facially violates Article I, Section Eighteen, or that it does so when applied to their particular circumstances.

A. Facial Challenge

To argue that a statutory sentencing scheme inherently violated Article I, Section Eighteen, a defendant would need to show either: (1) that there is no bona fide reason to think a sentence would reform his particular class of criminals (e.g., thieves) and that there has been no showing that that class of defendants cannot reform, (2) or that a sentence is inherently vindictive.

***314 1. There is no bona fide reason to think a sentence would reform a particular class of criminals (e.g., thieves) and there has been no showing that that class of defendants cannot reform**

The first inquiry in a facial challenge would be whether a particular class of defendants can reform. The reason a defendant would have to demonstrate being part of a particular class of criminals is that facial challenges to a statute's constitutionality do not allow for the consideration of a person's specific circumstances. [302] A facial challenge would argue that the portion of a statute providing sentences for particular crimes is unconstitutional in all cases. [303] In evaluating a facial challenge, courts could adopt a rebuttable presumption that a particular class of defendants can reform. The reason springs from the text of Article I, Section Eighteen of the Indiana Constitution itself, which logically must assume that criminals can reform if it mandates that punishments be designed to rehabilitate. Assuming the state could not show a particular class of defendants cannot reform, the court should use something akin to rational basis review. A sentencing statute would be harmonious with Article I, Section Eighteen if its overall thrust demonstrated a rational connection to the objective of rehabilitation. [304] To be sure, most facial challenges to sentencing statutes would likely fail. [305] Chief among several reasons for the likely failure of most challenges is the wide range of punishments possible for the same crime. For example, theft of property valued at $50,000 or more could lead to a sentence from one year-to-six years and a fine of anywhere between $0 and $10,000. [306] This wide range of discretion means a statute could yield a sentence focused on rehabilitation in one case, and a sentence that was not in another.

If the legislature persuasively demonstrated a high likelihood that a particular class of criminals could not reform, it could prescribe punishments solely to protect society--to incapacitate and deter-- ***315** although any sentence could still not evince vindictiveness. This ability is proper in such cases because there are indeed some cases where the foremost consideration must be protecting society. [307] For example, if a serial killer had been captured after escaping from prison, committed more murders, and stated a desire to commit more murders, most would accept that the most important consideration in passing sentence would be how to best protect society from further predations. Given a long track record of heinous crimes and plainly-stated desire to persist in such crimes moreover, the only logical conclusion to draw is that this person would be unlikely to ever reform. Similarly, a legislature would have a particularly strong argument that a defendant will likely not reform when the person has a long track record of violence, or when a defendant has repeatedly committed the same crime. [308] This idea is similar to the future dangerousness inquiry some states require in capital punishment cases. [309] Whether certain offenders pose grave risks to others is highly relevant to whether the legislature should be permitted to punish with the sole goal of protecting society rather than also facilitating an offender's return to society. That said, research surrounding the accuracy of future dangerousness assessments understandably evokes concern. [310] In deciding that certain offenders pose sufficiently great risks such that protection of society must be the only consideration, the legislature should do so only when there is robust statistical and scientific support for such findings.

Even if the legislature advanced a persuasive justification for why a class could not likely reform, a reviewing court would still consider whether the statute was inherently vindictive. There are at least two ways a defendant could show that a statute should be considered vindictive. First, the defendant could demonstrate that the range of sentences under the statute are so disproportionate to achieve a necessary degree of incapacitation and deterrence that those ***316** rationales cannot alone explain the statute--instead suggesting also a vindictive purpose. In such a case where the statutory scheme is disproportionate to legitimate penological objectives, there would likely be a violation of Article I, Section Sixteen of the Indiana Constitution which requires that "[a]ll penalties shall be proportioned to the nature of the offense." If appellate judges are hesitant to invalidate a sentence under Article I, Section Eighteen because they do not feel they have a framework, they would likely use Article I, Section Sixteen to strike the statute down instead.

Second, even in less egregious cases, Indiana courts could invalidate a statute if they found a desire to retaliate or get revenge against particular defendants in fact motivated the statute's enactment. Such an argument would be similar to the animus doctrine sometimes invoked by federal courts in equal protection and substantive due process analysis. [311] A sentencing statute could not be premised on "a bare [legislative] desire to harm a politically unpopular group [of criminals]." [312] In examining whether a statute is vindictive, Indiana courts could consider its legislative history. Isolated

statements illustrating vindictiveness would likely not be sufficient to invalidate the statute. Instead, Indiana courts would need to find that vindictiveness was the primary motivating factor behind the statute. [313] It would be rare for Indiana courts to conclude a statute is vindictive on its face, but the option should be available in particularly egregious cases. [314]

B. As-Applied Challenge

If a sentence facially complies with Article I, Section Eighteen of the Indiana Constitution, either because the legislature has demonstrated that a class of defendants is unlikely to reform, or, much more frequently, because a sentence is rationally related to ***317** promoting rehabilitation for the class of criminals, defendants could still challenge a sentence as-applied in particular cases. These cases would often challenge the sentence itself, arguing that the court had used its broad discretion under sentencing statutes to impose a sentence that did not promote rehabilitation. [315] For example, someone convicted of a class A felony could receive as few as twenty years in prison and as many as fifty. [316] In addition, a court can--but is not required to-- completely depart from the normal ranges and suspend the entire sentence. [317] Finally, a sentencing court can add years beyond what the statutory guidelines suggest if the prosecutor charges an enhancement (e.g., under a habitual offender statute) where the court could add an additional six to twenty years for a level one, two, three, or four felony. [318]

In a trial's penalty phase, the prosecution should bear the burden of proving to the trial court by clear and convincing evidence that a specific defendant cannot likely reform if it seeks to impose a sentence that is based solely on incapacitation and deterrence instead of on rehabilitation. [319] For example, when the prosecution seeks the death penalty or life without parole for a murderer--sentences foreclosing the possibility of returning an offender to society--the state would need to show, given the totality of the circumstances, that the offender was unlikely to reform. The state would undoubtedly meet this burden in an Article I, Section Eighteen challenge by a serial killer who has committed several violent offenses in the past and expresses a desire to keep murdering in the future. Similarly, if prosecutors sought a prison sentence of such length that it would practically preclude returning an offender to society, the prosecution would have to show that reform is unlikely. For example, consider a fifty-year old defendant who has committed a burglary that led to serious injury, and who would qualify as a habitual offender because of past non-violent felony convictions. That offender could face a ***318** fifty-year prison sentence. [320] A fifty-year sentence would, in all likelihood, prevent return to society, so the prosecution would need to show that the offender was unlikely ever to reform if it sought to impose such a sentence. An Article I, Section Eighteen challenge in this case would have a much greater chance of success.

The possibility of withholding parole if an offender is still dangerous should assuage concerns that this system could return a dangerous offender to society. Under a system aimed at reformation, an offender who receives a sentence of life with the possibility of parole is evaluated for release by the parole board based on the offender's conduct in prison rather than simply being bound to the trial court's prediction in denying the possibility of parole years before.

To prove that a particular defendant cannot be rehabilitated (regardless of whether that is generally true for defendants who commit a particular crime) the clear and convincing evidence best balances the competing interests. [321] Requiring the prosecution to prove beyond a reasonable doubt that a convicted criminal cannot reform is too high of a burden. With the right evidence, one can prove beyond a reasonable doubt that someone committed a crime. Whether a person will change the attitudes and habits that led to particularly egregious crimes or repeated offenses years in the future is always subject to doubt. Even the worst criminals may one day truly change. However, that possibility has to be weighed against society's need to protect itself from the most dangerous criminals. A clear and convincing evidence standard still requires the prosecution to a make a persuasive case that a particular defendant is unlikely to reform. Preponderance of the evidence would be inappropriate since it is used primarily in civil proceedings and grand jury indictments. [322] When life and liberty are at stake, the government typically assumes a higher burden of proof to ensure it has made a

compelling case that it should deprive someone of these core rights. In the context of sentencing, life and liberty are both at stake, and so a higher burden of proof is appropriate.

An alternative balancing of the interests would shift the burden of proof to the defendant after the state has proven that a class of ***319** defendants likely cannot reform. The state's showing that a class of defendants likely cannot reform would create a rebuttable presumption that a particular defendant likely cannot reform either. The defendant would have to affirmatively convince the trial court that reformation is possible. Keeping the burden of proof with the state in individual cases, rather than shifting it to the defendant undoubtedly places a significant onus on the prosecution. After the prosecution has shown that the legislature had good reason to conclude that a class of criminals was likely beyond rehabilitation, it would have to show that the particular defendant is also beyond rehabilitation. In other cases, the prosecution would have to show that a legislature's sentencing schemes for particular crimes were rationally calculated to rehabilitate a class of criminals, and that in an individual case, it is rational to think that a sentence will rehabilitate a particular defendant. Despite the hardship, the state should bear the burden of proof in both instances. The goal of the provision, as I have argued is not just to ensure a focus on rehabilitation generally, but in specific individual cases too. Giving the government the burden of proof in both instances will help ensure that it has adequately focused on how best to rehabilitate an individual. Given the amount of leeway prosecutors typically have to seek a wide range of sentences, it is especially important that they consider and prove how a particular sentence will promote rehabilitation.

C. Appellate Review

In appellate review, Indiana courts should adjudicate facial challenges to Indiana's sentencing statute de novo. Within a short time, Indiana courts will have considered different classes of criminals, such as thieves, drug dealers, murderers, and repeat offenders and rendered judgment on whether the possible sentence for those crimes generally complies with Article I, Section Eighteen of the Indiana Constitution. A facial challenge to whether the legislature properly concluded that a class of criminals cannot likely reform, or that the sentencing statute is not rationally calculated to produce that effect is not a pure question of law. [323] Indeed, looking at the evidence ***320** the legislature considered about certain types of criminals and how certain sentences would likely work is also a fact-based inquiry. However, it is not the sort of inquiry that a trial court judge is better able to perform. On questions of fact where trial court judges receive considerable deference, a judge has heard all of the evidence while presiding at trial, and is said to be better able to pick up on important nuances that are not readily conveyed in an appellate record. [324] In a facial challenge to a sentence under Article I, Section Eighteen of the Indiana Constitution, however, neither the trial court nor the appellate court witnessed the legislative debates first-hand. Neither is it likely that a trial court would spend more time considering one sentencing issue during a trial, even with a separate sentencing phase, presenting several other issues than an appellate court that is likely focusing its review on a narrower set of issues.

In deciding the standard of review appellate courts should use to assess lower court findings that a particular person cannot reform, or whether a particular sentence is rationally calculated to reform a particular criminal, it is important to decide whether these are questions of law or questions of fact. Whether a person can likely reform seems closer to a fact-based inquiry since the court looks to mitigating and aggravating circumstances of a crime and the person's prior history to make the best prediction possible. This is similar to the inquiry the court makes when it weighs all of the evidence in a case to determine if someone is guilty of a crime. Appellate courts in Indiana use a “substantial evidence” standard in reviewing guilty verdicts, [325] thus that standard could also be used to review findings of whether a person could reform. If there was substantial evidence to support a trial court's conclusion that an individual could not reform, the appellate court would not disturb that finding. [326]

VI. CONCLUSION

Two lessons are evident from Indiana's and Oregon's experiments in constitutionalizing rehabilitation.

First, Indiana defense lawyers would be well-advised not to waste time appealing a sentence under Article I, Section Eighteen of ***321** the Indiana Constitution. Unless they can satisfy the stringent criteria for the doctrine of amelioration, they will not succeed. If they wish to argue that a particular sentence forecloses rehabilitation, they would be better served to argue that the sentence is disproportionate and violates Article I, Section Sixteen of the Indiana Constitution.

Second, those seeking to make a penal code promoting rehabilitation nationwide should spend their time lobbying members of the legislative and executive branch. Politicians in Indiana and Oregon have showed at least occasional interest in Article I, Section Eighteen of the Indiana Constitution and former Article I, Section Fifteen of the Oregon Constitution. Demonstrating why rehabilitative models of punishment would reduce crime and save taxpayer dollars may persuade politicians. Appellate judges will likely not enforce such provisions as they have not developed frameworks to use.

Footnotes

a1 **Marcus** Alexander **Gadson**, J.D., Harvard Law Class of 2015. I would like to thank Carol Steiker, Nicole Garnett, Ron Sullivan, Former Indiana Supreme Court Justice Frank Sullivan, Antonia Domingo, and James Barta for their insightful feedback on previous drafts of this article.

1 *E.g.*, *Texas Rehabilitation Programs Reduce Recidivism Rates*, RIGHT ON CRIME http://rightoncrime.com/2011/05/texas-rehabilitation-programs-reduce-recidivism-rates/ (last visited July 1, 2017).

2 IND. CONST. art. I, § 18; OR. CONST. art. I, § 15 (amended 1996). In 1984, Oregon voters adopted Article I, Section Forty of the Oregon Constitution, reading, "Notwithstanding sections 15 and 16 of this Article, the penalty for aggravated murder as defined by law shall be death upon unanimous affirmative jury findings as provided by law and otherwise shall be life imprisonment with minimum sentence as provided by law." Then, in 1996, Oregon voters repealed the 1857 language and replaced it with the current Article I, Section Fifteen: "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation." This article does not address jurisprudence surrounding Current Article I, Section Fifteen because, unlike its predecessor provision and IND. CONST. art. I, § 18, it does not prioritize the objective of rehabilitation.

3 Philip Bump, *Bernie Sanders Pledges the U.S. Won't Be No. 1 in Incarceration. He'll Need to Release Lots of Criminals*, WASH. POST: THE FIX (Mar. 6, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/03/06/bernie-sanders-pledges-the-u-s-wont-be-no-1-in-incarceration-hell-need-to-release-lots-of-criminals/?utm_term=.ebf8f010ec9d.

4 Molly Ball*, Do the Koch Brothers Really Care About Criminal-Justice Reform?* THE ATLANTIC (Mar. 3, 2015), https://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615/.

5 IND. CONST. art. I, § 18.

6 OR. CONST. art. I, § 15 (amended 1996).

7 The Article will argue that there is one potential exception where the section has had an effect--Indiana cases involving the so-called *doctrine of amelioration*. *See infra* Part III.

8 IND. CONST. of 1816, art. IX, § 4.

9 ALA. CONST. of 1819, art. VI, § 19.

10 Elihu Stout, *Governor's Message*, WESTERN SUN & GEN. ADVERTISER (Vincennes, Ind.) (Jan. 6, 1827), https://newspapers.library.in.gov/cgi-bin/indiana?a=d&d=WSGA18270106.1.1&srpos=3&e=———182-en-20--1--txt-txIN-%22vindictive+justice%22——.

11 G.W. Johnston, WESTERN SUN & GENERAL ADVERTISER (Vincennes, Ind.) (June 2, 1827), https://newspapers.library.in.gov/cgi-bin/indiana?a=d&d=WSGA18270602.1.3&srpos=4&e=———182-en-20--1--txt-txIN-%22vindictive+justice%22———.

12 *See* ALA. CONST. of 1865.

13 David J. Bodenhamer, *Criminal Punishment in Antebellum Indiana: The Limits of Reform*, 82 IND. MAG. HIST. 358, 361 (Dec. 1986).

14 *Id.* at 361.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.* at 362.

20 *Id.*

21 *Id.* at 363.

22 *Id.*

23 *Id.*

24 Peter Scharff Smith, *The Effects of Solitary Confinement on Prisoners: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 456 (2006).

25 Bodenhamer, *supra* note 13, at 365.

26 *Id.*

27 *Id.*

28 *See id.* at 367.

29 *Id.* at 369-70.

30 *Id.* at 370.

31 *Id.*

32 *Id.* at 371.

33 *Id.*

34 *Id.*

35 Leslie M. Scott, *Oregon's Provisional Government, 1843-49*, 30 OR. HIST. Q. 207, 216 (1929).

36 Ward M. McAfee, *The Formation of Prison-Management Philosophy in Oregon*, 1843-1915, 91 OR. HIST. Q. 258, 259 (1990).

37 Priscilla Knuth et al., *Oregon Territory in 1849-1850*, 40 PAC. NORTHWEST Q. 3, 7 (1949).

38 Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857-Part I (Articles I and II)*, 37 WILLAMETTE L. REV. 469, 527-28 (2001).

39 State v. Finch, 103 P. 505, 512 (Or. 1909) ("we find that the section in question was substantially copied from the Constitution of the state of Indiana.").

40 *See, e.g.*, Priest v. Pearce, 840 P.2d 65, 68 (Or. 1992) (discussing OR. CONST. art. I, § 14); State v. Cookman, 920 P.2d 1086, 1091 (Or. 1996) (discussing OR. CONST. art. I, § 21).

41 Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1021 (1990).

42 *Id.*

43 *See id.*

44 *See id.* at 1052.

45 *See id.* at 1025.

46 *Id.* at 1024.

47 *Remarks of Oliver B. Torbet*, DAILY ST. SENTINEL (Indianapolis) (Mar. 13, 1852), https://newspapers.library.in.gov/cgi-bin/indiana?a=d&d=DSS18520313-01.1.2&srpos=4&e=———185-en-20--1--txt-txIN-%22principles+of+reformation%22———.

48 *Id.*

49 7 Ind. 338 (1855).

50 *See id.* at 343.

51 *Id.* ("The main object of all punishment is the protection of society.")

52 *See id.* ("With that end in view, the legislature have, in a given case, left it within the discretion of the jury to say when the death penalty shall be inflicted. It is true, one branch of that discretion does not contemplate reform; still, it is the only instance in the law in which the purpose of reformation is not prominent, and it cannot, it seems to us, be allowed to give character to the principles upon which the entire code is founded.")

53 *See, e.g.*, Ritchie v. State, 809 N.E.2d 258 (Ind. 2004); Smith v. State, 465 N.E.2d 1105, 1113 (Ind. 1984).

54 Bodenhamer, *supra* note 13, at 371.

55 Courts have invoked the absurdity canon when interpreting constitutional provisions. *See, e.g.,* Abrams v. Lamone, 398 Md. 146, 187 (2007) ("neither it nor logic demands that we so broadly interpret a constitutional provision as to make that provision 'absurd or unworkable.') (internal quotation omitted).

56 7 Ind. 332 (1855).

57 *Id.* at 337.

58 *Driskill*, 7 Ind. at 343. Indiana courts have often reiterated the principle that Article I, Section Eighteen challenges can only be made to the penal code as a whole. *See, e.g.*, Smith v. State, 686 N.E.2d 1264, 1272 (Ind. 1997); Conrad v. State, 747 N.E.2d 575, 584 (Ind. Ct. App. 2001).

59 *Sentence of Death*, TERRE HAUTE DAILY UNION (Oct. 24, 1857), https://newspapers.library.in.gov/cgi-bin/indiana?a=d&d=THDU18571024.1.2&srpos=3&e=————en-20--1--txt-txIN-%22throne+of+eternal+justice%22———.

60 STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 16 (Harvard University Press 2002).

61 *Id.* at 19.

62 *Hanging of the Three Culprits*, CRAWFORDSVILLE WKLY. J. (Jan. 17, 1856), https://newspapers.library.in.gov/cgi-bin/indiana?a=d&d=CWJ18560117.1.2&srpos=1&e=————en-20--1--txt-txIN-%22Driskill%22———.

63 *E.g.*, Saylor v. State, 686 N.E.2d 80, 88 (Ind. 1997).

64 Driskill v. State, 7 Ind. 338, 343 (1855) ("The main object of all punishment is the protection of society. With that end in view, the legislature have, in a given case, left it within the discretion of the jury to say when the death penalty shall be inflicted. It is true, one branch of that discretion does not contemplate reform; still, it is the only instance in the law in which the purpose of reformation is not prominent, and it can not, it seems to us, be allowed to give character to the principles upon which the entire code is founded.").

65 State v. Finch, 103 P. 505, 511 (Or. 1909).

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.* at 511-12.

72 *Id.* at 512.

73 Adams v. State, 271 N.E.2d 425, 431 (Ind. 1971) (DeBruler, J., dissenting), *vacated*, 284 N.E.2d 757 (Ind. 1972) (vacating in light of the intervening opinion in *Furman v. Georgia*, 405 U.S. 238 (1972)).

74 *Id.* at 432 ("This would be the same as claiming that the 'eye for an eye' philosophy is not vindictive, when in fact it is the epitome of vindictiveness and revengefulness. The exclusive use of the 'eye for an eye' philosophy is precisely what is precluded by § 18.").

75 Rice v. State, 7 Ind. 332 (1855).

76 *Adams*, 271 N.E.2d at 432 (DeBruler, J., dissenting).

77 *Id.*

78 Or. Laws 1927, ch. 334, § 4.

79 379 P.2d 553, 554 (Or. 1963).

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.* at 557.

84 *Id.* at 555 ("Reformation means doing over to bring about a better result, correction, or rectification. Vindictive, on the other hand, is defined by words such as 'revenge,' 'retaliate,' or 'punishment.' The best known law applying vindictive justice is *lex talionis:* 'An eye for an eye, and a tooth for a tooth.' Matthew 5:38").

85 *Id.* ("It has been suggested that life confinement is not inconsistent with reformation, i.e., the person might be reformed, but, nevertheless, his confinement would be continued. That view, we believe, is contrary to an implied essential corollary of reformation, that permanent reformation should be followed by release from confinement.").

86 *Id.* ("The drafters of the constitution, however, did not include the most important consideration of all, the protection and safety of the people of the state. Such a principle does not have to be expressed in the constitution as it is the reason for criminal law. All jurisdictions recognize its overriding importance.").

87 *Id.*

88 *Id.*

89 *See id.* at 556 ("However, the odds of true and permanent reformation of one who has already committed four felonies are so outweighed by the odds that a four-time repeater will continue to be a menace to a community if he is released from his confinement that the obligation to protect the people of this state justifies the passage of a compulsory life sentence for a four-time felon.").

90 *See, e.g.*, Fryback v. State, 400 N.E.2d 1128, 1133-34 (Ind. 1980) (collecting cases).

91 Conley v. State, 972 N.E.2d 864, 869 (Ind. 2012).

92 The defendant put his brother in a headlock until he passed out, choked him for around 20 minutes after that, placed a black plastic bag over his brother's face, and finally slammed his brother's face into concrete three times. *Id.* at 870.

93 *Id.* at 888 (Rucker, J., dissenting) ("As the trial court noted in its sentencing order, 'All [diagnosing medical experts] agree that the Defendant suffered from a mental disease at the time of the murder.'") (quoting the trial transcript).

94 *See id.* at 869-81 (majority opinion).

95 *See, e.g.*, Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 110-12 (1998).

96 Funk v. State, 427 N.E.2d 1081, 1083 (Ind. 1981).

97 *Id.*

98 IND. CODE § 35-50-2-8 (1979).

99 *Funk*, 427 N.E.2d at 1086-87.

100 Or. Laws 1947, ch. 585, p. 1101.

101 State v. Hicks, 325 P.2d 794, 799 (Or. 1958) ("There is no merit in the contention that the habitual criminal law, as such, violates the provisions of Article I, § 15 of the Oregon Constitution ...").

102 Tuel v. Gladden, 379 P.2d 553, 555 (Or. 1963).

103 *See, e.g.*, Wise v. State, 400 N.E.2d 114, 117-18 (Ind. 1980); Person v. State, 764 N.E.2d 743, 751 (Ind. Ct. App. 2002).

104 *Hicks*, 325 P.2d at 799.

105 State v. Reams, 616 P.2d 498, 505 (Or. Ct. App. 1980); *see also* State v. Jackson, 929 P.2d 323, 327 (Or. Ct. App. 1996); State v. Spinney, 820 P.2d 854, 856 (Or. Ct. App. 1991); State v. Oslund, 693 P.2d 1354, 1359 (Or. Ct. App. 1985).

106 Person v. State, 661 N.E.2d 587, 593 (Ind. Ct. App. 1996).

107 Huggins v. Ind. Parole Bd., 605 N.E.2d 229 (Ind. Ct. App. 1992).

108 *Id.* at 230.

109 *Id.*

110 *Id.* at 231.

111 *Id.*

112 *Id.* (citing White v. State, 330 N.E.2d 84, 88 (Ind. 1975)).

113 State v. Shumway, 630 P.2d 796, 808 (Or. 1981) (Tanzer, J., concurring).

114 *Id.* at 806-07.

115 *See, e.g.*, State v. Oslund, 693 P.2d 1354, 1359 (Or. Ct. App. 1985); Norris v. Cupp, 678 P.2d 756, 758 (Or. Ct. App. 1984).

116 *Indiana Legislature*, DAILY SENTINEL (Indianapolis) (Mar. 7. 1859), https://newspapers.library.in.gov/cgi-bin/indiana?a=d&d=DSS18590307-01.1.3&srpos=10&e=———185-en-20--1--txt-txIN-%22principles+of+reformation%22———.

117 Will H. Whittaker, *Reform of Criminals*, INDIANAPOLIS J. (Oct. 26, 1903), https://newspapers.library.in.gov/cgi-bin/indiana?a=d&d=IJ19031026.1.7&srpos=5&e=————en-20--1--txt-txIN-%22principles+of+reformation%22+AND+%22reformatory%22———.

118 *Id.*

119 J.D. Lee, Letter to the Editor, *To Help the Prisoners--J.D. Lee Favors Conditional Parole for Good Behavior*, MORNING OREGONIAN (Portland) (Nov. 05, 1902), http://oregonnews.uoregon.edu/lccn/sn83025138/1902-11-05/ed-1/seq-7/#index=13&rows=20&words=justice+vindictive&sequence=0&proxtext=%22vindictive+justice%22&y=0&x=0&dateFilterType=range&page=1.

120 *Id.*

121 *Queries Answered By Six Aspirants*, SUNDAY OREGONIAN (Portland) (Apr. 12. 1914), http://oregonnews.uoregon.edu/lccn/sn83045782/1914-04-12/ed-1/seq-16/#index=2&rows=20&words=Justice+vindictive&sequence=0&proxtext=%22vindictive+justice%22&y=0&x=0&dateFilterType=range&page=2.

122 OR. CONST. art. I, § 15 (amended 1996).

123 Kent v. Cupp, 554 P.2d 196, 197 (Or. Ct. App. 1976).

124 *Id.*

125 *Id.*

126 *Id.* at 198.

127 *Id.*

128 *Id.* at 200 (Fort, J., dissenting).

129 Manley v. State, 868 N.E.2d 1175, 1177 (Ind. Ct. App. 2007).

130 *Id.* at 1178.

131 *Id.*

132 *Id.*

133 *Id.*

134 *See id.* at 1178-79.

135 Hunter v. State, 676 N.E.2d 14 (Ind. 1996); *see also* Ratliff v. Cohn, 693 N.E.2d 530 (1998).

136 I have not found an Oregon case confronting a similar issue and legal challenge.

137 *See Hunter*, 676 N.E.2d at 16.

138 *Id.* at 17 ("We find it well within the legislature's purview to conclude that this system better accommodates the purposes behind Article I, § 18 and Article 9, § 2, because it segregates younger and less violent offenders from the most violent offenders, regardless of age.").

139 *Id.* ("The legislature has not frustrated this intent by setting up a statutory scheme that prohibits most youths from being confined to an adult correctional facility. The only youths who are not subject to this general rule are youths alleged to have committed the most serious and violent crimes.").

140 Emory v. State, 420 N.E.2d 883 (Ind. 1981).

141 *Id.* at 886.

142 Baird v. State, 604 N.E.2d 1170 (Ind. 1992).

143 *Id.* at 1179.

144 *Id.*

145 Schweitzer v. State, 700 N.E.2d 488, 490 (Ind. Ct. App. 1998), *superseded by statute*, IND. CODE § 35-38-1-17(b) (West 2018), *as recognized in* Johnson v. State, 36 N.E.3d 1130, 1135 (Ind. Ct. App. 2015) (relating to timing of prosecuting attorney opposing sentence modification).

146 *Id.*

147 *Id.*

148 *Id.* at 491.

149 State v. Wojahn, 282 P.2d 675, 677 (Or. 1955).

150 *Id.*

151 *Id.*

152 *See id.* at 702.

153 *See id.*

154 *See id.*

155 *Id.*

156 Hazlewood v. State, 3 N.E.3d 39, 40 (Ind. Ct. App. 2014).

157 *Id.*

158 *Id.* at 42.

159 *Id.*

160 Stursa v. Kyle, 782 P.2d 158 (Or. Ct. App. 1989).

161 *Id.* at 159.

162 *Id.*

163 *Id.* (quoting (without citation) the language of OR. CONST. art. I, § 15 (amended 1996)).

164 *Id.* at 160.

165 *Id.*

166 State v. Grady, 371 P.2d 68 (Or. 1962).

167 *Id.* at 70.

168 *Id.*

169 Dowdell v. State, 336 N.E.2d 699, 700 (Ind. Ct. App. 1975).

170 *Id.*

171 *Id.* at 701.

172 *Id.*

173 *Id.* at 702 n.8.

174 *Id.* at 702-03.

175 384 N.E.2d 1030, 1033 (Ind. 1979).

176 384 N.E.2d 1026, 1030 (Ind. 1979).

177 Richards v. State, 681 N.E.2d 208, 213 (Ind. 1997).

178 *See, e.g.,* Winbush v. State, 776 N.E.2d 1219, 1225 (Ind. Ct. App. 2002).

179 *Id.*

180 Turner v. State, 669 N.E.2d 1024, 1028 (Ind. Ct. App. 1996).

181 *Id.* at 1027-28.

182 Turner v. State, 870 N.E.2d 1083, 1086 (Ind. Ct. App. 2007).

183 *Id.* ("Consequently, had the amended statute been utilized to sentence Turner under a Class D felony sentencing scheme, the resulting sentence would have been significantly shorter than that imposed by the trial court, as a Class D felony carries a maximum penalty of just three years. *See* I.C. § 35-50-2-7. However, in another respect, the amended statute is not ameliorative because a defendant who owes back-support to more than one child must now have accumulated only a total of $15,000 in arrearages rather than $10,000 for each child. Consequently, while the amendment may have had an ameliorative effect in Turner's case, the amendment cannot be said to be truly ameliorative, that is ameliorative under all circumstances.").

184 Dowdell v. State, 336 N.E. 2d 699, 702 n.8 (Ind. Ct. App. 1975).

185 *See, e.g.,* Cotton v. Ellsworth, 788 N.E.2d 867, 871-72 (Ind. Ct. App. 2003) (invoking IND. CONST. art. I, §18 as support for decision); Renfroe v. State, 743 N.E.2d 299, 300-01 (Ind. Ct. App. 2001).

186 *See, e.g.,* Cottingham v. State, 952 N.E.2d 245, 249 (Ind. Ct. App. 2011), *vacated*, 971 N.E.2d 82 (Ind. 2012); Robertson v. State, 860 N.E.2d 621, 625 (Ind. Ct. App.), *vacated*, 871 N.E.2d 280 (Ind. 2007); Bell v. State, 654 N.E.2d 856 (Ind. Ct. App. 1995).

187 *See generally* IND. CONST. art. VII; OR. CONST. art. VII. In Indiana, candidates for most trial court judgeships compete in contested partisan elections. IND. CODE § 33-33-1-1 to 33-33-92-6 (West 2018) (codifying election procedures, or lack thereof, for trial court judges in each Indianan county). The governor appoints judges to seats on the Court of Appeals of Indiana and the Indiana Supreme Court from a list of names compiled by a judicial nomination commission; those judges are then subject to retention elections at the next general election occurring after two years on the bench. IND. CONST. art. VII, §§ 10-11. If retained, the judges serve for ten years before they must run in another election. IND. CONST. art. VII, § 11. In

Oregon, all judges run in nonpartisan elections for six year terms, though the governor may fill vacancies by appointment. OR. CONST. art. VII, § 1, 4.

188 John Hanley, *The Death Penalty*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 108, 117-18 (Nathaniel Persily et al., eds. 2008).

189 Gary LaFree, *Declining Violent Crime Rates in the 1990s: Predicting Crime Booms and Busts*, 25 ANN. REV. SOC. 145, 148 (1999).

190 Beverly Xaviera Watkins et al., *Arms Against Illness: Crack Cocaine and Drug Policy in the United States*, 2 HEALTH & HUM. RTS. 42, 43 (1998).

191 Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 75 (2009).

192 Amanda Frost & Stefanie A. Lindquist, *Countering the Majority Difficulty*, 96 VA. L. REV. 719, 735 (2010).

193 Todd S. Purdum, Opinion, *Rose Bird, Once California's Chief Justice, Is Dead at 63*, N.Y. TIMES (Dec. 6, 1999), http://www.nytimes.com/1999/12/06/us/rose-bird-once-california-s-chief-justice-is-dead-at-63.html.

194 *Id.*

195 Carol Ann Traut & Craig F. Emmert, *Expanding the Integrated Model of Judicial Decision Making: The California Justices and Capital Punishment*, 60 J. POL. 1166, 1168 (1998).

196 Tom Wicker, *In the Nation; A Naked Power Grab*, N.Y. TIMES (Sept. 14, 1986), http://www.nytimes.com/1986/09/14/opinion/in-the-nation-a-naked-power-grab.html.

197 Maura Dolan, *Ex-Chief Justice Rose Bird Dies of Cancer at 63*, L.A. TIMES (Dec. 5, 1999), http://articles.latimes.com/1999/dec/05/news/mn-40743/2.

198 Jeffrey D. Kubik & John R. Moran, *Lethal Elections: Gubernatorial Elections and the Timing of Executions*, 46 J.L. & ECON. 1, 6 (2003).

199 *Id.*

200 Georgiana Vines, *Where Are They Now: Election Loss Led to Success in Academia For Former TN Justice Penny White*, KNOXVILLE NEWS SENTINEL (Sept. 6, 2014), http://www.knoxnews.com/entertainment/life/where-are-they-now-election-loss-led-to-success-in-academia-for-former-tn-justice-penny-white-ep-596-354313321.html.

201 *Id.*

202 Dan Levine & Kristina Cooke, *In States with Elected High Court Judges, A Harder Line on Capital Punishment*, REUTERS (Sept. 22, 2015, 2:00 PM), http://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/.

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 James Albert Woodburn, *Constitution Making in Early Indiana: An Historical Survey*, 10 IND. MAG. HIST. 237, 246-47 (1914).

209 *Oregon Ratifies the Constitution*, OR. SEC'Y OF STATE, http://sos.oregon.gov/archives/exhibits/constitution/Pages/after-ratify.aspx (last visited Mar. 8, 2017).

210 State v. Finch, 103 P. 505, 511 (Or. 1909).

211 State v. Quinn, 623 P.2d 630, 640 (Or. 1981), *overruled by* State v. Hall, 115 P.3d 908 (Or. 2005). The death penalty has been alternatively reinstated and abolished several times since 1914. Aliza B. Kaplan, *Oregon's Death Penalty: The Practical Reality*, 17 LEWIS & CLARK L. REV. 1 (2013). It is currently instated, but under gubernatorial moratorium. Tony Hernandez, *Brown to Maintain Death Penalty Moratorium*, OREGONIAN (Portland) (Oct. 19, 2016, 6:08 AM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/10/brown_to_maintain_death_penalt.html.

212 Quinn, 623 P.2d at 640.

213 *Id.* at 642 (discussing OR. REV. STAT. § 163.116).

214 *Id.* at 644.

215 *Id.*

216 Cannon v. Gladden, 281 P.2d 233, 234 (Or. 1955).

217 *Id.*

218 *Id.* at 235 ("How can it be said that life imprisonment for an assault with intent to commit rape is proportioned to the offense when the greater crime of rape authorizes a sentence of not more than 20 years? It is unthinkable, and shocking to the moral sense of all reasonable men as to what is right and proper, that in this enlightened age jurisprudence would countenance a situation where an offender, either on a plea or verdict of guilty to the charge of rape, could be sentenced to the penitentiary for a period of not more than 20 years, whereas if he were found guilty of the lesser offense of assault with intent to commit rape he could spend the rest of his days in the bastille."); *see also* State v. Shumway, 630 P.2d 796, 802 (Or. 1981).

219 French v. State, 362 N.E.2d 834, 837 (Ind. 1977).

220 *Id.* at 836-37.

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

222 *French,* 362 N.E.2d at 837.

223 *Id.*

224 *Id.*

225 Frank Sullivan, Jr., *Selected Developments in Indiana Criminal Sentencing and Death Penalty Law (1993-2012)*, 49 IND. L.REV. 1349, 1369 n.158 (2016).

226 State v. Langley, 273 P.3d 901, 915 (Or. 2012); State v. Rogers, 288 P.3d 544, 546 (Or. 2012); State v. Guzek, 153 P.3d 101, 109 (Or. 2007); State v. Guzek, 86 P.3d 1106, 1108 (Or. 2004), *vacated,* Oregon v. Guzek, 546 U.S. 517 (2006); State v. Rogers, 4 P.3d 1261, 1264 (Or. 2000); State v. Langley, 16 P.3d 489, 490 (Or. 2000); State v. McDonnell, 987 P.2d 486, 487 (Or. 1999); State v. Guzek, 906 P.2d 272, 274 (Or. 1995), *superseded by statute,* OR. REV. STAT. § 163.150(1)(b)(D) (1991), *as recognized in* State v. Moore, 927 P.2d 1073, 1085 n.13; State v. Stevens, 879 P.2d 162, 162 (Or. 1994).

227 Fleenor v. State, 514 N.E.2d 80, 90 (Ind. 1987).

228 Baird v. State, 604 N.E.2d 1170, 1179 (Ind. 1992).

229 *Fleenor,* 514 N.E.2d at 90 (citing Williams v. State, 430 N.E.2d 759, 766 (Ind. 1982)).

230 *Admonition*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/admonition (last visited July 15, 2017).

231 *See Directory Provision*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Directory Requirement*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A statutory ... instruction to act in a way that is advisable, but not absolutely essential--in contrast to a mandatory requirement ...")

232 *See* Hunter v. State, 676 N.E.2d 14, 16-17 (Ind. 1996); *see also* Fointno v. State, 487 N.E.2d 140, 149 (Ind. 1986).

233 *Hunter*, 676 N.E.2d at 16-17.

234 *Id.* at 17.

235 Thomas Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 79 (Little, Brown, & Co. ed., 1868).

236 *Id.* ("We are not therefore to expect to find in a constitution provisions which the people, in adopting it, have not regarded of high importance, and worthy to be embraced ... [i]f directions are given respecting the times or modes of proceeding in which a power should be exercised, there is a least a strong presumption that the people designed it should be exercised in that time and mode only[.]").

237 *Id.*

238 N.Y. CONST. of 1846, art. III, § 15.

239 People *ex rel.* Scott v. Supervisors of Chenango, 8 N.Y. 317 (1853).

240 *Id.* at 317.

241 *Id.* at 317-328.

242 *Id.* at 328.

243 *Id.*

244 *See id.*

245 *Id.* at 324-26.

246 *Id.*

247 *Id.*

248 IND. CONST. art. I, §16.

249 *See, e.g.,* Doyle v. City of Medford, 337 P.3d 797, 822 (Or. 2014); United Rural Elec. Membership Corp. v. Ind. & Mich. Elec. Co., 549 N.E.2d 1019, 1021-22 (Ind. 1990).

250 State *ex rel.* Simpson v. Meeker, 105 N.E. 906, 907 (Ind. 1914).

251 Bodenhamer, *supra* note 13, at 365.

252 *See, e.g.*, Sara F. Werboff, *Halting the Sudden Descent into Brutality: How* Kennedy v. Louisiana *Presents a More Restrained Death Penalty Jurisprudence*, 14 LEWIS & CLARK L. REV. 1601, 1634-45 (2010) (discussing role of vindictive justice in arguing against capital rape statutes).

253 Smith v. State, 686 N.E.2d 1264, 1272 (Ind. 1997) (describing Article I, Section 18 of the Indiana Constitution as "'an admonition to the legislative branch of the state government and [that] is addressed to the public policy which the legislature must follow in formulating the penal code,' not a mandate upon the judiciary for determining the appropriateness of the sentence in a particular case.") (quoting Dillon v. State, 454 N.E.2d 845 (Ind. 1983)).

254 Heckler v. Chaney, 470 U.S. 821 (1985).

255 *Id.* at 823.

256 *Id.* at 831 ("[r]efusals to take enforcement steps generally involve precisely the opposite situation, and in that situation we think the presumption is that judicial review is not available. This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

257 *See id.* at 830.

258 *See id.* at 831.

259 I have chosen to use this dictionary since it was prominent during the mid-nineteenth century and would likely capture the definitions Americans during this time period understood words to have.

260 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (definition of the verb, *reform*).

261 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (definition of the verb, *rehabilitate*).

262 IND. CONST. art. I, § 18; OR. CONST. art. I, § 15 (amended 1996).

263 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (definition of the past participle, *founded*)

264 *Id.*

265 *Found*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/founded (last visited July 1, 2017).

266 Wallace v. State, 905 N.E.2d 371, 381 (Ind. 2009) ("under our state Constitution, the primary objective of punishment is rehabilitation.").

267 *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L REV. 1313, 1315-16 (2000).

268 *See id.*

269 *See id.*

270 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (definition of the adjective, *vindictive*).

271 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (definition of the verb, *avenge*).

272 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (definition of the verb, *revenge*).

273 *Vindictive*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/vindictive (last visited July 1, 2017).

274 *Revenge*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/revenge (last visited July 1, 2017).

275 *Avenge*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/avenge (last visited Feb. 13, 2018).

276 Driskill v. State, 7 Ind. 338 (1855).

277 *See, e.g.*, Hazelwood v. State, 3 N.E.3d 39, 42 (Ind. Ct. App. 2014) (collecting cases); State v. Rhodes, 941 P.2d 1072, 1074 (Or. Ct. App. 1997).

278 IND. CONST. art. I, § 18.

279 OR. CONST. art. I, § 15 (amended 1996).

280 676 N.E.2d 14, 16-17 (Ind. 1996);

281 *See, e.g.*, Fointno v. State, 487 N.E.2d 140, 149 (Ind. 1986); Tuel, 379 P.2d 553, 555-56 (Or. 1963).

282 *But see* OR. CONST. art. I, § 39.

283 *See* Teer v. State, 738 N.E.2d 283, 289 (Ind. Ct. App. 2000).

284 Conley v. State, 972 N.E.2d 864 (Ind. 2012).

285 *Id.* at 877-80.

286 IND. CONST. art. I, § 16 ("Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense.").

287 *Conley*, 972 N.E.2d at 880.

288 *Id.*

289 *Id.* at 879-80 (citing Dunlop v. State, 724 N.E.2d 592, 597 (Ind. 2000)).

290 *Id.*

291 Miller v. State, 49 N.E. 894, 895 (Ind. 1898) (briefly mentioning IND. CONST. art. I, § 18 in the context of a challenge to the trial court's overruling of a motion for a new trial); State v. Otis, 34 N.E. 954, 955 (Ind. 1893) (citing IND. CONST. art. I, § 18 in dicta as support for its finding that a man charged with seduction could not be convicted when he married the witness he seduced); State v. Hattabough, 66 Ind. 223, 242 (1879) (Biddle, J., dissenting) (listing IND. CONST. art. I, § 18 along with several other constitutional provisions, but making no use of it).

292 Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691-708, 695 (2010).

293 *Id.*

294 *Id.* at 696-97.

295 Peter Scharff Smith, *The Effects of Solitary Confinement on Prisoner Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 466 (2006).

296 *Id.*

297 Tuel v. Gladden, 379 P.2d 553, 555 (Or. 1963) ("Coupled with this necessity for protecting society is the knowledge that it is difficult to determine whether or not a person has really reformed and how permanent this reformation is. The petitioner's history is an example of this difficulty. Twice he was thought to be reformed to the extent that he could be released from confinement; and twice it was found that such a conclusion was erroneous ... The motive of the legislature in enacting the Habitual Criminal Act here attacked could be found to be as follows: ... the odds of true and permanent reformation of one who has already committed four felonies are so outweighed by the odds that a four-time repeater will continue to be a menace to a community if he is released from his confinement that the obligation to protect the people of this state justifies the passage of a compulsory life sentence for a four-time felon.").

298 Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 382 (1980); Conley v. State, 972 N.E.2d 864, 879 (Ind. 2012) ("We now turn to the state constitutional analysis. The Indiana Constitution can provide

more protections than the United States Constitution provides. *Justice v. State,* 552 N.E.2d 844, 847 (Ind. Ct. App.1990). Our Constitution provides in pertinent part 'Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense.' IND. CONST. art.1, § 16. 'The penal code shall be founded on the principles of reformation, and not of vindictive justice.' IND. CONST. art.1, § 18. Although the language is not the same as the United States Constitution, the protections are the same.").

299 Linde, *supra* note 298, at 387.

300 *See* French v. State, 362 N.E.2d 834, 837 (Ind. 1977).

301 Boehm v. Town of St. John, 675 N.E.2d 318, 321 (Ind. 1996) (quoting Ind. Gaming Comm'n v. Moseley, 643 N.E.2d 296, 298 (Ind. 1994)).

302 United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

303 *See id.*

304 *See* Heller v. Doe, 509 U.S. 312, 320 (1993).

305 Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 899 (2012).

306 IND. CODE § 35-43-4-2 (West 2018); IND. CODE § 35-50-2-6(c) (West 2018).

307 See Rice v. State, 7 Ind. 332, 338 (1855).

308 *See* Tuel v. Gladden, 379 P.2d 553, 555-56 (Or. 1963)

309 Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post*-Daubert *World* 24 CARDOZO L. REV. 1845, 1849-50 (2003).

310 *See*, *e.g.*, Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports,"* 35 AM. J. CRIM. L. 145, 166-67 (2008). Mental health experts have debated the extent to which they can successfully predict future violence on the part of convicts. John F. Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to "Disinvent the Wheel?"* 29 L. & HUM. BEHAV. 55, 60 (2005).

311 *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (finding an equal protection violation based on "a bare congressional desire to harm a politically unpopular group" in Congress's 1971 amendment, Pub. L. No. 91-671, § 2, 84 Stat. 2048, to the Food Stamp Act of 1964, Pub. L. No. 88-525, § 3, 78 Stat. 703 to prevent hippies and hippie communes from eligibility); *see also* United States v. Windsor, 570 U.S. 744 (2013) (invalidating the Defense of Marriage Act, Pub. L. No. 104-199, §3, 110 Stat. 2419 (1996) as a "bare congressional desire to harm" same-sex couples).

312 *See Moreno*, 413 U.S. at 534.

313 *See id.* ("As a result, '[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment.'").

314 Pollvogt, *supra* note 305, at 892.

315 Gertner, *supra* note 292, at 691 ("Different theories of sentencing, in turn, confer power on different sentencing players. For example, rehabilitation theories necessarily enhanced the role of judges and parole officers, the purported experts in individualized punishment aimed at 'curing' deviant behavior.").

316 IND. CODE § 35-50-2-4 (West 2018).

317 IND. CODE § 35-50-2-2 (West 2018).

318 § 35-50-2-4.

319 *See* Richard Husseini, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387, 1407 (1990).

320 *See* IND. CODE § 35-50-2-4.5 (West 2018); IND. CODE § 35-50-2-8(i) (West 2018).

321 *See* Husseini, *supra* note 319.

322 Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 405 (1986).

323 Prominent legal thinkers including Justice Antonin Scalia have questioned the distinction between fact and law. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1188 (1989) ("I frankly do not know why we treat some of these questions matters of fact and others as matters of law. I imagine that their relative importance to our liberties has much to do with it.").

324 *See, e.g.*, State v. Russum, 333 P.3d 1191, 1200 (Or. Ct. App 2014) (court of appeals defers "to a trial court's findings of credibility where they are based on an opportunity to see and hear witnesses").

325 Bivins v. State, 433 N.E.2d 387, 391 (Ind. 1982).

326 *See id.*

54 WMTLR 269